DECISIONS OF THE

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1985

James J. Carey, Member
Thomas F. Moakley, Member
Edward J. Philbin, Member
Robert Setrakian, Member

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FEDERAL MARITIME COMMISSION

DOCKET NO. 82–30

CONTRACT MARINE CARRIERS, INC.

ORDER

July 6, 1984

This proceeding is before the Commission upon a Motion to Dismiss filed by respondent Contract Marine Carriers, Inc. (CMC). CMC was granted leave to file its motion by the Commission in an order also suspending consideration of this proceeding. The Commission's Bureau of Hearing Counsel (Hearing Counsel) has filed a response in accordance with that order.

BACKGROUND

This proceeding was initiated by order served June 21, 1982, to determine whether CMC's practice of undertaking contract carriage at different rates than those published in its tariffs for the same trade and commodities violates sections 18(b)(3), 16 Second, 17 and 14 Fourth of the Shipping Act, 1916 (1916 Act) (46 U.S.C. § 817(b)(3), 815 Second, 816, and 812 Fourth). By stipulation the matter was submitted for consideration by Administrative Law Judge William Beasley Harris (Presiding Officer) on a written record. The Presiding Officer issued an Initial Decision finding that the Commission had jurisdiction over the contract practices of CMC and that CMC had engaged in practices violative of the 1916 Act. Exceptions to the Initial Decision were filed by CMC; Replies to these Exceptions were filed by Hearing Counsel.

On March 6, 1984 CMC requested that the Commission suspend consideration of the proceeding to permit it time to file a motion to dismiss based on the imminent passage of the Shipping Act of 1984 (1984 Act) (46 U.S.C. app. § 1701 *et seq.*).[1] The Commission granted the request and in so doing directed CMC to address the following specific issues in any motion filed: (1) whether the 1984 Act rendered this proceeding moot; (2) whether the rights of third parties will be affected by dismissal; and (3) whether section 20 of the 1984 Act (46 U.S.C. app. § 1719) is relevant to a final disposition of this case. Hearing Counsel was also instructed to address these matters.

[1] The Shipping Act of 1984 was signed into law by the President on March 20, 1984 and by its terms became effective on June 18, 1984.

DISCUSSION

CMC argues that this proceeding should be discontinued as moot and because no regulatory purpose will be served by a disposition of the merits. It alleges that the inclusion of service contracts within the Commission's jurisdiction under the 1984 Act supports its position that they were not within the scope of the 1916 Act. Regulation of CMC's service contracts pursuant to this proceeding would allegedly be premature and contrary to the congressional intent underlying those provisions in the 1984 Act which address "service contracts."

CMC acknowledges the Commission's jurisdiction over its contract practices under the 1984 Act and states its intention to meet the publication requirements of that Act. CMC argues that, although conduct engaged in prior to the effective date of the 1984 Act is subject to the 1916 Act, the assessment of civil penalties is not an issue in this proceeding and there is no evidence that any third parties would be prejudiced or disadvantaged by a discontinuance of the proceeding.

Hearing Counsel opposes dismissal of this proceeding arguing that a regulatory purpose would be served by a decision on the jurisdictional issue presented in this case, *i.e.*, whether the Commission has jurisdiction over "contract carriage" services provided by common carriers. Hearing Counsel also contend that the rights of any unknown third parties would be effectively eliminated by a dismissal of this case.

For reasons stated below, the Commission will grant CMC's Motion to Dismiss. It should be pointed out here, however, that this dismissal is without prejudice to the rights of any third party interest that may have been injured by CMC's past conduct to seek redress for such injuries before the Commission. The discontinuance of this proceeding is in no way to be interpreted as a disposition on the merits of any issues presented in this proceeding or to otherwise limit the right of third parties to file complaints with the Commission based on the conduct at issue in the proceeding.

There is no doubt that certain aspects of this proceeding are moot, *i.e.* any *prospective* proscription of specific conduct by CMC with regards to violations of the 1916 Act. The statutory provisions which the Presiding Officer concluded that CMC had violated, sections 18(b)(3), 16 Second, 17 and 14 Fourth of the 1916 Act, have been superseded by section 10(b) (1–4, 6) of the 1984 Act (46 U.S.C. app. § 1709(b) (1–3, 6)).[2] Although the provisions of section 10(b) (1–4, 6) generally correspond to those of sections 18(b)(3), 16 Second, 17 and 14 Fourth of the 1916 Act, there are some important differences. Section 10(b) (1–3), which carries forward the prohibitions of section 18(b)(3) of the 1916 Act, specifically

[2] Section 20(a) of the 1984 Act repeals section 18(b) of the Shipping Act, 1916; section 20(b)(2) of the 1984 Act makes sections 14 and 16 applicable only to "common carriers by water in interstate commerce"; section 20(b)(8) of the 1984 Act strikes section 17, first paragraph from the Shipping Act, 1916.

refers to service contracts, thereby recognizing that a carrier may have both tariff rates and service contract rates. Section 10(b)(6), which is a substantial revision of section 14 Fourth, expressly exempts service contracts from the prohibition against unfair or unjustly discriminatory practices. A finding that CMC did not comply with the 1916 Act would clearly be of little value in interpreting the requirements of the 1984 Act.

Nor would any regulatory purpose be served by rendering an opinion on the legality of CMC's past conduct. First, the assessment of civil penalties is not at issue in this proceeding. Second, the record does not disclose any third parties adversely affected by CMC's conduct. Although it is possible that civil penalties could be assessed and that an injured third party come forward at this time, these matters could not be addressed in *this* proceeding unless it is essentially reconstituted.[3] Such theoretical contingencies do not appear to justify continued litigation in this case.[4]

There does not appear to be any dispute that contractual arrangements entered into by CMC after March 20, 1984 are subject to public disclosure under the requirements of the 1984 Act.[5] However, it is not at all clear that the Commission could require CMC to file its present contracts entered into prior to March 20, 1984.[6] Requiring CMC to undertake alternative

[3] *See National Steel & Shipbuilding Co. v. Director, Workers Comp. Pro.*, 616 F.2d 420 (9th Cir. 1980); *see also First Nat. Bank of Bellaire v. Comp. of Currency*, 697 F.2d 683 (5th Cir. 1983).

[4] CMC alleges that section 20(e)(2) of the 1984 Act applies to complaints filed with the Commission and allows a one-year period within which complaints alleging a violation of the 1916 Act may be filed after the effective date of the 1984 Act. Section 20(e)(2) provides:

(2) This Act and the amendments made by it shall not affect any suit—

(A) filed before the date of enactment of this Act; or

(B) with respect to claims arising out of conduct engaged in before the date of enactment of this Act, filed within one year after the date of enactment of this Act.

While a full discussion of the legal effects of section 20(e)(2) is unnecessary for a proper disposition of CMC's Motion to Dismiss, it is our opinion that section 20(e)(2) was intended only to preserve court antitrust actions and has no application to cases pending before the Commission. H.R. Rep. No. 53, 98th Cong., 1st Sess. 39 (1983).

[5] CMC submits that its service contracts will eventually be subject to the service contract provisions of the 1984 Act, section 8(c) (46 U.S.C. app. § 1707) which provides:

(c) Service Contracts.—An ocean common carrier or conference may enter into a service contract with a shipper or shippers' association subject to the requirements of this Act. Except for service contracts dealing with bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, each contract entered into under this subsection shall be filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. The essential terms shall include—

(1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;

(2) the commodity or commodities involved;

(3) the minimum volume;

(4) the line-haul rate;

(5) the duration;

(6) service commitments; and

(7) the liquidated damages for nonperformance, if any.

The exclusive remedy for a breach of contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree.

[6] Section 20(e)(1) of the 1984 Act (46 U.S.C. app. § 1719) provides:

Continued

remedial actions to preclude the possibility of continuing adverse effects from its *past* practices would be of limited value and would not appear to serve a regulatory purpose.

The only matter of continuing significance raised in this proceeding is the issue of the Commission's jurisdiction over the contract practices now (other than those involving service contracts) of carriers which are also operating as common carriers with tariffs on file. Although CMC has asserted that it will file its service contracts with the Commission in accordance with the 1984 Act, Hearing Counsel is correct in asserting that the 1984 Act does not clearly put to rest all the underlying jurisdictional uncertainties that essentially gave rise to this proceeding. However, as is the case with CMC's alleged violations of the substantive provisions of the 1916 Act, a jurisdictional decision in this case based on circumstances and the law existing prior to June 18, 1984 would be of little value in administering the 1984 Act. The Commission is of the opinion that a rulemaking proceeding, wherein all interested and affected parties may contribute their views, would be a better vehicle to address this remaining issue. It is our intention therefore to initiate such a proceeding by separate order.

THEREFORE, IT IS ORDERED, That the Motion to Dismiss filed by Contract Marine Carriers, Inc. is granted; and,

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

Each service contract entered into by a shipper and an ocean common carrier or conference before the date of enactment of this Act may remain in full force and effect and need not comply with the requirements of section 8(c) of this Act until 15 months after the date of enactment of this Act.

CMC cites the following passage of the legislative history of the 1984 Act as explanatory of the Congressional intent underlying section 20(e)(1):

The Committee's intention in this, as well as other sections of the act is to institute changes in liner shipping regulations and practices without undue or unnecessary economic disruption. S. Rep. No. 3, 98th Cong., 1st Sess. 42 (1983).

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–49

REEFER EXPRESS LINES, PTY., LTD.

v.

UITERWYK COLD STORAGE CORPORATION, ELLER AND COMPANY, INC. AND TAMPA PORT AUTHORITY

ORDER OF REMAND

JULY 27, 1984

This proceeding was initiated by the filing of a complaint by Reefer Express Lines, Pty. Ltd. (REL) against Uiterwyk Cold Storage Corporation (Uiterwyk), Eller and Company (Eller) and the Tampa Port Authority (Port Authority) alleging that: (1) a charge for "warehouse checking" is a charge for a service not actually performed and, therefore, is an unreasonable and unjust practice in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. §816); (2) the charge is not reflected in the Uiterwyk and Harborside tariffs, but is based on cross-referencing in those tariffs to the Port Authority's tariff, in violation of section 17; and (3) the Port Authority's tariff represents an agreement among terminal operators which is not approved by the Commission in violation of section 15.[1] Complainant asks the Commission to disapprove the charge for warehouse checking and to direct Respondents to cease and desist from attempting to collect such charges.

A prehearing conference was held in February, 1983 and evidentiary hearings were held in June, 1983 for the purpose of receiving written direct testimony and live cross-examination of three witnesses, one each for REL and Respondents Eller and the Port Authority.[2] Simultaneous opening and reply briefs were filed by all parties.

Administrative Law Judge Charles E. Morgan (Presiding Officer) issued an Initial Decision finding that the physical activity of warehouse checking has been performed on cargo carried by REL, which service is of at least some benefit to the ocean carrier. The Presiding Officer also found that the charges for warehouse checking were not shown to be unjust and unreasonable in violation of section 17; the practice of Uiterwyk and

[1] REL also charged that the Port Authority's tariff had not been filed with the Commission, but admitted at the prehearing conference that this allegation was in error.

[2] No appearance was made by Uiterwyk. Its interest in the cold storage facility was purchased by Harborside Refrigerated Services, Inc. (Harborside). Uiterwyk is now in bankruptcy proceedings. Prehearing Conference Transcript, 6–7.

Eller of incorporating by reference in their tariffs the warehouse checking charge of the Port Authority was not an unjust or unreasonable practice; and that the Port Authority's tariff was not an unapproved agreement among terminal operators.

BACKGROUND

REL is a common carrier by water in the U.S. foreign commerce which serves the export trade from the Port of Tampa (Port) with refrigerated vessels. Uiterwyk was the operator of a cold storage terminal facility at the Port. Eller, through its wholly-owned subsidiary, Harborside, was the successor to Uiterwyk's operation at the Port. The Port Authority is a public body established by statute to prescribe rules, regulations and rates for the Port of Tampa. See Exhibit 6B, Appendix A.

The disputed charge is for warehouse checking, defined in the Port Authority's Tariff FMC No. 8; Item 285 as:

> The employment of warehouse clerks and checkers, as differentiated from shipside clerks and checkers, in delivery of inbound cargo upon commencement of discharge of cargo and the end of the Free Time allowance; or, in receipt of outbound cargo from the beginning of the Free Time allowance until completion of the loading aboard vessel of the cargo. "Warehouse Checking" is assessed against the carrying vessel based on total inbound and outbound cargo manifest weight.[3]

The complaint charged that no service describable as "warehouse checking" had been requested by REL or performed by Uiterwyk or Eller. The complaint further alleged that the charge was an "arbitrary charge imposed for no service."

The Presiding Officer found that warehouse checking is an actual service performed by terminal personnel, which consists of tallying cargo on receipt by the terminal from an overland carrier, and upon discharge from the cold storage facility to the vessel, and includes preparation of dock receipts and loading lists as well as acting as the interface of product/cargo information between the terminal and vessel's stevedore so that the cargo can be delivered to the vessel for loading in an efficient and reasonable manner. I.D., 4–6.

Warehouse checking was described by Eller's witness Francis S. Cunningham, General Manager of Harborside, on cross examination as

[3] At REL's urging, after the complaint herein was filed, the Port Authority's tariff was amended, effective October 1, 1982 to shift responsibility for the warehouse checking charge from the vessel in all cases to the "party responsible for stevedoring charges," and to add language permitting the party responsible for payment to request that warehouse checking not be performed. However, in the latter instance, the amended tariff provides that "the terminal operators will not be responsible for any overages and/or shortages." Port of Tampa Tariff FMC No. 8, Item 285. Since October, 1982, REL has requested that warehouse checking not be performed.

> "tallying upon receipt from trucks or railcars of cargo by mark or lot number, by count, at times by weight and condition before placement into the warehouse . . . to tallying, the checking of condition, marks, lot numbers upon presentation of that cargo to a stevedore for loading on board a vessel." Transcript 69.

REL's Director of Terminal Operations admitted in both his written direct testimony and at the hearing that he had seen warehouse employees, other than forklift operators, checking and tallying export cargo both upon arrival at the refrigerated terminal facility (Direct Testimony 2, Transcript, 13) and discharge from the warehouse to the vessel (Transcript, 16).

The Presiding Officer concluded that warehouse checking "is of some benefit" to the vessel "insofar as the terminal arranges to check out and deliver the cargoes by ports of discharge, by consignees, quantities, lots and weights . . . [which] enables a smooth flow of cargo from the terminal to the ship." I.D., 8.

REL contends that its tariff provides for "tackle-to-tackle" service which renders it inappropriate to charge the vessel for services rendered to the cargo before it reaches the place of rest beneath ship's tackle, citing *Terminal Rate Structures, Pacific Northwest Ports,* 5 FMB 53 (1956).[4] REL's argument that the warehouse checking service charge would fall upon the shipper under its "tackle-to-tackle" tariff was offset, in the Presiding Officer's view, by the charge's coverage of "other services of benefit to the ship, such as listing the cargo by lot and by various shippers and consignees, for segregated delivery by separate consignees, ports of discharges, and alongside different hatches of the vessel." *I.D.,* 8. Therefore, the Presiding Officer concluded that the charge for warehouse checking levied against the vessel or the party responsible for stevedoring was not an unjust and unreasonable practice in violation of section 17.

The Presiding Officer further concluded that, no evidence having been offered as to the level of the charges, the actual charges for warehouse checking had not been shown to be unjust and unreasonable. Noting that Agreement No. T–2291 among the terminal operators of the Port of Tampa provides that such operators will conform to the tariff of the Port Authority, except to the extent that the Port Authority's tariff is silent or inapplicable, the Presiding Officer found that incorporation by reference of the Port Authority's warehouse checking charges in the Uiterwyk and Eller tariffs was not an unjust or unreasonable practice.

Finally, the Presiding Officer concluded that the Port Authority's tariff had not been shown to be an agreement among the Port Authority and terminal operators in violation of section 15.

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[4] *REL's Tariff FMC No. 4 contains the following* Rule 2A:

"Except as otherwise provided, rates named herein . . . are applicable from end of ships tackle at loading port and include only the on-shore cost or on-lighter cost of hooking sling load to ships gear." Quoted in Complainant's Brief, 8.

DISCUSSION

Exceptions to the Initial Decision were filed by REL; Eller and the Port Authority replied to the Exceptions. REL's Exceptions generally reargue contentions advanced in its initial brief. These include the arguments that otherwise permissible terminal charges for checking do not fall on the vessel under a tackle-to-tackle tariff such as its own; that the checking function is performed as part of the general obligation of a terminal as bailee of the cargo, for its own convenience and protection, and may not be separately charged for; that the cross-references in the Uiterwyk and Harborside tariffs are misleading, confusing and unlawful; and that the Port Authority's tariff constitutes an unapproved section 15 agreement among the terminal operators and the Port Authority.[5] REL further excepts to the reasoning of the Initial Decision in that it permits assessment of the entire charge for checking against the vessel on the basis of incidental benefits, without explicitly rejecting REL's contentions regarding its tackle-to-tackle tariff.

Respondents argue on exceptions that REL has failed to meet its burden of proof and that its arguments on issues such as its tackle-to-tackle tariff and allocation of the charges were not encompassed by its complaint which alleged only that no physical service which could be identified as "warehouse checking" had been performed.[6]

Most of REL's Exceptions concern issues correctly decided by the Presiding Officer. Other issues raised, however, require further investigation. These include the question of who benefits from and should bear the charge for the warehouse checking function, and what effect REL's tackle-to-tackle tariff provision may have on the assessment of terminal charges.[7]

The Commission's cases indicate two separate bases for terminal charges assessed against a vessel: services performed for or benefits conferred upon the vessel, as distinct from those performed for cargo interests; and performance by the terminal of a function which the carrier is obliged to perform as part of the transportation function.

In holding that the charge for warehouse checking may be assessed solely against the vessel, the Presiding Officer characterizes the function as being of "some" benefit to the vessel, apparently recognizing that

[5] REL's argument with respect to the obligations of a terminal being analogous to those of a "common carrier" cites the Commission's cases concerning the general responsibilities of a common carrier for provision of terminal services for safe receipt and delivery of cargo. This argument ignores the difference between a common carrier by water and a terminal operator which underlies the Commission's terminal cases: the terminal operator performs services for more than one master and is therefore obliged to charge each proportionately for the services performed or the benefits conferred.

[6] Eller, however, in its brief below, characterized REL's complaint as being, *inter alia*, that the charge for warehouse checking was an arbitrary charge imposed for no actual service "and/or no actual physical service of any benefit to REL; * * *" Eller's Opening Brief, 2. This seems to be a fair reading of the issues raised by REL's complaint, without overreliance on strict rules of pleading. Such a reading also indicates that the issue of who benefits from the terminal service was understood to be raised by the complaint.

[7] REL's tariff was not introduced in evidence, but was identified and quoted in REL's opening brief. The Presiding Officer and the Commission may take judicial notice of any tariff on file.

there may be other beneficiaries of the service. He does not, however, address the issue of whether the charges should be split among such beneficiaries. While the record supports the Presiding Officer's findings with respect to benefits conferred upon the vessel—*i.e.* that warehouse checking enables the terminal to marshal the cargo in a particular manner, under orders from the vessel, to promote the greatest efficiency of vessel time in port—it also indicates that warehouse checking is of benefit to the shipper. Warehouse checking enables the terminal to aggregate cargo arriving at different times for shipment to a variety of consignees and for a variety of vessels, and to facilitate changes in ownership which frequently occur while the cargo is in the terminal facility. See Transcript, 90–95. In addition, we note REL's argument that the warehouse checking function is performed for the terminal's own benefit and protection while the cargo is in its custody.[8]

The Initial Decision makes no attempt to allocate the warehouse checking charges between the cargo interests and vessel interests or the terminal itself, based upon benefits conferred. As REL notes in its Exceptions, the issue under section 17 is "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 facilities. *Pacific Northwest Tidewater Elevators Assoc.*, 11 F.M.C. 369 (1968)." *Baton Rouge Marine Contractors, Inc. v. Cargill.*, 521 F.2d 281 (D.C. Cir. 1975). *See also Volkswagenwerk A.G. v. FMC*, 390 U.S. 261, 282 (1968). Although, as indicated above, the record alludes to benefits conferred upon the cargo, the issue was not directly addressed in testimony, on brief, or in the Initial Decision. The record does not disclose the practice at other terminals: whether the charge for checking is usually a charge against the cargo or the vessel, particularly where the carrier has an explicit tackle-to-tackle provision in its tariff.

The Presiding Officer disposed of REL's argument regarding its tackle-to-tackle tariff by noting that warehouse checking "covers other services of benefit to the ship, such as listing the cargo by lot and by various shippers and consignees, for segregated delivery by separate consignees, ports of discharge, and alongside different hatches of the vessel." I.D., 8. This reasoning justifies the assessment of part of the charge for warehouse checking against the vessel on grounds that the vessel as well as the cargo benefits. REL argues, however that under a tackle-to-tackle tariff the charge should not be assessed against the vessel because warehouse checking is not a service which the terminal performs as agent for the carrier in performance of the carrier's obligation to provide facilities for the safe receipt and delivery of cargo.

[8] REL also contends that such benefits are separately charged by the terminal against the cargo under the tariff item defined as "through-put" and the shipper might thus be charged twice for the same services if warehouse checking is charged to the shipper on the basis of these benefits. The Presiding Officer may wish to consider this argument within the context of the issues remanded herein.

We believe that these arguments raise two issues which remain unresolved by the Initial Decision. These are: (1) whether the function of warehouse checking—*i.e.* checking the cargo for amount and condition as it arrives at the terminal, issuing receipts therefore, and keeping track of its destination, ownership and location in the terminal facility—is so closely associated with its receipt by the terminal for the carrier that it is appropriately to be considered part of the transportation service for which the carrier recovers in its rates, and; (2) if the function is not performed by the terminal operator as part of the carrier's transportation obligation, whether the service benefits the vessel, the shipper or owner of the cargo, or the terminal operator, or all or some of them, and should be assessed by the terminal against each in proportion to the benefits conferred. The Commission has not expressly addressed these *precise* issues in previous cases cited by the parties.

In *Boston Shipping Association, Inc.* v. *Port of Boston*, 10 F.M.C. 409 (1967), the Commission held that the carrier's obligation to "tender for delivery" includes the provision of adequate terminal facilities, including free time, and that charges for strike demurrage for cargo which was in free time at the beginning of the strike were properly assessed against the vessel. The case did not deal with the specific function of "checking" or with its relationship to the carrier's transportation obligation, and involved general cargo rates which were not tackle-to-tackle rates. It thus offers little guidance for the case at bar.

In *Terminal Rate Increases—Puget Sound Ports, supra*, the Commission indicated that a carrier who publishes tackle-to-tackle rates may not be liable for terminal charges for services rendered beyond the end of ship's tackle:

> "The carrier must furnish a convenient and safe place at which to receive cargo from the shipper and to deliver cargo to the consignee. If this can be done at end of ship's tackle, then it can be so stated and the contracts of carriage may be limited to such service." *Id.*, at 23.

However, the Commission also noted that "the carrier's obligations also include the receiving of cargo from shipper and the giving of a receipt therefore, . . . together with the handling of the necessary papers." *Id.* at 24.[9] Thus, while this case indicates that a tackle-to-tackle tariff may limit the liability of a vessel for some terminal services rendered to cargo, it also raises the possibility that the receipt of cargo, with which warehouse checking is closely associated, may not be among these.

The Commission in *Far East Conference Amended Tariff Rule*, 20 F.M.C. 772 (1978), held that the conference could not lawfully amend its tariff

[9] Here, REL contends that it fulfills this obligation itself by issuing a stevedore's receipt for the cargo to the terminal operator at the end of ship's tackle, and that any functions performed by the terminal prior to that point are for the benefit of the cargo alone.

to pass through to shippers terminal charges for wharfage and handling, holding that these charges had traditionally been absorbed by the FEC and were already reflected in the level of their tackle-to-tackle rates. The case turned, however, not on the relationship between the terminal charges and tackle-to-tackle rates, but on the relationship between section 15 and section 205 of the Merchant Marine Act of 1936, 46 U.S.C. 1115. The Commission specifically noted that an individual carrier might do that which the conference could not: establish tackle-to-tackle rates, and separately assess accessorial or terminal charges, resulting in different rates at adjoining ports. *Id.*, 1776. The case is, thus, not dispositive of the issue here.

The closest case in point is *Terminal Rate Structure—Pacific Northwest Ports*, 3 USMC 21 (1948), which specifically involved a terminal service charge of which the greatest proportion of cost was for checking of cargo on receipt. *Id.*, 5 F.M.B. at 55. The Commission held that "where the contract of affreightment involves a tackle-to-tackle rate, handling and service charges incurred between point of rest and ship's hook outbound and between ship's hook and point of rest inbound are incurred for the benefit of the shipper or consignee, and . . . such charges must be assessed against the shipper or consignee." *Id., on reconsid.*, 5 F.M.B. 326 (1957). The Commission recognized specifically that a "terminal may not assess charges for checking not performed for the carrier" and that "under tackle-to-tackle rates a carrier's duty to receive cargo does not arise until delivery to a point within reach of ship's tackle whether the actual delivery to that point is performed, in whole or in part, by the terminal or by the shipper himself." *Id.*, 58. The Commission there characterized its holding in *Intercoastal Steamship Freight Assoc. v. N.W. Marine Terminal Assoc.*, 4 F.M.B. 387 (1953), specifically involving tackle-to-tackle rates on lumber, as being that "under tackle-to-tackle rates the carrier did not assume the duty to provide these services (related to the checking, receiving and handling of cargo), and that such services were instead performed for the convenience of the shipper." *Id.* at 58. These cases did not, however, indicate that the checking function involved the sorting of cargo on ship's instructions for loading which the Presiding Officer found to benefit the vessel here.

The record in this case is somewhat unclear as to the actual operation of REL's tackle-to-tackle rates at Tampa. REL's tariff includes Rule 2A which states that its rates are tackle-to-tackle. REL argued on exception that Rule 2A is "fully operative in respect to its Tampa service." There was however, some discussion at the prehearing conference which suggests that some of REL's service at Tampa may be contract rather than common carriage, but this did not indicate whether any contract carriage by REL is done on tackle-to-tackle or other terms. There may thus be some question as to whether REL's port calls at Tampa, on which the charges for warehouse checking which are in dispute here were assessed, were performed on tackle-to-tackle terms. This question may have to be resolved if the

Presiding Officer determines on remand that the vessel may not be charged for warehouse checking under a tackle-to-tackle tariff.

Under the Port Authority's amended tariff, the party to be charged for warehouse checking is the "party responsible for stevedoring charges." [10] The record includes scant evidence as to REL's practice with regard to stevedoring charges. In its opening brief, REL states that under a tackle-to-tackle tariff, the party responsible for stevedoring charges "would be . . . the shipper to and from shipside and the carrier in and out of the ship." Complainant's opening brief, 10, Complainant's Exceptions, 10. However, REL also indicates that it hires the stevedores, (Brigante Testimony, 2, 3, & 6), and that its rates take into consideration the carrier's expense for stevedoring. (Complainant's opening brief, 11 and Complainant's Exceptions, 11.)

In view of the above-noted unresolved relevant issues regarding the operation of Complainant's tackle-to-tackle rates at Tampa, the Commission will remand the case to the Presiding Officer for determination, as necessary, of factual questions regarding the operation and effect of REL's tackle-to-tackle tariff on the allocation of terminal charges for warehouse checking as well as the legal issues previously discussed.

REL also alleged that the Port Authority's amended item for warehouse checking was unlawful in that it constituted an exculpatory clause which would protect the terminal operators from the consequences of their own negligence. Reply Brief, 7. The charge was not dealt with in the Initial Decision and was not specifically pressed by REL on exception. (Exceptions 14, n. 5.) The remand ordered here should also address this issue.

The Presiding Officer properly disposed of the remaining issues raised by REL. REL contends that the Port Authority and terminal tariffs contain duplicative, overlapping and confusing terms and cross-references. The Presiding Officer found that the cross-referencing is consistent with a Commission approved agreement among the terminal operators which requires them to conform to the Port Authority's tariff, except with respect to certain items. As additional grounds for the same result, we note that REL's arguments regarding confusing cross references between the Uiterwyk and Eller tariffs and the Port Authority tariff concern items other than the warehouse checking charge which is the basis of this dispute. REL is not the party charged under these other items, and its arguments as to any resulting confusion of shippers may be regarded as arguments made on behalf of others who have not themselves complained. The cross references to the warehouse checking charge in the Port Authority tariff appear to be clear, unambiguous, and not unlawful.

REL contends that the Port Authority's tariff constitutes an unapproved agreement among the terminal operators and Port Authority. The Presiding

[10] See note 3, *supra.*

Officer found that "there is no agreement." We agree with the Presiding Officer that there is no evidence of such an agreement.

THEREFORE, IT IS ORDERED, That Docket No. 82–49 is remanded to Presiding Officer for the purpose of determining whether:

(1) any of the charges for warehouse checking in the Port Authority's tariff may lawfully be charged for the account of the vessel in light of REL's tariff provision for tackle-to-tackle rates and the Commission's prior decisions;

(2) if such charges may be assessed against the vessel, whether the charges should be allocated among the vessel and the shipper/consignee in proportion to the benefits conferred on each by the service and whether any proportion of the costs should be borne by the terminal operator; and

(3) whether the amended Port Authority tariff definition of warehouse checking unlawfully exculpates the terminal operators from possible liability for their own negligence; and

IT IS FURTHER ORDERED, That the Initial Decision is adopted to the extent not inconsistent with this order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–49
REEFER EXPRESS LINES PTY. LTD.

v.

UITERWYK COLD STORAGE CORPORATION, ELLER & COMPANY, INC., AND TAMPA PORT AUTHORITY

Warehouse checking charge at the Port of Tampa found not shown to be an arbitrary charge for no physical service, and the said charge found not shown to be unjust and unreasonable; practice of terminal operators, Uiterwyk and Eller, of incorporating by reference in their tariffs, the warehouse checking charge of the Port of Tampa found not shown to be unjust and unreasonable; and Port of Tampa's tariff found not shown to be an agreement among terminal operators not approved by the Commission. Complaint dismissed.

Joseph A. Klausner, Josiah K. Adams, and *Leslie S. Gallmeyer* for complainant, Reefer Express Lines Pty. Ltd.

David F. Pope for respondent, Eller & Company, Inc.

H.E. Welch for respondents, Tampa Port Authority.

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

Partially Adopted July 27, 1984

By complaint, filed October 22, 1982, and served October 26, 1982, the complainant, Reefer Express Lines Pty. Ltd. (Reefer Express) alleges that the charges for "warehouse checking" at the Port of Tampa, Florida (the Port), made by Uiterwyk Cold Storage Corporation (Uiterwyk) and by Uiterwyk's successor, Eller & Company, Inc. (Eller), both Uiterwyk and Eller having been or being in the business of furnishing cold storage terminal facilities at the Port, were arbitrary charges for no physical service; and that exacting charges for warehouse checking is an unreasonable and unjust practice in violation of section 17 of the Shipping Act of 1916, as amended (the Act).

The complainant also alleges that the warehouse checking charge is published in the Port's tariff, that the Port acted as an agent for the terminal operators in the Port, and that the failure of Uiterwyk and Eller to incorporate the charge for warehouse checking in their own tariffs, while instead making cross-reference of the Port's tariff, is an unreasonable and unjust practice in violation of section 17 of the Act.

[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).

The complainant further alleges that the Port's tariff represented an agreement among terminal operators not approved by the Federal Maritime Commission in violation of section 15 of the Act.

The complainant also alleged in its complaint that the Port of Tampa's tariff was not filed with the Commission, but at the prehearing conference complainant admitted that it was in error in this respect, and that the Port had duly filed its tariff.

The complainant has not paid the charges on certain past shipments here in issue. Thus, the complainant asks the Commission to disapprove the charge for warehouse checking; and to direct all respondents to strike it from their tariffs and to cease and desist from collecting or attempting to collect such charge.

Effective October 1, 1982, item 285 of the Port's tariff changed the definition of warehouse checking, in part, by the addition of the following provision:

> Warehouse Checking will be performed on all inbound and outbound cargo and charges assessed as provided above, except in cases of direct discharge or direct load cargo and container cargo not stuffed or unstuffed in port, as described in Item 330, and when party responsible for payment specifically requests, in writing, that Warehouse Checking be not performed. When Warehouse Checking is requested not to be performed, terminal operators will not be responsible for any overages and/or shortages.

The complainant has requested that warehouse checking be not performed on its present and future shipments. Thus, only the warehouse checking charges on past shipments remain in issue.

Prior to the above change, effective October 1, 1982, of the Port's definition of warehouse checking, the Port Authority held a public hearing, at which counsel for the complainant agreed that complainant Reefer Express would accept responsibility for any cargo loss when the service of warehouse checking was requested by Reefer Express not to be performed.

The original definition in the Port's tariffs of warehouse checking was:

> The employment of warehouse clerks and checkers, as differentiated from shipside clerks and checkers, in delivery of inbound cargo upon commencement of discharge of cargo and the end of the Free Time allowance; or, in receipt of outbound cargo from the beginning of the Free Time allowance until completion of the loading aboard vessel of the cargo. "Warehouse Checking" is assessed against the carrying vessel based on total inbound and outbound cargo manifest weight.

Effective October 1, 1982, the definition of warehouse checking was changed to provide that, instead of being assessed *against the carrying vessel,* it is assessed *against the party responsible for stevedoring charges* based on inbound or outbound cargo manifest weight.

Also, as seen above, the 1982 definition provided that when the party responsible for payment of warehouse checking specifically requests in writing that warehouse checking be not performed then the terminal operators will not be responsible for any overages and/or shortages.

Generally, the ocean carrier is the party responsible for stevedoring charges.

WAREHOUSE CHECKING

Warehouse checking is a service performed by terminal personnel (of Uiterwyk or Eller), using tally clerks and checkers to:

(1) Tally, by count, lot, supplier, and/or mark the product/cargo into the cold storage terminal facility and record where, in the cold storage terminal facility, the various lots, marks, or shipper's product/cargo is stored;

(2) Tally and withdraw from the cold storage terminal facility, by count, lot, mark, and/or shipper the product/cargo to the vessel's side, or the overland carrier's equipment, to insure correct count and delivery by lot, mark, or shipper of the overall product/cargo furnished to the vessel or overland carrier; and

(3) Act as the interface of product/cargo information, both as to count and lot/mark/shipper information between the cold storage terminal facility and the contract stevedore for the vessel so that the vessel can be loaded and the product/cargo delivered to the vessel's side for loading in an efficient and reasonable manner.

While warehouse checking may relate to either export or import cargo, the refrigerated cargo in issue herein, and the warehouse checking charges sought to be collected, relate only to export cargoes shipped on the vessels of the complainant, Reefer Express.

Such export cargo arrives by train or truck at the overland loading and unloading dock of the Uiterwyk-Eller cold storage terminal on its landward side. The terminal on its water side is alongside a waterway which runs north and south.

A clerk (terminal employee) appears and checks the cargo to be delivered by the overland carrier to the terminal. The clerk issues a dock receipt, which states what the cargo is, for whom intended, by what shipper, and the total number of cartons and weights.

The dock receipt is prepared by an office employee of the terminal. The truck driver or trainman presents the dock receipt to the terminal's clerk who in turn designates the place for unloading the truck or rail car.

Two employees are assigned by the terminal to receive the cargo from the overland carrier. They are a checker and a fork lift operator. The fork lift operator moves the cargo out of the overland carrier to an area of the terminal adjacent to, but outside of, the freezer or cold storage area of the terminal, on the premises and the property of the terminal.

The checker ascertains that the cargo unloaded from the overland carrier is as stated on the dock receipt. The cargo is not necessarily weighed because the weight of a carton is stamped usually on the box or on the dock receipt, or on the delivery bill of lading from the rail carrier or truck.

Next, a second movement of the cargo occurs. Another fork lift driver transports the cargo from the initial discharge area into the freezer-cold storage area of the terminal. At times the same fork lift operator performs both movements, but they are separate movements and the cargo does not move directly from the overland carrier into the freezer-cold storage area. The cargo always is put down first, and by a second move, taken into the freezer-cold storage area of the terminal.

The cargo remains in the freezer-cold storage area until an ocean vessel arrives; and then the cargo is taken out of the freezer-cold storage area through the back doors (water-side doors) of the terminal, and the cargo is put on the wharf for acceptance by the stevedore assigned to deliver the cargo to the vessel. The stevedore employs longshoremen who move the cargo under the ship's hook or loading gear for eventual loading aboard the vessel.

The complainant's witness Brigante admitted on cross-examination that he had seen certain checking performed by warehouse (Uiterwyk-Eller terminal) personnel on this export cargo. Such personnel checked "as far as this lot goes to the ship, this one doesn't."

A lot is a commercial unit or block of cargo assigned to a specific consignee or shipper.

Reefer Express issues directions to the terminal as to how the cargo is to be delivered to a Reefer Express ship. These directions may include segregation of the cargo by port of discharge, by shipper or consignee, by quantity of cargo, and by weight.

It is normal to have several shipments for a given discharge port, and three or four consignees for a particular discharge port, with each consignee having separate lots or blocks of cargo to be delivered.

The ocean carrier, such as Reefer Express, generally gives a telex or telephone notice to the terminal of the impending arrival of its ship. The terminal also is advised about the number of longshoremen's gangs which will be on hand, and how much cargo from the terminal should be brought out.

A terminal (warehouse) employee prepares a loading list of the ship's cargo, or a summary of the dock receipts for all of the cargo designated to be exported on a particular ship. This loading list shows the quantity of cargo, nature—be it frozen, chilled or otherwise, weights, shippers and consignees, as well as the breakdown by discharge ports.

Quite often while the vessel is "working" or being loaded, other cargo is received at the terminal, or the terminal may have other cargo not originally destined for this particular ship, which other cargo now has

been released to go on this ship. In other words, the loading list may be updated from time to time, or it is supplemented by other cargo and events which occur while the vessel is being loaded. This updating may be done verbally or by the vessel's port captain or an other designated agent of the vessel.

In general the warehouse checking, including the preparation of a load list, is a procedure designed to provide for a smooth flow of cargo to the ship from the terminal on export movements.

When the stevedore gets the cargo from the terminal, the stevedore makes its own check as to the consist of the cargo. Also the ship's mate makes a check on receiving the cargo from the stevedore. Delivery to the stevedore is considered by the terminal as delivery to the vessel, since the stevedore is employed by the vessel.

The terminal for its protection receives a mate's receipt or other receipt that it has delivered the cargo to the vessel.

The complainant stresses that the warehouse checking done by the terminal's personnel is not a service to the ship inasmuch as the ship owner performs its own tally and count of cargoes received on its ship. Also, the complainant believes that warehouse checking is for the protection of the warehouseman and the shipper.

This reasoning overlooks that warehouse checking also benefits the ship, insofar as the terminal arranges to check out and deliver the cargoes by ports of discharge, by consignees, quantities, lots, and weights; that without warehouse checking there could be either overages or shortages in delivery of cargoes to the ship; and more importantly that warehouse checking enables a smooth flow of cargo from the terminal to the ship.

As seen, warehouse checking is an actual physical service of some benefit to the ship (ocean carrier, such as Reefer Express).

Under Reefer Express' tariff, the complainant argues that the charges to the shippers and consignees provide that the the cargo is booked "free alongside ship" (f.a.s.), and therefore the cargo has to be put alongside the ship by the shipper. The complainant also argues that the shipper pays the terminal to take the cargo from the overland carrier, place it into freezer or cold storage, remove it from same, and place it alongside the ship. This argument conveniently overlooks that the warehouse checking performed by the terminal covers other services of benefit to the ship, such as listing the cargo by lot and by various shippers and consignees, for segregated delivery by separate consignees, ports of discharge, and alongside different hatches of the vessel.

It is concluded and found that warehouse checking, at least in part, benefits the ocean carrier, as well as benefits the shipper, consignee, and the terminal. It is further concluded and found that warehouse checking is an actual physical service performed by terminal (warehouse) personnel. Therefore, it is concluded and found that the practice of levying a charge for warehouse checking on the ocean carrying vessel, or on the party

responsible for stevedoring charges, as provided, respectively, in the past and present, by the Port's tariffs, is not shown to be an unjust and unreasonable practice in violation of section 17 of the Act.

No evidence was introduced as to the reasonableness of the measure in dollars and cents of the charges for warehouse checking, and accordingly it is concluded and found that the actual charges for warehouse checking are not shown to be unjust and unreasonable in violation of section 17.

TARIFF INCORPORATION BY REFERENCE

The Uiterwyk Cold Storage Corp. tariff—F.M.C. No. 12, effective November 15, 1980, provided Item 76—Warehouse Checking:

> Charge to be billed for the account of the vessel. Tampa Port Authority Item 290.

The Harborside Refrigerated Services, Inc.[2] tariff—F.M.C. No. 14, effective November 15, 1982, provided Item 76—Warehouse Checking:

> Tampa Port Tariff—.

The terminal operators in the Port of Tampa have a Commission-approved Agreement No. T–2291. This agreement provides, among other things, that the parties, such as respondent Eller, will conform to the tariff of the Port Authority, but also allows the right of independent action in publishing tariffs to the extent that the Port's tariff is silent or inapplicable. The cross-referencing above to the Port's tariff is not only lawful, but also is consistent with the approved section 15 agreement.

It is concluded and found that the practice of the terminal operators, Uiterwyk and Eller, of incorporation by reference in their tariffs, the warehouse checking charge of the Port is not shown to be unjust and unreasonable.

PORT OF TAMPA'S TARIFF

The Tampa Port Authority is not a party to the section 15 agreement of the terminal operators. The Port publishes its rules, regulations and rates in the Port's tariffs under authority of Chapter 23338 of the laws of the State of Florida. There is no agreement between the Port Authority and the terminal operators whereby rates, rules and regulations are established.

It is concluded and found that the Port's tariff has not been shown to be an agreement among terminal operators, and therefore no violation of section 15 has been shown.

[2] Harborside is a wholly-owned subsidiary of Eller.

ULTIMATE CONCLUSION

It ultimately is concluded and found that the warehouse checking charges on certain past shipments of Reefer Express are lawful; and the complaint is dismissed.

(S) CHARLES E. MORGAN
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 DISCONTINUING PROCEEDING

August 8, 1984

This proceeding was instituted to determine whether the rate-making activities of the Pacific Westbound Conference (PWC) member lines with regard to their carriage of wastepaper and woodpulp violated sections 15, 16, 17 or 18(b)(5) of the Shipping Act, 1916 (1916 Act). On August 15, 1977, Administrative Law Judge Seymor Glanzer (Presiding Officer) issued an Initial Decision which found that certain PWC rates on wastepaper should be disapproved under section 18(b)(5) and that the Conference's ratemaking practices had violated section 15. In light of those findings, the Presiding Officer concluded that no useful regulatory purpose would be served by determining whether the wastepaper rates were unreasonably preferential or unjustly discriminatory under sections 16 or 17.

On March 9, 1979, the Commission reversed the Initial Decision and found PWC's rates to be lawful under sections 15 and 18(b)(5).[1] We also held *de novo* that no violation of sections 16 and 17 of the 1916 Act had been proven under established Commission precedent.[2]

The National Association of Recycling Industries (NARI), a trade association of wastepaper shippers, appealed the Commission's order to the United States Court of Appeals for the District of Columbia Circuit. On December 24, 1980, the court issued a decision finding that the Commission had misinterpreted the standard of section 18(b)(5). *National Association of Recycling Industries, Inc.*, v. *FMC*, 658 F.2d 816 (1980) (*NARI* v. *FMC*). The court held that the PWC wastepaper rates under review "may not be approved on the basis of the existing administrative record" (*id.* at 829), although "[t]he Commission is free to engage in any further administrative proceedings in this case not inconsistent with this opinion" (*id.*). The court specifically excluded sections 15, 16 and 17 of the 1916 Act from the scope of its decision.

[1] The Commission's decision is reported at 21 F.M.C. 834.
[2] *Id.* at 837–39.

Because the PWC rates in issue before the D.C. Court had long since been superseded by new rates when *NARI* v. *FMC* was decided, an order from the Commission on remand regarding the superseded rates was unnecessary.[3] After more than a year had passed without a request from NARI for further relief from the FMC, we solicited the parties' views by a notice served on January 11, 1982, as to whether any further proceedings in Docket No. 72–35 were necessary. NARI responded by stating that it was preparing to file an antitrust lawsuit against PWC and its member lines, that the controversy between itself and the Conference lines regarding wastepaper rates would be resolved through the lawsuit and that Docket No. 72–35 therefore should be terminated. For its part, PWC argued that the issues raised by NARI's antitrust complaint might fall within the Commission's primary jurisdiction and that the question of further action in Docket No. 72–35 should be held in abeyance pending clarification of NARI's intentions.

NARI proceeded to file its antitrust complaint in United States District Court in Los Angeles on February 23, 1982. Reduced to its essentials, the complaint alleged that the wastepaper rates set by the PWC lines from 1968 to the date of the complaint had been found to violate sections 15 and 18(b)(5) of the 1916 Act and that actions under a conference agreement are not immune from the antitrust laws if they result in rates unlawful under those provisions. PWC filed a motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted and, as alternative relief, to stay further proceedings before the District Court pending referral to the Commission of NARI's allegations concerning PWC's rates.

Given the potential impact of NARI's theory of relief on the FMC's authority under section 15 to approve conference rate agreements, the Commission determined to file an *amicus curiae* brief before the District Court in support of PWC's motion to dismiss. In the meantime, on June 15, 1982, we issued an order in Docket No. 72–35 directing that the proceeding remain open pending the District Court's disposition of PWC's motion.

The Commission filed its *amicus* brief on July 7, 1982. On December 3, 1982, the District Court granted PWC's motion to dismiss NARI's complaint. NARI appealed the court's order to the United States Court of Appeals for the Ninth Circuit. Because the appeal preserved the possibility that issues under the 1916 Act might be referred to the Commission for resolution, no further order in Docket No. 72–35 was issued. The Commission filed a second *amicus* brief before the Court of Appeals which, on November 14, 1983, affirmed the dismissal of NARI's complaint.[4] NARI

[3] Under section 18(b)(5), the Commission's powers were limited to disapproving rates in effect that it found to be so unreasonably high or low as to be detrimental to U.S. foreign commerce.

[4] *National Association of Recycling Industries, Inc.* v. *American Mail Line, Ltd.*, 720 F.2d 618 (9th Cir. 1983).

requested the Supreme Court to review the decision of the Court of Appeals; this request was denied on March 19, 1984.[5]

The conclusion of NARI's antitrust lawsuit removes the possibility that a court might request the Commission to make findings regarding PWC's wastepaper rates based on the record developed in Docket No. 72–35. There is no longer any reason to maintain this investigation as an open proceeding. It should also be noted that section 8 of the Shipping Act of 1984, Pub. L. 98–237, exempts tariffs and service contracts covering shipments of wastepaper (and certain other recyclable materials) from the requirement that they be filed with the Commission and kept open to public inspection. There is therefore little resemblance between the original statutory basis for this proceeding and the current regulation of liner carriage of wastepaper.[6]

THEREFORE, IT IS ORDERED, That this proceeding is hereby discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[5] 466 U.S. 994 (1983).

[6] By notice served on May 15, 1984, 49 FR 21,798, the Commission stated that determinations of the applicability of the Shipping Act of 1984 to cases pending before the agency on June 18, 1984, the effective date of the 1984 Act, would be made on a case-by-case basis. No such determination is necessary in order to discontinue this proceeding.

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 508]

DOCKET NO. 83–45

ACTIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE UNITED STATES/REPUBLIC OF THE PHILIPPINES TRADE

AUGUST 21, 1984

ACTION: Notice of Discontinuance.

SUMMARY: The Federal Maritime Commission discontinues this rulemaking proceeding without prejudice to institute a new rulemaking proceeding, should there be indication of unfavorable conditions in this trade.

DATE: August 24, 1984.

SUPPLEMENTARY INFORMATION:

By a "Notice of Proposed Rulemaking" (Proposed Rule) published on October 7, 1983 (48 *Fed. Reg.* 45,800), the Commission instituted this proceeding under section 19 of the Merchant Marine Act, 1920 (46 U.S.C. § 876) in response to allegations by shippers, third-flag carriers and others that government enforcement of the cargo reservation laws of the Republic of the Philippines had created unfavorable conditions in the foreign ocean-borne trade between the United States and the Philippines. The Philippine laws in question require that all government cargo be reserved for transport by Philippine flag carriers, and that 80% of non-government cargo be reserved for flag carriers of the Philippines and of the bilateral trading partner with cross traders limited to the remaining unreserved 20% of non-government cargo.

The Proposed Rule set forth two options as remedies under section 19. Option A would suspend the tariffs of Philippine carriers operating in the United States/Republic of the Philippines trade. Option B would allow Philippine carriers to avoid tariff suspension by obtaining "authorized" status from the Commission. The effect of the Proposed Rule would be to adjust or meet any unfavorable trade conditions by imposing burdens on Philippine carriers equal to those imposed on non-Philippine carriers by Philippine laws and regulations.

A total of 13 comments were received in response to the Proposed Rule. Comments alleging the existence of unfavorable trade conditions or supporting some action under section 19 were received from the following persons: Maersk Line (Maersk); Barber Blue Sea Lines (BBSL); Port of Portland (Portland); Virginia Port Authority (VPA); The Port Authority of New York and New Jersey (New York); Philadelphia Port Corporation

(Philadelphia); Maryland Port Administration (Baltimore); the Council of European & Japanese National Shipowners' Associations (CENSA); the Chemical Manufacturers Association (CMA); P.L. Thomas Paper Co., Inc. (P.L. Thomas); and the New York Chamber of Commerce and Industry. Comments challenging the allegations of unfavorable trade conditions and opposing any action under section 19 were received from the following persons: National Galleon Shipping Corporation (Galleon) and the Maritime Company of the Philippines (MCP); and the U.S.-Flag Far East Discussion Agreement (Agreement No. 10050).

The Commission published on March 30, 1984 (49 *Fed. Reg.* 12,720) a "Notice of Request for Further Comment" (Request for Further Comment). The Request for Further Comment addressed the various legal, procedural and policy arguments raised in the comments on the Proposed Rule and invited additional comment limited to factual matters. The Request for Further Comment provided parties who might be adversely affected by the Proposed Rule with an opportunity to address factual allegations in other comments that were filed simultaneously with theirs. The Request for Further Comment also specifically invited the Executive Branch to file comment and indicated that information concerning the amount of cargo in the U.S./Philippines trade subject to U.S. cargo preference laws would be helpful to the Commission in its deliberations.

Eleven comments were received in response to the Request for Further Comment. Section 19 action continued to be supported in comments filed by Maersk, BBSL, CENSA, CMA, and P.L. Thomas, all of whom had previously filed comment. Additional comments supporting section 19 action were filed for the first time by: the United States Departments of Transportation, State, Justice, and Commerce and the Office of the United States Trade Representative (Executive Branch); the National Industrial Transportation League (League); Sta-Rite Industries Overseas Corporation (Sta-Rite); and Westinghouse Electric Corporation (Westinghouse). The Philippine-flag carriers (Galleon and MCP) and the U.S.-flag carrier members of Agreement No. 10050 filed further comments continuing their opposition to section 19 action.

Subsequently, by letter dated June 1, 1984, counsel for the Philippine-flag carriers informed the Commission that the Philippine Maritime Industry Authority (MARINA) had issued Memorandum Order No. 5 which revoked Memorandum Orders Nos. 3 and 4.[1] Memorandum Order No. 3 had implemented E.O. 769 by establishing a waiver program which applied to com-

[1] Memorandum Order No. 4, which excluded transshipped cargo from the coverage of E.O. 769, was not at any time in issue in this proceeding. The June 1, 1984 letter attached a photocopy of a telex from the Philippine Minister of Transportation and Communications to the Philippine Embassy in Washington which quoted in full the text of Memorandum Order No. 5. The Order was signed by the Administrator of MARINA and the Minister of Transportation and Communications. Previously, the Department of State in a letter dated May 29, 1984 had advised the Commission that Memorandum Order No. 3 was rescinded. Further communications confirming this fact were received in the form of letters from the State Department dated June 6, 1984 and June 28, 1984.

mercial export and import cargoes in the U.S./Philippines trades. Counsel for the Philippine carriers contends that this action by the Philippine government moots the controversy in this proceeding and requests that the proceeding be terminated and the rule withdrawn.

In response to the Philippine flag carriers' request, CMA, by letter of June 15, 1984, submits that it is too early to evaluate the impact of the revocation of Memorandum Order No. 3 on the Philippine waiver program with respect to non-government cargo (*i.e.*, cargo subject to E.O. 769). In addition, CMA states that some of its members report that waivers may still be required for government cargo (*i.e.*, cargo subject to P.D. 1466). CMA notes that "government cargo" is broadly defined under P.D. 1466 and that a significant amount of cargo may still be subject to anti-competitive conditions. CMA therefore believes that termination of this proceeding at this time would be premature.

The principal focus of the comments submitted in this proceeding urging action under section 19 was on the Philippine waiver program for commercial cargoes.[2] The various allegations of burden on access to the trade, inadequate service, non-competitive rates, and cargo diversion were, for the most part, related to the enforcement of the Philippine cargo reservation law through the waiver program. The revocation of Memorandum Order No. 3, on its face, removes the waiver program as it applied to commercial cargo. This action of the Philippine government would appear to eliminate the principal implementing mechanism of E.O. 769 in the U.S./Philippines trades.

Moreover, there is some confirmation from the shipper community that the revocation of the waiver program has, for the moment, removed the burden of the Philippine cargo reservation laws with regard to commercial cargoes.[3] There is also information in the record that the impact of the waiver program has, at the present time, been lifted from third-flag carriers. For example, trade data submitted in the second round of comments would appear to indicate that competitive conditions are returning to the trade.[4] Moreover, although all parties of record have been informed of the withdrawal of the waiver program, only CMA has suggested that this proceeding should be continued. Although the CMA letter raises certain concerns about Philippine cargo reservation laws, it does not present factual information that would indicate the presence of unfavorable trade conditions. With the removal of the specific gravamen of the various complaints (*i.e.*, the waiver program) and the apparent resumption of normal trade conditions, the Commission believes that the fundamental purpose in instituting this

[2] Memorandum Order No. 3 was put into effect by the Philippine government on July 22, 1982. It provided for a waiver of the requirement that non-government cargo be carried on Philippine or U.S.-flag carriers, provided that a proper application was submitted to Philippine authorities.

[3] By letter dated May 31, 1984, Pier 1 Imports commended the Commission for its successful efforts in this proceeding with regard to Philippine cargo sharing regulations.

[4] The record shows that, in the first quarter of 1984, third-flag carriers appear to be regaining their historical average share of the trade over the past six years.

proceeding, namely removing unfair burdens on shippers and preserving competitive access for non-national flag carriers, has been substantially accomplished. There does not therefore appear to be any need for further action or the imposition of sanctions at this time. The Commission therefore shall discontinue this proceeding.

In taking this action, however, the Commission wishes to make it clear that it continues to be concerned about shipping conditions in this trade. The revocation of Memorandum Order No. 3 withdraws only one element, albeit a critical one, from the panoply of Philippine cargo reservation laws and regulations. The basic laws and decrees, including E.O. 769 with respect to non-government cargo and P.D. 1466 with respect to government cargo, apparently remain in effect.[5] These laws reserve substantial portions of both commercial and government cargo to Philippine-flag carriers and their enforcement could create conditions unfavorable to shipping.

The Commission therefore intends to closely monitor this trade for any indication of renewed application of a waiver program or other means of enforcement of E.O. 769, or greater enforcement of P.D. 1466, and to act swiftly to protect the trade if the need arises.

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

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[5] There is nothing in the record to indicate the current status of the Central Bank Memorandum which further implemented the waiver program with respect to non-government cargo.

FEDERAL MARITIME COMMISSION

[46 CFR PART 510]

DOCKET NO. 84–19

LICENSING OF OCEAN FREIGHT FORWARDERS

August 24, 1984

ACTION: Final Rules.

SUMMARY: These rules finalize and/or revise the Commission's ocean freight forwarder interim regulations to implement the Shipping Act of 1984 which became effective June 18, 1984. Revisions included in these final rules relate to, among others, the reporting and noticing of shipper affiliations by forwarders, invoicing, certification requirements for compensation, anti-rebate policy declarations, accounting to principals, port-wide exemptions and sale/transfer of forwarder's stock. The revisions are intended to lessen the regulatory burden upon the forwarding industry.

DATES: Final rules effective October 15, 1984.

SUPPLEMENTARY INFORMATION:

On March 20, 1984, the Shipping Act of 1984 (the 1984 Act) (46 U.S.C. app. 1701–1720) was enacted. This legislation substantially altered the regulatory responsibilities of the Commission and directly impacted on the Commission's regulations pertaining to the ocean freight forwarding industry. A number of changes to the Commission's forwarder regulations, 46 CFR Part 510, were required by the new legislation.

On May 3, 1984, the Commission published in the FEDERAL REGISTER (49 FR 16839) Interim Rules concerning the licensing and operations of ocean freight forwarders which became effective on June 18, 1984 pursuant to section 17(b) of the 1984 Act (26 F.M.C. 621). The Interim Rules also addressed rule changes previously proposed and noticed in Docket No. 83–35, The Licensing of Independent Ocean Freight Forwarders. The Commission provided thirty days for comments on its Interim Rules. Comments were received from the following parties: The Marine Exchange of the San Francisco Bay Region; General Steamship Corporation Ltd.; NAVTRANS International Freight Forwarding, Inc.; The "8900" Lines, North Atlantic Israel Freight Conference, North Atlantic Mediterranean Freight Conference, U.S. Atlantic and Gulf/Australia-New Zealand Conference, and United States Atlantic Ports/Italy, France and Spain Freight Conference, collectively; American President Lines, Ltd; Hapag-Lloyd Agencies; Kerr Steamship Company, Inc.; Columbia River Customs Brokers

& Forwarders Association, Inc.; The Pacific Merchant Shipping Association; TMX Shipping, Inc.; J.E. Lowden & Company; Sea-Land Service, Inc.; The National Customs Brokers & Forwarders Association of America, Inc.; The National Council on International Trade Documentation; and Trans Freight Lines, Inc.

DISCUSSION OF COMMENTS

In view of the discussion in the Interim Rules of the previous comments submitted in Docket No. 83–35, we will limit our discussion to the comments to the Interim Rules.

The vast majority of the commenting parties, twelve of fifteen, limited their comments to the certification requirements for the payment of ocean freight forwarder compensation. The general view of these comments is that the current certification requirements contained in section 510.33 of the forwarder rules create substantial administrative expenses both on the part of the forwarder and the carrier which could be eliminated through use of efficient automated systems for the payment of compensation. It is pointed out that the 1984 Act specifically eliminates the language of the Shipping Act, 1916 (1916 Act) requiring certification *prior* to payment of compensation by the carrier. It is suggested that this change expresses Congress' intent to eliminate the current onerous and counterproductive paperwork procedures.

A number of these commenters recommend that forwarders be allowed to provide the required certification to carriers in various ways. It is suggested that the forwarder's certification be allowed to be placed on the bill of lading (the current requirement), or on a summary statement, or on a forwarder's compensation invoice to a carrier, or on a carrier's check. Other methods suggested included an annual written statement to a carrier that the forwarder is entitled to compensation on all shipments handled by it except as otherwise indicated on the bill of lading and a restrictive endorsement on the back of the carrier's compensation check.

It has been estimated by one commenter that with a revised rule, as recommended, the industry could realize a saving of three million dollars. The significant saving, it is suggested, would result from elimination of the need both for forwarders to submit the huge volume of certifications to carriers and for carriers to process and retain this paperwork in order to generate appropriate compensation checks. Payment of compensation, it is believed, could be better automated and less enmeshed in clerical procedures.

In view of the comments regarding the certification requirements contained in the forwarder regulations, the Final Rules will allow forwarders to provide the required certification on one copy of the bill of lading, or on a forwarder's summary statement, or on a forwarder's invoice for compensation, or as an endorsement on the back of a carrier's compensation check. Carriers will still be required to retain a copy of the forwarder's

certification. Forwarders will only be required to retain their shipment files evidence that the required services were performed on the particular shipments.

It is our belief that this change is consistent with the language of the 1984 Act, and it will afford the industry an opportunity to streamline procedures for the payment of ocean freight forwarder compensation to the benefit of all concerned. Moreover, under our Final Rule forwarders will no longer be required to check specific services performed on each shipment as the certification language is broad enough to cover any shipment. Appropriate amendments to the pertinent sections of the Final Rules have been made accordingly.

The National Customs Brokers and Forwarders Association of America, Inc. (the Association) submitted comments on a number of areas of the Interim Rules. The Association favors the shipper-affiliations notice requirement contained in section 510.31(b) of the Interim Rules. However, it believes that it does not go far enough to protect exporters in the United States. It believes that the requirement should be extended beyond affiliations with exporters from the United States to include exporters from foreign countries. It sees the potential for harm to U.S. exporters if forwarders affiliated with foreign exporters release information about their U.S. principals to their foreign affiliates which the foreign affiliate could use to attract business away from the U.S. exporter.

We see merit in the Association's suggestion and we have adopted the recommended language offered by the Association as part of the Final Rules.

The Association, although generally supporting the changes in the invoicing rule, does not feel the notice that is to appear on each invoice to a principal advising of potential markup of charges is necessary and results in more regulation than the previous rule. It urges that this notice requirement be deleted. Further, it suggests that the prior written quotation provisions of the previous rules be retained. It seeks also to retain the filing of fee schedules so that no further disclosure beyond the schedule is required.

The Association's comments regarding the invoicing rule are not persuasive. The intent of our Interim Rule on invoicing was, and still is, to interject the forces of the marketplace in the area of forwarder billing practices. We believe this will act as a self-policing mechanism compelling forwarders to account to their principals rather than to the Commission, to the extent possible.

We have amended, however, the language of the rule so as not to prescribe a specific format that forwarders must follow. The rule will allow a forwarder to bill its principal for services rendered by the forwarder in any manner the forwarder so chooses. We have retained the notice requirement, with some modification, which will advise a principal that, upon request, the forwarder shall provide a detailed breakout of the compo-

nents of charges assessed by the forwarder along with copies of any pertinent document.

The Association does not agree with the rule on requiring forwarders to place an anti-rebate policy declaration on each invoice to a principal. It believes that there is no statutory basis for the rule; thus the rule should be deleted.

For the reasons stated in our notice of Interim Rules, we are not disposed to change this rule and it will be adopted in the Final Rules.

Finally, the Association seeks modification to the rule on accounting to the principal for funds due the principal. It believes that the forwarder should be allowed to offset its receivables from any funds due the principal without the principal's consent. This is a matter which is best left to the parties involved to agree upon rather through government regulation. Thus, we have deleted the consent requirement in the Final Rules. The forwarder will still be required, however, to account to its principal for such funds.

NAVTRANS International Freight Forwarding, Inc. (NAVTRANS) generally supports the Interim Rules. It requests, however, that we reconsider its previous comments in Docket No. 83–35. Further to its previous comments, it questions the continued need for notification of the sale/transfer of a forwarder's stock in view of the deletion of the approval requirement.

NAVTRANS' previous comments were considered in drafting the Interim Rules; thus, we see no need to reconsider them here. Further, we do not agree that we need not be notified of stock sales/transfers. To properly discharge our regulatory responsibilities, it is essential that we know who are the owners of forwarders, especially in instances where the question of beneficial interest is present.

The "8900" Lines, *et al.* submitted comments on a single point. They oppose deletion of section 510.36 requiring the filing of agreements under section 15 of the 1916 Act. They argue that the 1984 Act in no way affects, much less eliminates, the requirement under section 15 of the 1916 Act, that agreements among ocean freight forwarders be filed with the Commission for approval. They state that persons carrying on the business of forwarding are still "other persons" subject to the 1916 Act and, therefore, are required to file agreements for approval by the Commission pursuant to section 15 of that Act. They urge that section 510.36 be retained in the forwarder rules.

The issue raised by the "8900" Lines, *et al.* will be the subject of a separate rulemaking proceeding. Therefore, no further comment in the context of the instant proceeding on the issue is necessary at this time.

Having addressed the comments submitted to our Interim Rules, we turn now to two areas which we wish to further amend for clarification purposes.

Under section 510.31(e), *Arrangements with unauthorized persons*, we have amended the last sentence by adding the word "also" after "licensee

shall." This change is to make it clear that when a third party is involved in a forwarding transaction, the license shall, in addition to providing the third party with an invoice, provide a copy of its invoice to the shipper. Thus, the last sentence is to read, in pertinent part:

> . . . the licensee shall also transmit to the person paying the forwarding charges a copy of its invoice for services rendered.

Under section 510.33(a), *Disclosure of principal*, we have added language specifying that the identity of the shipper must be shown "in the shipper identification box on the bill of lading" as opposed to just "on the bill of lading" as the rule currently reads.

The Interim Rules deleted several sections from the rules in effect prior to June 18, 1984 (prior rules). For the sake of clarity, we have redesignated a number of sections. The Interim Rules deleted paragraph (a) of section 510.32, *Forwarder and principal; fees*. Therefore, we have redesignated the remaining paragraphs, (b) through (k), as paragraphs (a) through (j) in the Final Rules.

Paragraphs (a) and (b) of section 510.35, *Reports required to be filed*, have been deleted and all that remains is paragraph (c). Thus, we have retitled section 510.35 as *Anti-rebate certification*, and deleted the paragraph designation.

The Interim Rules also deleted sections 510.12 and 510.21 from the prior rules. In view of this, we have redesignated sections 510.13 through 510.20 as sections 510.12 through 510.19 in the Final Rules. Similarly, sections 510.31 through 510.35 have been redesignated as sections 510.21 through 510.25 in the Final Rules. Conforming amendments to cross references that appear throughout the Final Rules have been made accordingly.

To correct an oversight regarding the appropriate OMB control numbers appearing in section 510.91, we have amended that section to reflect the correct OMB control number as 3072–0018 for all the sections indicated in the table appearing in the section.

Pursuant to 5 U.S.C. 601 *et seq.*, the Chairman of the Commission certifies that the Final Rules published herein will not have a significant economic impact on a substantial number of small entities. The Final Rules are intended to bring the Commission's regulations in line with new legislation. Further, they tend to lessen the regulatory burden upon the forwarding industry and they should have a cost-saving impact on the operations of forwarders.

List of subjects in 46 CFR 510: Exports; Freight forwarders; Maritime carriers; Rates; Reports and record-keeping requirements; Surety bonds.

THEREFORE, pursuant to 5 U.S.C. 553 and sections 3, 8, 10, 11, 13, 15, 17, and 19 of the Shipping Act of 1984 (46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716 and 1718), the Commission revises 46 CFR Part 510 to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 510]

LICENSING OF OCEAN FREIGHT FORWARDERS

SUBPART A—GENERAL

Sec.
510.1 Scope.
510.2 Definitions.
510.3 License, when required.
510.4 License, when not required.

SUBPART B—ELIGIBILITY AND PROCEDURE FOR LICENSING; BOND REQUIREMENTS

510.11 Basic Requirements for licensing; eligibility.
510.12 Application for license.
510.13 Investigation of applicants.
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510.15 Denial of license.
510.16 Revocation or suspension of license.
510.17 Application after revocation or denial.
510.18 Issuance and use of license.
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SUBPART C—DUTIES AND RESPONSIBILITIES OF FREIGHT FORWARDERS; FORWARDING CHARGES; REPORTS TO COMMISSION

510.21 General duties.
510.22 Forwarder and principal; fees.
510.23 Forwarder and carrier; compensation.
510.24 Records required to be kept.
510.25 Anti-rebate certification.
510.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

AUTHORITY: 5 U.S.C. 553; Secs. 3, 8, 10, 11, 13, 15, 17 and 19, Shipping Act, of 1984; 46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716 and 1718.

SUBPART A—GENERAL

§ 510.1 Scope.

(a) This part sets forth regulations providing for the licensing as ocean freight forwarders of persons, including individuals, corporations and partnerships, who wish to carry on the business of freight forwarding. This part also prescribes the bonding requirements and the duties and responsibilities of ocean freight forwarders, regulations concerning practices of freight forwarders and common carriers, and the grounds and procedures for revocation and suspension of licenses.

(b) Information obtained under this part is used to determine the qualifications of freight forwarders and their compliance with shipping statutes and regulations. Failure to follow the provisions of this part may result in denial, revocation or suspension of a freight forwarder license. Persons operating without the proper license may be subject to civil penalties not to exceed $5,000 for each such violation unless the violation is willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $25,000 for each violation; for other violations of the provisions of this part, the civil penalties range from $5,000 to $25,000 for each violation (46 U.S.C. app. 1712). Each day of a continuing violation shall constitute a separate violation.

§ 510.2 Definitions.

The terms used in this part are defined as follows:

(a) "Act" means the Shipping Act of 1984 (46 U.S.C. app. 1701–1720).

(b) "Beneficial interest" includes a lien or interest in or right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from the whole or any part of a shipment of cargo where such interest arises from the financing of the shipment or by operation of law, or by agreement, express or implied. The term "beneficial interest" shall not include any obligation in favor of a freight forwarder arising solely by reason of the advance of out-of-pocket expenses incurred in dispatching a shipment.

(c) "Branch office" means any office established by or maintained by or under the control of a licensee for the purpose of rendering freight forwarding services, which office is located at an address different from that of the licensee's designated home office. This term does not include a separately incorporated entity.

(d) "Brokerage" refers to payment by a common carrier to an ocean freight broker for the performance of services as specified in paragraph (m) of this section.

(e) "Common carrier" means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

(f) "Compensation" means payment by a common carrier to a freight forwarder for the performance of services as specified in § 510.23(c) of this part.

(g) "Freight forwarding fee" means charges billed by a freight forwarder to a shipper, consignee, seller, purchaser, or any agent thereof, for the performance of freight forwarding services.

(h) "Freight forwarding services" refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but is not limited to, the following:

(1) Ordering cargo to port;

(2) Preparing and/or processing export declarations;

(3) Booking, arranging for or confirming cargo space;

(4) Preparing or processing delivery orders or dock receipts;

(5) Preparing and/or processing ocean bills of lading;

(6) Preparing or processing consular documents or arranging for their certification;

(7) Arranging for warehouse storage;

(8) Arranging for cargo insurance;

(9) Clearing shipments in accordance with United States Government export regulations;

(10) Preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;

(11) Handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;

(12) Coordinating the movement of shipments from origin to vessel; and

(13) Giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

(i) "From the United States" means oceanborne export commerce from the United States, its Territories, or possessions to foreign countries.

(j) "Licensee" is any person licensed by the Federal Maritime Commission as an ocean freight forwarder.

(k) "Non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

(l) "Ocean common carrier" means a vessel-operating common carrier but the term does not include one engaged in ocean transportation by ferry boat or ocean tramp.

(m) "Ocean freight broker" is an entity which is engaged by a carrier to secure cargo for such carrier and/or to sell or offer for sale ocean transportation services and which holds itself out to the public as one who negotiates between shipper or consignee and carrier for the purchase, sale, conditions and terms of transportation.

(n) "Ocean freight forwarder" means a person in the United States that:

(1) Dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and

(2) Processes the documentation or performs related activities incident to those shipments.

(o) "Principal", except as used in Surety Bond Form FMC 59, Rev., refers to the shipper, consignee, seller, or purchaser of property, and to anyone acting on behalf of such shipper, consignee, seller, or purchaser of property, who employs the services of a licensee to facilitate the ocean transportation of such property.

(p) "Reduced forwarding fees" means charges to a principal for forwarding services that are below the licensee's usual charges for such services.

(q) "Shipment" means all of the cargo carried under the terms of a single bill of lading.

(r) "Shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(s) "Small shipment" refers to a single shipment sent by one consignor to one consignee on one bill of lading which does not exceed the underlying common carrier's minimum charge rule.

(t) "Special contract" is a contract for freight forwarding services which provides for a periodic lump sum fee.

(u) "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions.

§ 510.3 License; when required.

Except as otherwise provided in this part, a person must hold a valid ocean freight forwarder license in order to perform freight forwarding services and, except as provided in § 510.4 of this part, no person shall perform, or hold out to perform, such services unless such person holds a valid license issued by the Commission to engage in such business. A separate license is required for each branch office that is separately incorporated.

§ 510.4 License; when not required.

A license is not required in the following circumstances:

(a) *Shipper.* Any person whose primary business is the sale of merchandise may, without a license, dispatch and perform freight forwarding services on behalf of its own shipments, or on behalf of shipments or consolidated

shipments of a parent, subsidiary, affiliate, or associated company. Such person shall not receive compensation from the common carrier for any services rendered in connection with such shipments.

(b) *Employee or branch office of licensed forwarder.* An individual employee or unincorporated branch office of a licensed ocean freight forwarder is not required to be licensed in order to act solely for such licensee, but each licensed ocean freight forwarder will be held strictly responsible hereunder for the acts or omissions of any of its employees rendered in connection with the conduct of the business.

(c) *Common carrier.* A common carrier, or agent thereof, may perform ocean freight forwarding services without a license only with respect to cargo carried under such carrier's own bill of lading. Charges for such forwarding services shall be assessed in conformance with the carrier's published tariffs on file with the Commission.

(d) *Ocean freight brokers.* An ocean freight broker is not required to be licensed to perform those services specified in § 510.2(m).

SUBPART B—ELIGIBILITY AND PROCEDURE FOR LICENSING; BOND REQUIREMENTS

§ 510.11 Basic Requirements for licensing; eligibility.

(a) *Necessary qualifications.* To be eligible for an ocean freight forwarder's license, the applicant must demonstrate to the Commission that:

(1) It possesses the necessary experience, that is, its qualifying individual has a minimum of three (3) years experience in ocean freight forwarding duties in the United States, and the necessary character to render forwarding services; and

(2) It has obtained and filed with the Commission a valid surety bond in conformance with § 510.14.

(b) *Qualifying individual.* The following individuals must qualify the applicant for a license:

(1) *Sole proprietorship*—The applicant sole proprietor.

(2) *Partnership*—At least one of the active managing partners, but all partners must execute the application.

(3) *Corporation*—At least one of the active corporate officers.

(c) *Affiliates of forwarders.* An independently qualified applicant may be granted a separate license to carry on the business of forwarding even though it is associated with, under common control with, or otherwise related to another ocean freight forwarder through stock ownership or common directors or officers, if such applicant submits (1) a separate application and fee, and (2) a valid surety bond in the form and amount prescribed under § 510.14 of this part. The proprietor, partner or officer who is the qualifying individual of one active licensee shall not also be designated

the qualifying proprietor, partner or officer of an applicant for another ocean freight forwarder license.

(d) *Common carrier.* A common carrier or agent thereof which meets the requirements of this part may be licensed to dispatch shipments moving on other than such carrier's own bill of lading subject to the provisions of § 510.23(g) of this part.

§ 510.12 Application for license.

(a) *Application and forms.* Any person who wishes to obtain a license to carry on the business of forwarding shall submit, in duplicate, to the Director of the Commission's Bureau of Tariffs, a completed application Form FMC–18 Rev. ("Application for a License as an Ocean Freight Forwarder") and a completed anti-rebate certification in the format prescribed under § 510.25 of this part. Copies of Form FMC–18 Rev. may be obtained from the Director, Bureau of Tariffs, Federal Maritime Commission, Washington, D.C. 20573, or from any of the Commission's offices at other locations. Notice of filing of such application shall be published in the *Federal Register* and shall state the name and address of the applicant. If the applicant is a corporation or partnership, the names of the officers or partners thereof shall be published.

(b) *Fee.* The application shall be accompanied by a money order, certified check or cashier's check in the amount of $350 made payable to the "Federal Maritime Commission."

(c) *Rejection.* Any application which appears upon its face to be incomplete or to indicate that the applicant fails to meet the licensing requirements of the Shipping Act of 1984, or the Commission's regulations, shall be returned by certified U.S. mail to the applicant without further processing, together with an explanation of the reason(s) for rejection, and the application fee shall be refunded in full. All other applications will be assigned an application number, and each applicant will be notified of the number assigned to its application. Persons who have had their applications returned may reapply for a license at any time thereafter by submitting a new application, together with the full application fee.

(d) *Investigation.* Each applicant shall be investigated in accordance with § 510.13 of this part.

(e) *Changes in fact.* Each applicant and each licensee shall submit to the Commission, in duplicate, an amended Form FMC–18 Rev. advising of any changes in the facts submitted in the original application, within thirty (30) days after such change(s) occur. In the case of an application for a license, any unreported change may delay the processing and investigation of the application and may result in rejection or denial of the application. No fee is required when reporting changes to an application for initial license under this section.

§ 510.13 Investigation of applicants.

The Commission shall conduct an investigation of the applicant's qualifications for a license. Such investigations may address:

(a) The accuracy of the information submitted in the application;

(b) The integrity and financial responsibility of the applicant;

(c) The character of the applicant and its qualifying individual; and

(d) The length and nature of the qualifying individual's experience in handling freight forwarding duties.

§ 510.14 Surety bond requirements.

(a) *Form and amount.* No license shall be issued to an applicant who does not have a valid surety bond (FMC–59 Rev.) on file with the Commission in the amount of $30,000. The amount of such bond shall be increased by $10,000 for each of the applicant's unincorporated branch offices. Bonds must be issued by a surety company found acceptable by the Secretary of the Treasury. Surety Bond Form FMC–59 Rev. can be obtained in the same manner as Form FMC–18 Rev. under § 510.12(a) of this part.

(b) *Filing of bond.* Upon notification by the Commission by certified U.S. mail that the applicant has been approved for licensing, the applicant shall file with the Director of the Commission's Bureau of Tariffs, a surety bond in the form and amount prescribed in § 510.14(a) of this part. No license will be issued until the Commission is in receipt of a valid surety bond from the applicant. If more than six (6) months elapse between issuance of the notification of qualification and receipt of the surety bond, the Commission shall, at its discretion, undertake a supplementary investigation to determine the applicant's continued qualification. The fee for such supplementary investigation shall be $100 payable by money order, certified check or cashier's check to the "Federal Maritime Commission." Should the applicant not file the requisite surety bond within two years of notification, the Commission will consider the application to be invalid.

(c) *Branch offices.* A new surety bond, or rider to the existing bond, increasing the amount of the bond in accordance with § 510.14(a) of this part, shall be filed with the Commission prior to the date the licensee commences operation by any branch office. Failure to adhere to this requirement may result in revocation of the license.

(d) *Termination of bond.* No license shall remain in effect unless a valid surety bond is maintained on file with the Commission. Upon receipt of notice of termination of a surety bond, the Commission shall notify the concerned licensee by certified U.S. mail, at its last known address, that the Commission shall, without hearing or other proceeding, revoke the license as of the termination date of the bond unless the licensee shall have submitted a valid replacement surety bond before such termination date. Replacement surety bonds must bear an effective date no later than the termination date of the expiring bond.

§ 510.15 Denial of license.

If the Commission determines, as a result of its investigation, that the applicant:

(a) Does not possess the necessary experience or character to render forwarding services;

(b) Has failed to respond to any lawful inquiry of the Commission; or

(c) Has made any willfully false or misleading statement to the Commission in connection with its application,

a letter of intent to deny the application shall be sent to the applicant by certified U.S. mail, stating the reason(s) why the Commission intends to deny the application. If the applicant submits a written request for a hearing on the proposed denial within twenty (20) days after receipt of notification, such hearing shall be granted by the Commission pursuant to its Rules of Practice and Procedure contained in Part 502 of this chapter. Otherwise, denial of the application will become effective and the applicant shall be so notified by certified U.S. mail. Civil penalties for violations of the Act or any Commission order, rule or regulation may be assessed in accordance with Part 505 of this chapter in any proceeding on the proposed denial of a license or may be compromised for any such violation when a proceeding has not been instituted.

§ 510.16 Revocation or suspension of license.

(a) *Grounds for revocation.* Except for the automatic revocation for termination of a surety bond under § 510.14(d) of this part, or as provided in § 510.14(c) of this part, a license may be revoked or suspended after notice and hearing for any of the following reasons:

(1) Violation of any provision of the Act, or any other statute or Commission order or regulation related to carrying on the business of forwarding;

(2) Failure to respond to any lawful order or inquiry by the Commission;

(3) Making a willfully false or misleading statement to the Commission in connection with an application for a license or its continuance in effect;

(4) Where the Commission determines that the licensee is not qualified to render freight forwarding services; or

(5) Failure to honor the licensee's financial obligations to the Commission, such as for civil penalties assessed or agreed to in a settlement agreement under Part 505 of this chapter.

(b) *Civil penalties.* As provided for in Part 505 of this chapter, civil penalties for violations of the Act or any Commission order, rule, or regulation may be assessed in any proceeding to revoke or suspend a license and may be compromised when such a proceeding has not been instituted.

(c) *Notice of Revocation.* The Commission shall publish in the FEDERAL REGISTER a notice of each revocation.

§ 510.17 Application after revocation or denial.

Whenever a license has been revoked or an application has been denied because the Commission has found the licensee or applicant to be not qualified to render forwarding services, any further application within 3 years of the date of the most recent conduct on which the Commission's notice of revocation or denial was based, made by such former licensee or applicant or by another applicant employing the same qualifying individual or controlled by persons on whose conduct the Commission based its determination for revocation or denial, shall be reviewed directly by the Commission.

§ 510.18 Issuance and use of license.

(a) *Qualification necessary for issuance.* The Commission will issue a license if it determines, as a result of its investigation, that the applicant possesses the necessary experience and character to render forwarding services and has filed the required surety bond.

(b) *To whom issued.*The Commission will issue a license only in the name of the applicant whether the applicant be a sole proprietorship, a partnership, or a corporation, and the license will be issued to only one legal entity. A license issued to a sole proprietor doing business under a trade name shall be in the name of the sole proprietor, indicating the trade name under which the licensee will be conducting business. Only one license shall be issued to any applicant regardless of the number of names under which such applicant may be doing business.

(c) *Use limited to named licensee.* Except as otherwise provided in this part, such license is limited exclusively to use by the named licensee and shall not be transferred without approval to another person.

§ 510.19 Changes in organization.

(a) The following changes in an existing licensee's organization require prior approval of the Commission:

(1) Transfer of a corporate license to another person;

(2) Change in ownership of an individual proprietorship;

(3) Addition of one or more partners to a licensed partnership;

(4) Change in the business structure of a licensee from or to a sole proprietorship, partnership, or corporation, whether or not such change involves a change in ownership;

(5) Acquisition of one or more additional licensee, whether for the purposes of merger, consolidation, or control;

(6) Any change in a licensee's name; or

(7) Change in the identity or status of the designated qualifying individual, except as discussed in paragraphs (b) and (c) of this section.

(b) *Operation after death of sole proprietor.* In the event the owner of a licensed sole proprietorship dies, the licensee's executor, administrator, heir(s), or assign(s) may continue operation of such proprietorship solely

with respect to shipments for which the deceased sole proprietor had undertaken to act as an ocean freight forwarder pursuant to the existing license, if the death is reported within thirty (30) days to the Commission and to all principals for whom services on such shipments are to be rendered. The acceptance or solicitation of any other shipments is expressly prohibited until a new license has been issued. Applications for a new license by the said executor, administrator, heir(s), or assign(s) shall be made on Form FMC–18 Rev., and shall be accompanied by the transfer fee set forth in § 510.19(e) of this part.

(c) *Operation after retirement, resignation, or death of qualifying individual.* When a partnership or corporation has been licensed on the basis of the qualifications of one or more of the partners or officers thereof, and such qualifying individual(s) shall no longer serve in a full-time, active capacity with the firm, the licensee shall report such change to the Commission within thirty (30) days. Within the same 30-day period, the licensee shall furnish to the Commission the name(s) and detailed ocean freight forwarding experience of other active managing partner(s) or officer(s) who may qualify the licensee. Such qualifying individual(s) must meet the applicable requirements set forth in § 510.11(a) of this part. The licensee may continue to operate as an ocean freight forwarder while the Commission investigates the qualifications of the newly designated partner or officer.

(d) *Incorporation of branch office.* In the event a licensee's validly operating branch office undergoes incorporation as a separate entity, the licensee may continue to operate such office pending receipt of a separate license, provided that:

(1) The separately incorporated entity applies to the Commission for its own license within ten (10) days after incorporation, and

(2) The continued operation of the office is carried on as a *bona fide* branch office of the licensee, under its full control and responsibility, and not as an operation of the separately incorporated entity.

(e) *Application form and fee.* Applications for Commission approval of status changes or for license transfers under § 510.19(a) of this part shall be filed in duplicate with the Director, Bureau of Tariffs, Federal Maritime Commission, on Form FMC–18, Rev., together with a processing fee of $100, made payable by money order, certified check, or cashier's check to the "Federal Maritime Commission."

SUBPART C—DUTIES AND RESPONSIBILITIES OF FREIGHT FORWARDERS; FORWARDING CHARGES; REPORTS TO COMMISSION

§ 510.21 General duties.

(a) *License; name and number.* Each licensee shall carry on the business of forwarding only under the name in which its license is issued and

only under its license number as assigned by the Commission. Wherever the licensee's name appears on shipping documents, its FMC license number shall also be included.

(b) *Stationery and billing forms; notice of shipper affiliation.*

(1) The name and license number of each licensee shall be permanently imprinted on the licensee's office stationery and billing forms. The Commission may temporarily waive this requirement for good cause shown if the licensee rubber stamps or types its name and FMC license number on all papers and invoices concerned with any forwarding transaction.

(2) When a licensee is a shipper or seller of goods in international commerce or affiliated with such an entity, the licensee shall have the option of (i) identifying itself as such and/or, where applicable, listing its affiliates on its office stationery and billing forms, or (ii) including the following notice of such items:

> This company is a shipper or seller of goods in international commerce or is affiliated with such an entity. Upon request, a general statement of its business activities and those of its affiliates, along with a written list of the names of such affiliates, will be provided.

(c) *Use of license by others; prohibition.* No licensee shall permit its license or name to be used by any person who is not a *bona fide* individual employee of the licensee. Unincorporated branch offices of the licensee may use the license number and name of the licensee if such branch offices (1) have been reported to the Commission in writing; and (2) are covered by an increased bond in accordance with § 510.14(c) of this part.

(d) *Arrangements with forwarders whose licenses have been revoked.* Unless prior written approval from the Commission has been obtained, no licensee shall, directly or indirectly, (1) agree to perform forwarding services on export shipments as an associate, correspondent, officer, employee, agent, or sub-agent of any person whose license has been revoked or suspended pursuant to § 510.16 of this part; (2) assist in the furtherance of any forwarding business of such person; (3) share forwarding fees or freight compensation with any such person; or (4) permit any such person directly or indirectly to participate, through ownership or otherwise, in the control or direction of the freight forwarding business of the licensee.

(e) *Arrangements with unauthorized persons.* No licensee shall enter into an agreement or other arrangement (excluding sales agency arrangements not prohibited by law or this part) with an unlicensed person so that any resulting fee, compensation, or other benefit inures to the benefit of the unlicensed person. When a licensee is employed for the transaction of forwarding business by a person who is not the person responsible for paying the forwarding charges, the licensee shall also transmit to the

person paying the forwarding charges a copy of its invoice for services rendered.

(f) *False or fraudulent claims, false information.* No licensee shall prepare or file or assist in the preparation or filing of any claim, affidavit, letter of indemnity, or other paper or document concerning a forwarding transaction which it has reason to believe is false or fraudulent, nor shall any such licensee knowingly impart to a principal, common carrier or other person, false information relative to any forwarding transaction.

(g) *Response to requests of Commission.* Upon the request of any authorized representative of the Commission, a licensee shall make available promptly for inspection or reproduction all records and books of account in connection with its forwarding business, and shall respond promptly to any lawful inquiries by such representative.

(h) *Policy against rebates.* The following declaration shall appear on all invoices submitted to principals:

> (Name of firm) has a policy against payment, solicitation, or receipt of any rebate, directly or indirectly, which would be unlawful under the United States Shipping Act of 1984.

§ 510.22 Forwarder and principal; fees.

(a) *Compensation or fee sharing.* No licensee shall share, directly or indirectly, any compensation or freight forwarding fee with a shipper, consignee, seller, or purchaser, or an agent, affiliate, or employee thereof; nor with any person advancing the purchase price of the property or guaranteeing payment therefor; nor with any person having a beneficial interest in the shipment.

(b) *Withholding information.* No licensee shall withhold any information concerning a forwarding transaction from its principal.

(c) *Due diligence.* Each licensee shall exercise due diligence to ascertain the accuracy of any information it imparts to a principal concerning any forwarding transaction.

(d) *Errors and omissions.* Each licensee shall comply with the laws of the United States and any involved State, Territory, or possession thereof, and shall assure that to the best of its knowledge there exists no error, misrepresentation in, or omission from any export declaration, bill of lading, affidavit, or other document which the licensee executes in connection with a shipment. A licensee who has reason to believe that its principal has not, with respect to a shipment to be handled by such licensee, complied with the laws 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 its principal promptly of the suspected noncompliance, error, misrepresentation or omission, and shall decline to participate in any transaction involving such document until the matter is properly and lawfully resolved.

(e) *Express written authority.* No licensee shall endorse or negotiate any draft, check, or warrant drawn to the order of its principal without the express written authority of such principal.

(f) *Receipt for cargo.* Each receipt issued for cargo by a licensee shall be clearly identified as "Receipt for Cargo" and be readily distinguishable from a bill of lading.

(g) *Invoices; documents available upon request.* A licensee may charge its principal for services rendered. Upon request of its principal, each licensee shall provide a complete breakout of the components of its charges and a true copy of any underlying document or bill of charges pertaining to the licensee's invoice. The following notice shall appear on each invoice to a principal:

> Upon request, we shall provide a detailed breakout of the components of all charges assessed and a true copy of each pertinent document relating to these charges.

(h) *Special contracts.* To the extent that special arrangements or contracts are entered into by a licensee, the licensee shall not deny equal terms to other shippers similarly situated.

(i) *Reduced forwarding fees.* No licensee shall render, or offer to render, any freight forwarding service free of charge or at a reduced fee in consideration of receiving compensation from a common carrier or for any other reason. Exception: A licensee may perform freight forwarding services for recognized relief agencies or charitable organizations, which are designated as such in the tariff of the common carrier, free of charge or at reduced fees.

(j) *Accounting to principal.* Each licensee shall account to its principal(s) for overpayments, adjustments of charges, reductions in rates, insurance refunds, insurance monies received for claims, proceeds of c.o.d. shipments, drafts, letters of credit, and any other sums due such principal(s).

§ 510.23 Forwarder and carrier; compensation.

(a) *Disclosure of principal.* The identity of the shipper must always be disclosed in the shipper identification box on the bill of lading. The licensee's name may appear after the name of the shipper, but the licensee must be identified as the shipper's agent.

(b) *Certification required for compensation.* A common carrier may pay compensation to a licensee only pursuant to such common carrier's tariff provisions. Where a common carrier's tariff provides for the payment of compensation, such compensation shall be paid on any shipment forwarded on behalf of others where the licensee has provided a written certification as prescribed in § 510.23(c) of this part and the shipper has been disclosed on the bill of lading as provided for in § 510.23(a) of this part. The common carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect. The common carrier shall retain such certification for a period of five (5) years.

(c) *Form of certification.* Where a licensee is entitled to compensation, the licensee shall provide the common carrier with a signed certification which indicates that the licensee has performed the required services that entitle it to compensation. The certification shall read as follows:

> 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 performed the following services:
>
> (1) Engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space; and
>
> (2) Prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to the shipment.

The required certification may be placed on one copy of the relevant bill of lading, a summary statement from the licensee, the licensee's compensation invoice, or as an endorsement on the carrier's compensation check. Each licensee shall retain evidence in its shipment files that the licensee, in fact, has performed the required services enumerated on the certification.

(d) *Compensation pursuant to tariff provisions.* No licensee, or employee thereof, shall accept compensation from a common carrier which is different than that specifically provided for in the carrier's effective tariff(s) lawfully on file with the Commission. No conference or group of common carriers shall deny in the export commerce of the United States compensation to an ocean freight forwarder or limit that compensation to less than a reasonable amount.

(e) *Compensation; services performed by underlying carrier; exemptions.* No licensee shall charge or collect compensation in the event the underlying common carrier, or its agent, has, at the request of such licensee, performed any of the forwarding services set forth in §510.2(h) unless such carrier or agent is also a licensee, or unless no other licensee is willing and able to perform such services.

(f) *Duplicative compensation.* A common carrier shall not pay compensation for the services described in §510.23(c) more than once on the same shipment.

(g) *Licensed non-vessel-operating common carriers; compensation.*

> (1) A non-vessel-operating common carrier or person related thereto licensed under this part may collect compensation when, and only when, the following certification is made together with the certification required under paragraph (c) of this section:
>
> The undersigned certifies that neither it nor any related person has issued a bill of lading or otherwise undertaken common carrier responsibility as a non-vessel-operating common carrier

for the ocean transportation of the shipment covered by this bill of lading.

(2) Whenever a person acts in the capacity of a non-vessel-operating common carrier as to any shipment, such person shall not collect compensation, nor shall any underlying ocean common carrier pay compensation to such person for such shipment.

(h) A freight 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.

§ 510.24 Records required to be kept.

Each licensee shall maintain in an orderly and systematic manner, and keep current and correct, all records and books of account in connection with its business of forwarding. These records must be kept in the United States in such manner as to enable authorized Commission personnel to readily determine the licensee's cash position, accounts receivable and accounts payable. The licensee must maintain the following records for a period of five years:

(a) *General financial data.* A current running account of all receipts and disbursements, accounts receivable and payable, and daily cash balances, supported by appropriate books of account, bank deposit slips, canceled checks, and monthly reconciliation of bank statements.

(b) *Types of services by shipment.* A separate file shall be maintained for each shipment. Each file shall include a copy of each document prepared, processed, or obtained by the licensee, including each invoice for any service arranged by the licensee and performed by others, with respect to such shipment.

(c) *Receipts and disbursements by shipment.* A record of all sums received and/or disbursed by the licensee for services rendered and out-of-pocket expenses advanced in connection with each shipment, including specific dates and amounts.

(d) *Special contracts.* A true copy, or if oral, a true and complete memorandum, of every special arrangement or contract with a principal, or modification or cancellation thereof, to which it may be a party. Authorized Commission personnel and *bona fide* shippers shall have access to such records upon reasonable request.

§ 510.25 Anti-rebate certifications.

By March 1st of each year, the Chief Executive Officer of every licensee shall certify that it has a policy against rebates, that it has promulgated such policy to all appropriate individuals in the firm, that it has taken steps to prevent such illegal practices which measures must be fully described in detail, and, that it will cooperate with the Commission in any

investigation of suspected rebates. This certification shall be in accordance with the following format:

(Name of Filing Firm)

Certification of Policies and Efforts to Combat Rebating in the Foreign Commerce of the United States

Pursuant to the provisions of section 15(b) of the Shipping Act of 1984, and Federal Maritime Commission regulations promulgated pursuant thereto, 46 CFR Parts 510 and 582,

I, _____, Chief Executive Officer of (name of firm), holder of valid ocean freight forwarder license #_____, state under oath that:

1. It is the policy of (name of firm) to prohibit the participation of said freight forwarder in the payment, solicitation, or receipt of any rebate, directly or indirectly, to or by any carrier or shipper, which is unlawful under the provisions of the Shipping Act of 1984.
2. Each owner, officer, employee and agent of (name of firm) was notified or reminded of this policy on or before _____ of the present year.
3. (Set forth the details of measures instituted within the filing firm or otherwise to prohibit participation in the payment of illegal rebates in the foreign commerce of the United States.)
4. (Name of firm) affirms that it will fully cooperate with the Commission in its investigation of suspected rebating in United States foreign trades.

(S) _____

Subscribed to and sworn before me
this _____ day of _____, 19_____.

(S) _____.
Notary Public

§ 510.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this part comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
510.12 (Form FMC–18)	3072–0018
510.14	3072–0018
510.15	3072–0018
510.19 (Form FMC–18)	3072–0018
510.21 through 510.25	3072–0018

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 515, 520, 525, 530, 540]

[DOCKET NO. 84–18]

INTERIM RULES TO IMPLEMENT THE SHIPPING ACT OF 1984

(SUBCHAPTER B—FINAL RULES FOR MARINE TERMINAL OPERATIONS AND PASSENGER VESSELS)

September 10, 1984

ACTION: Final Rules.

SUMMARY: On March 20, 1984, the President signed the Shipping Act of 1984, which became effective on June 18, 1984. The Commission hereby issues final rules to supersede previously issued interim rules to implement the Shipping Act of 1984. In addition, minor style and technical changes have been made. The parts which are included in this rulemaking are: Part 515 [filing of tariffs by marine terminal operators—old part 533]; Part 520 [filing of tariffs by terminal barge operators in Pacific Slope States—old part 550]; Part 525 [free time and demurrage—old part 526]; Part 530 [truck detention at New York—old part 551]; and Part 540 [security for the protection of the public on passenger vessels]. Along with the final rule on Part 510 (Ocean Freight Forwarders), published separately, all of Subchapter B is now final.

DATE: October 15, 1984.

SUPPLEMENTARY INFORMATION:

These final rules, together with the simultaneous but separately published final rule on Part 510 (Ocean Freight Forwarders) finalize Subchapter B of Chapter IV, Title 46 of the Code of Federal Regulations. The new Title for Subchapter B is:

REGULATIONS AFFECTING OCEAN FREIGHT FORWARDERS, MARINE TERMINAL OPERATIONS AND PASSENGER VESSELS

This proceeding was instituted by a Notice entitled "Interim Rules to Implement the Shipping Act of 1984", published in the *Federal Register* on May 3, 1984 (49 FR 18846) (26 F.M.C. 611), which cited the Federal Maritime Commission's interim rulemaking authority under section 17(b) of the Shipping Act of 1984 [46 U.S.C. app. 1716(b)] and the necessity,

under that statute, for publishing superseding, final rules by December 15, 1984. These rules are being published as such final, superseding rules, without prejudice, however, to the promulgation of any further rules that may be desirable, from time to time, before or after December 15, 1984.

The Interim Rules, finalized herein, restructure the Commission's Code of Federal Regulations' Part numbers for logic and convenience. The "new" numbers are effective as of June 18, 1984, while the "old" numbers appeared in the October 1, 1983, Title 46 (Shipping), Part 400 to End, edition of the CFR.

The major changes made by the Interim Rules to the old rules involved the Authority Citations, penalty provisions, and the exclusion of forest products, bulk cargo and recyclable metal scrap, waste paper and paper waste from the tariff-filing requirements—all to implement the Shipping Act of 1984. See 49 FR 18846.

The Supplementary Information to the interim rules also mentioned Docket No. 83–38, *Notice of Inquiry and Intent to Review Regulations of Ports and Marine Terminal Operators,* presided over by Commissioner Robert Setrakian. The issues in that proceeding may affect marine terminal operations and suggest further amendments to the rules in the parts published here. Such further rulemaking, if necessary may be outside the scope of the Interim Rules and, therefore, require a separate rulemaking. Accordingly, at this time, the Commission will not defer finalization of these marine-terminal-related rules.

The Interim Rules published on May 3, 1984, generated only two comments: one from the Maryland Port Administration which endorsed the language modifications to Part 515, "Filing of Tariffs by Terminal Operators"; and the other from the National Maritime Council which had no further comment other than recognizing that the Interim Rules were required for technical compliance with the 1984 Act. The Commission, therefore, sees no need to make any substantive changes in any of the Interim Rules, and is publishing them as final, superseding rules in this proceeding in their entirety.

In preparing the various parts for publication, certain other non-substantive changes suggested themselves. Most of such minor changes made here involve style (e.g., for OMB Control Numbers or exemptions under the Paperwork Reduction Act; changing "provided, however" to "except"; elimination of gender specific references, etc.), grammar, syntax, numbering, punctuation, correction of typographical errors, and removal of superfluous verbiage—all without affecting substance.

In addition, we are restoring to the "Authority Citation" in old Part 550 (new Part 520), reference to Sec. 3 of the Shipping Act, 1916 (46 U.S.C. app. 804); we are deleting obsolete, effective-date provisions appearing in (old) sections 533.4 and 540.4(b); a new map of the New York Port District is being provided for (new) Part 530; and we think a more

descriptive nomenclature is "Marine Terminal Operators" instead of merely "Terminal Operators."

The Federal Maritime Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of Subjects:

46 CFR Parts 515, 520, 525, and 530

Barges; Cargo; Cargo vessels; Harbors; Imports; Maritime carriers; Motor carriers; Ports; Rates and fares; Reporting and recordkeeping requirements; Trucks, Water carriers; Waterfront facilities; Water transportation.

46 CFR Part 540

Rates and fares; Passenger vessels; Reporting and recordkeeping requirements; Surety bonds.

CORRECTIONS

These final rules are subject to review and editing of form before publication in the Code of Federal Regulations. Users are requested to notify the Commission of any omissions and typographical-type errors in order that corrections can be made before the Commission's CFR book goes to press in January, 1985.

Therefore, pursuant to 5 U.S.C. 552, 553; secs. 3, 17, 18(a), 21 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 804, 816, 817(a), 820, and 841a); sec. 2 of the Intercoastal Shipping Act, 1993 (46 U.S.C. app. 844); secs. 8, 10, 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707, 1709, 1714 and 1716), and secs. 2 and 3, Pub. L. 89–777, 80 Stat. 1356–1358 (46 U.S.C. app. 817d and 817e):

1. The Title to Subchapter B is revised to read as follows:

SUBCHAPTER B—REGULATIONS AFFECTING OCEAN FREIGHT FORWARDERS, MARINE TERMINAL OPERATIONS AND PASSENGER VESSELS

2. Title 36 Code of Federal Regulations, Parts 515, 520, 525, 530 and 540 are revised to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 515]

FILING OF TARIFFS BY MARINE TERMINAL OPERATORS

Sec.
515.1 Scope.
515.2 Purpose.
515.3 Persons who must file.
515.4 Filing of tariffs and tariff changes
515.5 Compliance with this part and other terminal tariff filing requirements.
515.6 Definitions
515.91 OMB Control numbers assigned pursuant to the Paperwork Reduction Act.

AUTHORITY: 5 U.S.C. 553; secs. 17, 21, 43 of the Shipping Act, 1916 (46 U.S.C. app. 816, 820, 841a); secs. 10, 15, 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709, 1714, 1716).

§ 515.1 Scope.

This part sets forth rules and regulations for the filing of terminal tariffs by persons engaged in carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities within the United States or a commonwealth, territory, or possession thereof, in connection with a common carrier by water in the foreign or domestic offshore commerce of the United States.

§ 515.2 Purpose.

The purpose of this part is to enable the Commission to discharge its responsibilities under section 17 of the Shipping Act, 1916 and section 10 of the Shipping Act of 1984, by keeping informed of practices, rates and charges related thereto, instituted and to be instituted by marine terminals, and by keeping the public informed of such practices. Compliance is mandatory and failure to file the required tariffs may result in a peanlty of not more than $5,000 for each day such violation continues. Additionally, if willful and knowing, the Shipping Act of 1984 provides a civil penalty of not more than $25,000 for each day a violation continues.

§ 515.3 Persons who must file.

Except with regard to bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste, every person other than the Department of Defense (including the military department and all agencies of the Department of Defense), carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities as described in § 515.1, including, but not limited to terminals owned or operated by States and their political subdivisions; railroads who perform port terminal services not covered by

their line haul rates; common carriers who perform port terminal services; and warehousemen who operate port terminal facilities, shall file in duplicate with the Bureau of Tariffs, Federal Maritime Commission, and shall keep open for inspection at all its places of business, a schedule or tariff showing all its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities, except that rates and charges for terminal services performed for water carriers pursuant to negotiated contracts, and for storage of cargo and services incidental thereto by public warehousemen pursuant to storage agreements covered by issued warehouse receipts need not be filed for purposes of this part.

§ 515.4 Filing of tariffs and tariff changes.

Every tariff or tariff change shall be filed on or before its effective date, except as required by Commission Order or by agreements approved pursuant to section 15 of the Shipping Act, 1916 and/or effective under section 6 of the Shipping Act of 1984, and be kept open for public inspection as provided in § 515.3.

§ 515.5 Compliance with this part and other terminal tariff filing requirements.

Persons who file tariffs pursuant to requirements of Commission Orders or agreements, approved under section 15 of the Shipping Act, 1916 and/or effective under section 6 of the Shipping Act of 1984, and shall not be relieved of such requirements by this part. Marine Terminal Operators who file tariffs with the Interstate Commerce Commission pursuant to statute or rule of that Commission may satisfy the requirements of this part by filing with the Federal Maritime Commission a copy of any such tariff filed with the Interstate Commerce Commission.

§ 515.6 Definitions.

(a) The definitions of terminal services set forth in paragraph (d) of this section shall be set forth in tariffs filed pursuant to this part except that other definitions of terminal services may be used if they are correlated by footnote or other appropriate method to the definitions set forth herein. Any additional services which are offered shall be listed and charges therefor shall be shown in terminal tariffs.

(b) These definitions shall apply to "port terminal facilities" which are defined as one or more structures comprising a terminal unit, and include, but are not limited to wharves, warehouses, covered and/or open storage spaces, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers in the interchange of same between land and water carriers or between two water carriers.

(c) For the purpose of this section, "point of rest" means that area on the terminal facility which is assigned for the receipt of inbound cargo

from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading.

(d) *Definitions of terminal services:*

(1) *"Dockage"* means the charge assessed against a vessel for berthing at a wharf, pier, bulkhead structure, or bank, or for mooring to a vessel so berthed.

(2) *"Wharfage"* means a charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

(3) *"Free time"* means the specified period during which cargo may occupy space assigned to it on terminal property free of wharf demurrage or terminal storage charges immediately prior to the loading or subsequent to the discharge of such cargo on or off the vessel.

(4) *"Wharf demurrage"* means a charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.

(5) *"Terminal storage"* means the service of providing warehouse or other terminal facilities for the storing of inbound or outbound cargo after the expiration of free time, including wharf storage, shipside storage, closed or covered storage, open or ground storage, bonded storage and refrigerated storage, after storage arrangements have been made.

(6) *"Handling"* means the service of physically moving cargo between point of rest and any place on the terminal facility, other than the end of ship's tackle.

(7) *"Loading and unloading"* means the service of loading or unloading cargo between any place on the terminal and railroad cars, trucks, lighters or barges or any other means of conveyance to or from the terminal facility.

(8) *"Usage"* means the use of terminal facility by any rail carrier, lighter operator, trucker, shipper or consignee, its agents, servants, and/or employees, when it performs its own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

(9) *"Checking"* means the service of counting and checking cargo against appropriate documents for the account of the cargo or the vessel, or other person requesting same.

(10) *"Heavy lift"* means the service of providing heavy lift cranes and equipment for lifting cargo.

§ 515.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Manage-

ment and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
515.3 through 515.5	3072–0002

FEDERAL MARITIME COMMISSION

[46 CFR PART 520]

FILING OF TARIFFS BY TERMINAL BARGE OPERATORS IN PACIFIC SLOPE STATES

Sec.
520.1 Scope.
520.2 Tariff filing requirements.

AUTHORITY: 5 U.S.C. 553; secs. 3, 18(a) and 43 of the Shipping Act, 1916 (46 U.S.C. app. 804, 817(a) and 841(a)); sec. 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 844); and secs. 8 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707 and 1716).

§ 520.1 Scope.

(a) The rules and regulations set forth in this part cover the filing of tariffs by terminal barge operators in Pacific Slope States in the foreign and domestic commerce of the United States.

(b) Terminal barge operators moving containers or containerized cargo by barge between points in the Continental United States shall file a schedule of their rates, charges and services solely with the Federal Maritime Commission where:

(1) The cargo is moving between a point in a foreign country or a noncontiguous State, territory, or possession and a point in the United States.

(2) The transportation by barge between points in the United States is furnished by a terminal operator as a service substitute in lieu of a direct vessel call by the common carrier by water transporting the containers or containerized cargo under a through bill of lading.

(3) Such terminal operator is a Pacific Slope State municipality, or other public body or agency subject to the jurisdiction of the Federal Maritime Commission, and the only one furnishing the particular circumscribed barge service on January 2, 1975.

(4) Such terminal operator is in compliance with the rules and regulations of the Federal Maritime Commission for the operator of such barge service.

(c) The terminal operator providing such service shall be subject to the provisions of the Shipping Act, 1916 and/or the Shipping Act of 1984.

§ 520.2 Tariff filing requirements.

(a) Terminal barge operators subject to this part shall comply with the tariff filing requirements of Part 580 of this Chapter with respect to the publication of rates, charges and services for cargo moving in the foreign and/or domestic offshore commerce of the United States.

(b) Terminal barge operators, while exempt from the tariff filing form requirements of Part 550 of this Chapter with respect to their operations

as water carriers carrying cargo in the domestic offshore trades, shall comply with all other required regulations, where applicable.

(c) Tariff(s) filed pursuant to § 520.2(a) shall specifically provide that rates charged are based upon factors normally considered by a regular commercial operator in the same service.

NOTE: In accordance with 44 U.S.C. 3506(c)(5), any information request or requirement in this part is not subject to the requirements of section 3507(f) of the Paperwork Reduction Act, because there are nine or fewer respondents.

FEDERAL MARITIME COMMISSION

[46 CFR PART 525]

FREE TIME AND DEMURRAGE CHARGES ON IMPORT PROPERTY APPLICABLE TO ALL COMMON CARRIERS BY WATER

AUTHORITY: 5 U.S.C. 553; secs. 17 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 816, 841a); secs. 10 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709 and 1716).

§ 525.1 Free time and demurrage charges at the Port of New York.

(a) Free time of five days (exclusive of Saturdays, Sundays, and legal holidays), computed from the start of business on the first day after complete discharge of the vessel, is adequate free time on import property at New York under present conditions.

(b) Free time on import property at New York shall not be less than five days, except on property of such a special nature as to require earlier removal because of local ordinances or other governmental regulations, or because piers are not equipped to care for such property for such period, or except as the Commission may hereafter direct.

(c) Except as provided in §§ 530.3(e)(2), 530.4(e), and 530.4(g) of this Chapter, where a carrier is for any reason, unable, or refuses, to tender cargo for delivery during free time, free time must be extended for a period equal to the duration of the carrier's disability or refusal. If such condition arises after the expiration of free time, either no demurrage or first period demurrage, whichever is specified in the appropriate tariff, will be charged for a period equal to the duration of the carrier's inability or refusal.

(d) Where a consignee is prevented from removing its cargo by factors beyond its control (such as, but not limited to, longshoremen's strikes, trucking strikes or weather conditions) which affect an entire port area or a substantial portion thereof, and when a consignee is prevented from removing its cargo by a longshoremen's strike which affects only one pier or less than a substantial portion of the port area, carriers shall (after expiration of free time) assess demurrage against imports at the rate applicable to the first demurrage period, for such time as the inability to remove the cargo may continue. Every departure from the regular demurrage charges shall be reported to the Commission.

(e) The Commission makes no finding approving or disapproving demurrage rates presently effective as to import property at the port of New York.

(f) Following a longshoremen's strike of five (5) days or more:

(1) Free time shall be extended for a period not less than five (5) days (exclusive of Saturdays, Sundays, and legal holidays) beyond the

time at which it would normally terminate, for cargo which was in a free time period at the commencement of the longshoremen's strike.

(2) First period demurrage shall be extended for a period not less than five (5) calendar days beyond the time at which it would normally terminate, for cargo which was subject to first period demurrage at the commencement of the longshoremen's strike.

(g) The extensions set forth in paragraphs (f)(1) and (f)(2) of this section, shall apply only (1) if the cargo is actually picked up within such extended time or (2) if, pursuant to an appointment system adopted by both carriers and consignees, cargo is picked up within twenty-four (24) hours of advance notification that cargo is available for pickup and readily accessible, in which latter event, time shall not be extended more than twenty-four (24) hours beyond the additional free time or demurrage period.

Note: In accordance with 44 U.S.C. 3506(c)(5), any information request or requirement in this part is not subject to the requirements of section 3507(f) of the Paperwork Reduction Act, because there are nine or fewer respondents.

FEDERAL MARITIME COMMISSION

[46 CFR PART 530]

TRUCK DETENTION AT THE PORT OF NEW YORK

Sec.
530.1 General provisions.
530.2 Documentation.
530.3 Terminals operating on appointment system.
530.4 Terminals operating a non-appointment system.
530.5 Combination non-appointment/appointment system.
530.6 Computation of time.
530.7 Penalties.
530.8 Submission of claims for penalties.
530.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

Appendix A—New York/New Jersey Port District.
Appendix B—Motor carrier Preference Slip.

AUTHORITY: 5 U.S.C. 553; secs. 17 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 816 and 841a); secs. 10 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709 and 1716).

§ 530.1 General provisions.

(a) The *"Port of New York"* is that area designated as "The Port District" on the map (Appendix A).

(b) For purposes of this part, a terminal operator is any person who receives cargo from motor carriers and/or delivers cargo to motor carriers in connection with transportation by common carrier by water, excluding persons who operate marine terminal facilities controlled by the Department of Defense including the military department and all agencies of the Department of Defense.

(c) Motor carriers (common, contract, or private), terminal operators, including steamship companies acting as terminal operators, and steamship companies whose action or inaction otherwise impedes expeditious pickup and delivery of cargo by motor carriers at marine terminal facilities within the Port of New York, shall be subject to the provisions established by terminal operators in accordance with this part, which provisions shall be reflected in the tariff of each such terminal operator.

(d) Importers and exporters, or motor carriers or other agents of importers or exporters, and terminal operators at marine terminal facilities in the Port of New York, shall be entitled to receive remuneration in accordance with the provisions of this part.

(e) The person responsible for operating each marine terminal facility within the Port of New York shall identify itself to the Federal Maritime Commission not more than 10 days after the effective date of this part

and shall thereafter promptly notify the Commission of any change in responsibility. Based thereon, the Federal Maritime Commission (Commission) will publish and maintain a current list identifying, as to each such marine terminal facility, the party responsible for receipt and settlement of claims arising under this part.

(f) All communications to the Federal Maritime Commission required by this part shall be directed to the Federal Maritime Commission, Office of the Secretary, 1100 L Street N.W., Washington, D.C. 20573.

(g)(1) Except as provided in paragraph (g)(2) of this section, no penalty shall be imposed upon a terminal operator under this part if receipt or delivery of cargo at a marine terminal facility is prevented or delayed by strike or work stoppage, act of God, fire, serious accident, or severe or unusual weather condition. The Commission shall be notified in writing by the party claiming the existence of the condition who shall specify the date and time of commencement and termination of any such strike, work stoppage, or severe or unusual weather or other condition.

(2) No terminal operator shall be absolved from liability under this part for delays resulting from inadequate or insufficient labor, and/or equipment, other than reasonable delays necessary to obtain special equipment required for handling unusual cargo on a non-appointment basis.

(h) Terminal operators shall not be liable for delays due to United States Government regulations; nor shall terminal operators be liable for time consumed by receipt or delivery of cargo by marks other than by bill of lading, provided at the request of the shipper, consignee or motor carrier.

(i) Steamship companies responsible for house-to-house movement of containers, i.e., containers moving as a unit from origin to destination, are responsible under this part for delay occasioned by lack of sufficient chassis, or unavailability, action or inaction of their container inspection personnel. For purposes of this part, "containers" shall include empty as well as stuffed containers.

(j) Disputes concerning liability under any provisions of this part shall be settled by an impartial Adjudicator selected by the Commission.

(k) Terminal operators are not required to deliver cargo to motor carriers prior to the time that the ocean vessel which transported said cargo is fully discharged. If a terminal operator exercises the option of delivering cargo to motor carriers prior to the time that the ocean carrier which transported said cargo is fully discharged, the terminal operator shall notify the consignee or its designated agent that the cargo is on the pier, at its place of rest, and segregated by bill of lading, and shall identify the terminal operator employee giving such notification.

(l) Marine terminal facilities in the Port of New York shall be operated in accordance with the appointment, non-appointment, or combination appointment/non-appointment procedures established by the terminal operator in accordance with this part. Each terminal operator shall identify in its

respective tariff whether its marine terminal facility will be operated on an appointment, non-appointment, or combination appointment/non-appointment basis. Said tariff shall incorporate the specific procedures applicable at each such marine terminal facility, which procedures shall comply with the provisions of this part, be prominently displayed at the marine facility, and shall be modified on not less than 30 days' notice.

(m) Compliance is mandatory and failure of terminal operators or motor carriers to follow the provisions of this part may result in the assessment of penalties as specified in § 530.7.

§ 530.2 Documentation.

(a)(1) Delivery orders shall not be mailed or delivered to terminal operators, not mailed or delivered to steamship companies for receipt on behalf of terminal operators, prior to arrival of motor carrier vehicles at marine terminal facilities. Dock receipts may be lodged with terminal operators or steamship companies for receipt on behalf of terminal operators prior to arrival of motor carrier vehicles at marine terminal facilities. Upon arrival at marine terminal facilities, motor carrier vehicle operators shall have physical possession of delivery orders required by this part, and shall either have physical possession of dock receipts required by this part or shall have had said dock receipts lodged with the terminal operator or steamship company in accordance with the above-described procedure. Motor carrier vehicles having physical possession of delivery orders or dock receipts immediately shall be issued a sequentially numbered and time-stamped gate pass by order of arrival. When dock receipts are lodged with the terminal operator or steamship company, the sequentially numbered and time-stamped gate pass immediately shall be issued upon tender of the dock receipt to the gateman by the motor carrier vehicle driver. The sequential number and all time stamps and notations recorded on the gate pass and any other arrival document shall be recorded on the copy of the delivery order or dock receipt retained by the motor carrier. Motor carrier vehicles not complying with the requirements of this paragraph shall be denied entry to the marine terminal facility.

(2) Motor carriers shall be permitted to receive cargo on Open Delivery Orders, i.e., single delivery orders covering multiple truckloads or shipments, and deliver cargo on Open Dock Receipts, i.e., single dock receipts covering multiple truckloads or shipments, upon presenting to the terminal operator, subsequent to receipt or delivery of the initial load, satisfactory evidence of authorization to effect receipt or delivery of the remaining truckloads or shipments, as established by the terminal operator and published in its tariff.

(b) Dock receipts required as full and complete documentation for receipt of export cargo shall include the following information:

(1) Name of the motor carrier.

(2) Name of forwarding agent. (If none, insert "none").

(3) Shipper.

(4) Name of vessel.

(5) Pier, berth, or area designated for receipt of cargo.

(6) Port of discharge.

(7) Container identification and seal number. (On full container loads.)

(8) Booking number.

(9) Cargo to be held on dock should be so indicated in space provided for vessel name.

(10) Marks, number of packages, commodity, cube and weight.

(11) An original and three copies of the dock receipt authorized by the steamship line that is to receive the cargo must be tendered to the terminal operator, one copy of which shall be returned to and retained by the motor carrier in accordance with § 530.2(a)(1).

(c) Delivery order required as full and complete documentation for the delivery of import cargo shall provide the following information:

(1) Name and address of party issuing delivery order.

(2) Address of terminal.

(3) Name and address of motor carrier making pickup.

(4) Vessel name.

(5) Voyage number or estimated date of arrival.

(6) Bill of Lading number.

(7) Port of Lading.

(8) City of destination. (On full container loads.)

(9) Container identification number. (On full container loads.)

(10) Booking number. (On receipt of empty containers.)

(11) Marks, number of packages, commodity, cube and weight. When partial lots are to be delivered, they should be identified by marks.

(12) Date free time expires.

(13) Date through which demurrage is paid/guaranteed after free time has expired.

(14) An original and two copies of the delivery order, the original legibly signed in ink, with the name of the signer typed below the signature, shall be tendered to the terminal operator, one copy of which shall be returned to and retained by the motor carrier in accordance with § 530.2(a)(1).

(d)(1) Terminal operators shall not honor delivery orders with strikeouts or other changes to the original.

(2) If a motor carrier named in an original delivery order substitutes another motor carrier in its place, the motor carrier named in the original delivery order shall provide a turnover order to the second carrier containing all information required by the original delivery order. Both the original delivery order and the turnover order must be presented to the terminal operator by the motor carrier requesting delivery of cargo. Upon written request, in accordance with procedures established by the terminal operator and published in its tariff, special arrangements may be made to accommodate general agency situations.

(e) If a motor carrier presents documents to the terminal operator which do not contain all information required by this part, or which are complete but contain inaccurate information, said motor carrier shall be required to surrender its gate pass and shall be denied service; or, at the request of said motor carrier, the terminal operator may correct or complete the deficient document and service said motor carrier in accordance with this part.

(f) If documents are rejected by the terminal operator, or service is refused for any other reason, the terminal operator shall provide the motor carrier written explanation, time-stamped, of the deficiencies in documentation or other reason(s) for refusal of service, and shall attach thereto a copy of the deficient document, if any.

(g) Section 530.2(e) shall not be applicable if documents are incorrect because of substitution of one vessel for another, redocking of a vessel from a scheduled pier to another, or change in consignment of an export shipment from a scheduled vessel to another due to an early closeout of the scheduled vessel or other such rescheduling for the convenience of the steamship company or terminal operator. Delay occasioned in such circumstances shall be included in the computation of time for purposes of this rule and chargeable to the party responsible for such change.

§ 530.3 Terminals operating on appointment system.

Subject to the following provisions of this section, terminal operators shall establish the basis upon which appointments will be available and shall publish in their tariffs reasonable methods and procedures for booking appointments.

(a)(1) Except for good cause, all requests for appointments shall be granted. If a request for an appointment is not granted, the terminal operator shall record the request and reason for refusal.

(2) Appointments, when granted, shall be identified by sequentially assigned numbers. The terminal operator shall record the date and time of requests for appointments, the name of the person making the requests; the date, time and identification number of scheduled appointments; and shall identify the terminal operator employee granting the appointment.

(b) Appointments to receive delivery of cargo shall not be granted by terminal operators unless and until a freight release covering subject cargo has been provided by the steamship company. Appointments shall be granted only if the terminal operator is advised of the nature, type and quantity of cargo to be delivered or received. If, because of the size, weight or shape of the cargo, special equipment is required, the terminal operator shall so advise the motor carrier at the time the appointment is granted, and the motor carrier shall advise the terminal operator of the type of "rolling stock" which it will employ to effectuate the interchange of cargo.

(c)(1) Gate passes shall be issued to motor carriers by order of arrival at the marine terminal facility. Motor carriers arriving after the time of

a scheduled appointment shall be deemed to have missed the appointment and may be denied service.

(2) Except where a terminal operator has arranged for delivery of cargo on the last day of free time, or on the first or second day of demurrage, in accordance with paragraph (e)(2) of this section, motor carriers may cancel appointments (without penalty), provided the terminal operator is given three (3) working hours' notice of said cancellation.

(d)(1) Upon receipt of a gate pass issued pursuant to paragraph (c)(1) of this section, motor carrier personnel holding dock receipts or other satisfactory evidence of authorization to effect delivery or cargo shall proceed immediately to the receiving clerk of the terminal operator who shall immediately time-stamp the gate pass upon presentation of documents. After said documents are determined to be in proper order, the motor carrier shall be routed for unloading.

(2) Upon receipt of a gate pass issued pursuant to paragraph (c)(1) of this section, motor carrier personnel holding delivery orders or other satisfactory evidence of authorization to receive delivery of cargo shall proceed to the Bureau of Customs for completion of required procedures, and thereafter, shall immediately proceed to the delivery clerk of the terminal operator who shall immediately time-stamp the gate pass upon presentation of documents. After said documents are determined to be in proper order, the motor carrier shall be routed for loading.

(e)(1) See § 525.1(c) of this Chapter for provisions regarding extension of free time.

(2) At full-appointed terminals, if an appointment is not available as requested, an appointment shall be granted within 72 hours (three business days) of said request, except as provided by paragraphs (e)(2)(i) and (e)(2)(ii) of this section.

(i) *Cargo permitted 5 days' free time—Extension of free time.*

(A) If an appointment is requested at least 48 hours prior to the expiration of free time, the terminal operator shall arrange to deliver cargo prior to expiration of free time, or extend free time until an appointment is granted.

(B) If an appointment is requested less than 48 hours—but more than 24 hours—prior to expiration of free time, the terminal operator shall arrange for delivery of cargo prior to the close of business on the first working day of demurrage for which first demurrage day the cargo shall be liable, or, after said first demurrage day, cargo shall assume non-demurrage status until an appointment is granted.

(C) If an appointment is requested less than 24 hours prior to expiration of free time, the terminal operator shall arrange for delivery of cargo prior to the close of business on the second working day of demurrage for which two (2) demurrage days the cargo shall be liable, or, after said two (2) demurrage days, cargo shall assume non-demurrage status until an appointment is granted.

(ii) *Cargo permitted 2 or 3 days' free time—Extension of free time.*

(A) If an appointment is requested at least 24 hours prior to expiration of free time, the terminal operator shall arrange to deliver cargo prior to expiration of free time or extend free time until an appointment is granted.

(B) If an appointment is requested less than 24 hours prior to expiration of free time, the terminal operator shall arrange for delivery of cargo prior to the close of business on the first working day of demurrage for which first demurrage day the cargo shall be liable, or, after said first demurrage day, cargo shall assume non-demurrage status until an appointment is granted.

§ 530.4 Terminals operating a non-appointment system.

(a) Each business day shall be divided into a number of "service periods" (for example, periods commencing at 8 a.m., 10 a.m., 1 p.m., 3 p.m.) as scheduled by the terminal operator according to the nature and capabilities of the particular facility.

(b) Motor carriers arriving at marine terminal facilities shall be issued sequentially numbered time-stamped gate passes by order of arrival, valid for entry to the terminal facility at the time of commencement of the service period indicated thereon.

(c) Upon receipt of a gate pass issued pursuant to paragraph (b) of this section, motor carrier personnel holding dock receipts or other satisfactory evidence of authorization to effect delivery of cargo shall proceed immediately to the receiving clerk of the terminal operator who shall immediately time-stamp the gate pass upon presentation of documents. After said documents are determined to be in proper order, the motor carrier shall be routed for unloading.

(d) Upon receipt of a gate pass issued pursuant to paragraph (b) of this section, motor carrier personnel holding delivery orders or other satisfactory evidence of authorization to receive delivery of cargo shall proceed to the Bureau of Customs for completion of required procedures and thereafter immediately proceed to the delivery clerk of the terminal operator, who shall immediately time-stamp the gate pass upon presentation of documents. After said documents are determined to be in proper order, the motor carrier shall be routed for loading.

(e) A motor carrier entitled to a gate pass scheduling service for a later service period, but unwilling to wait for that service, may elect, not more than 30 minutes after issuance of said gate pass, to receive a preference slip (Appendix B), entitling said motor carrier to service on the next business day as specified thereon. However, free time will not be extended if cargo is on the last day of free time, nor will collection of demurrage charges be suspended.

(f) Motor carriers arriving at a marine terminal facility after the capacity of said facility has been reached may be turned away, but shall be given preference for service on the next business day according to the order

in which they arrived and were turned away. Motor carriers turned away under these circumstances shall be issued a preference slip (Appendix B), sequentially numbered, which shall assure preference for service on the next business day and, where cargo is on the last day of free time, create a one-day extension of free time, or suspend collection of demurrage charges for one day as to cargo already on demurrage. The preference slip shall be attached to the gate pass when said gate pass is issued and all notations recorded on the preference slip shall be duplicated on the motor carrier's copy of the delivery order or dock receipt.

(g) If, at the commencement of its scheduled service period, a motor carrier is not available to receive cargo which is on the last day of free time, and because of the unavailability of said motor carrier, the terminal operator is unable to provide service on that day, there shall be no extension of free time.

(h) If all vehicles scheduled for a service period are discharged prior to the end of that period, the motor carrier available and holding the next sequenced gate pass shall be served.

(i) It shall be the responsibility of the motor carrier to determine from the terminal operator whether cargo to be delivered to said motor carrier is on the pier, at its place of rest, and segregated by bill of lading.

§ 530.5 Combination non-appointment/appointment system.

(a) An express line or non-appointment line may be established in conjunction with an appointment system in such a manner as the terminal operator determines best suits the needs of the particular facility.

(b) All rules applicable to non-appointment facilities (§ 530.4) shall be applicable to the non-appointment portion of a combination non-appointment/appointment terminal operation.

(c) If a motor carrier attempts to make an appointment at a facility operating a combination system, and no appointment is available, and then said motor carrier seeks service as a non-appointment vehicle, said motor carrier shall be treated as a non-appointment vehicle for purposes of extension of free time.

§ 530.6 Computation of time.

(a) Validation time is (1) time of issuance of a gate pass upon a motor carrier's arrival at a marine terminal facility or (2) if, upon arrival, a motor carrier is scheduled for a later service period, the time of commencement of that scheduled service period, or (3) if a motor carrier is issued a preference slip pursuant to § 530.4(e) or § 530.4(f), the time scheduled thereon.

(b) Time for purposes of this part shall accrue from validation or appointment time. Delay demonstrated by the terminal operator to be due to United States Government regulations, action or inaction of motor carrier personnel, or other such cause, shall be excluded from computation of time. Time elapsed, if any, between appointment or validation time and

presentation of documents to the delivery or receiving clerk shall be presumed to be due to such cause.

§ 530.7 Penalties.

(a) A terminal operator who refuses to serve a motor carrier after rejecting, for lack of full and complete documentation, a delivery order or dock receipt which does contain the information required by this part, shall be subject to a penalty of $30.

(b) If a motor carrier fails to meet a scheduled appointment at a marine terminal facility, said motor carrier shall be subject to a charge of $15. If, pursuant to § 530.3(b) a motor carrier is advised that special equipment will be required and the motor carrier fails to meet said appointment, the motor carrier shall be subject to a charge of $30.

(c) If, pursuant to § 530.2(e), a terminal operator completes or corrects deficient documents presented by a motor carrier, a charge of $15 shall be assessed against said motor carrier.

(d) If, contrary to § 530.3(b) a freight release covering subject cargo has not been authorized prior to a scheduled appointment, the terminal operator that granted said appointment shall be assessed a penalty of $30.

(e) If, pursuant to § 530.1(k) or a request under § 530.4(i) a terminal operator notifies a motor carrier that cargo is on the pier, at its place of rest, and segregated by bill of lading, and cargo is not on the pier, at its place of rest, and segregated by bill of lading, when the motor carrier attempts to obtain said cargo, the terminal operator shall be subject to a penalty of $30.

(f) *Time allowances*

(1) *Containers handled as a single unit.* If service is not completed within the following times, penalty charges will accrue against the terminal operator at a rate of $4 per 15 minutes, or any fraction thereof, in excess of these times.

Appointment	75 minutes.
Non-appointment	120 minutes.

(2) *Non-containerized cargo.* When vehicles are loaded by the terminal operator, or unloaded by the terminal operator at the request of the motor carrier, within the time periods set forth below, there will be no penalty. If a vehicle is not loaded or unloaded within the following time periods, penalty charges will accrue against the terminal operator at a rate of $4.00 per 15 minutes, or any fraction thereof, in excess of these times.

(i) *Non-Appointment Vehicles:*

0 to 5,000 pounds	210 minutes.
5,001 to 10,000 pounds	240 minutes.
10,001 to 15,000 pounds	270 minutes.
15,001 to 30,000 pounds	285 minutes.

Over 30,000 pounds	300 minutes.
(ii) *Appointment Vehicles:*	
2,000 pounds or less	90 minutes.
2,001 to 5,000 pounds	120 minutes.
5,001 to 10,000 pounds	150 minutes.
10,001 to 15,000 pounds	180 minutes.
15,001 to 20,000 pounds	210 minutes.
20,001 to 25,000 pounds	240 minutes.
Over 25,000 pounds	270 minutes.

(g) When freight is unloaded by the driver or other personnel of the motor carrier and unloading is not completed within the times prescribed by paragraph (f) of this section, as computed from the time that the vehicle is spotted at a place convenient for unloading, the terminal operator shall be entitled to a penalty payment of $4 for each 15 minute period or any fraction thereof in excess of the specified time, unless the delay is demonstrated by the motor carrier to have been occasioned by the action or inaction of the terminal operator.

(h) A motor carrier admitted to a marine terminal facility for loading or unloading—or holding an appointment for loading or unloading—shall be completely loaded or unloaded prior to the close of that business day. If the motor carrier is not completely loaded or unloaded when the terminal closes on that business day, time for purposes of this part shall accrue only while the terminal is conducting operations. In addition:

(1) Motor carriers holding appointments shall be entitled to a penalty payment of $30 from the terminal operator whether the shutout of the vehicle was due to refusal of management to authorize overtime, or labor's refusal to work overtime.

(2) Non-appointment vehicles shall be entitled to a penalty payment of $30 from the terminal operator if the shutout of the vehicle was due to refusal of management to authorize overtime. If the shutout results from labor's refusal to work overtime, the terminal operator shall not be subject to a penalty.

(3) Management shall be presumed to have refused to authorize overtime, unless the terminal operator establishes otherwise.

§ 530.8 Submission of claims for penalties.

(a) All communication required by this section shall be via certified mail; return receipt requested.

(b) Any person claiming payments under this section shall file a written claim with the terminal operator or motor carrier against whom said claim is made.

(c)(1) Claims shall be filed within forty-five (45) calendar days from the date on which the claim arose or said claim shall be barred. The party against whom claim is made shall within twenty (20) calendar days from receipt of said claim make payment thereon or reject. In rejecting a claim, the terminal operator or motor carrier shall set forth the reason

or reasons for said rejection and shall provide available documentation substantiating said rejection. Claims rejected because they do not contain sufficient information may be resubmitted no later than twenty (20) days from receipt of rejection.

(2) Rejected claims may be submitted for review within twenty (20) days of receipt of rejection to the Adjudicator who will affirm or reverse the rejection of claims within 30 days of receipt of the request for review. All decisions of said adjudicator shall be final and binding.

(d)(1) Claims submitted by motor carriers, or importers or exporters on whose behalf motor carriers act, shall include the motor carrier's copy of the applicable delivery order or dock receipt, any other relevant document, a brief, but complete description of the facts giving rise to the claim, and a statement of the amount claimed.

(2) Claims filed by terminal operators shall include the terminal operator's copy of the applicable delivery order or dock receipt, a copy of the gate pass and any other arrival documents issued, copies of all other relevant documents, a brief explanation of the facts giving rise to the claim, and a statement of the amount claimed.

(e)(1) If the party identified as the terminal operator at a marine terminal facility under § 530.1(e) rejects a claim pursuant to § 530.1(e) or § 530.2(g), or otherwise denies a claim on the ground that the delay was caused by the steamship company, the original claim and a statement of the reasons for rejection shall be forwarded within seven days to the steamship company alleged by the terminal operator to be liable for the claim, copy to the claimant.

(2) The steamship company shall pay or reject the claim within twenty (20) calendar days from receipt thereof.

(3) If the claim is rejected by the steamship company, the claimant may submit both rejections to the Adjudicator who shall review the rejection of the claim by both parties and determine liability as between the two.

§ 530.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

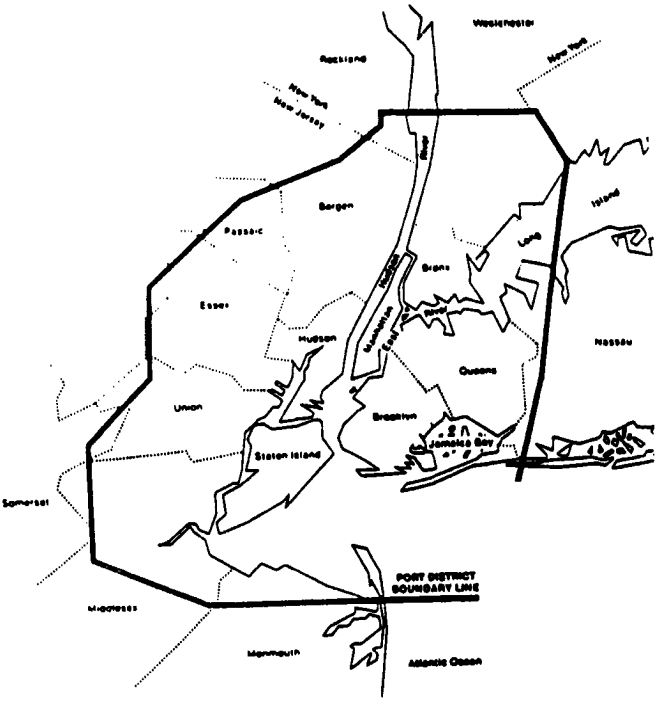
Section	Current OMB Control No.
530.1 through 530.3	3072–0010

Section	Current OMB Control No.
530.8	3072–0010

Appendix A to 46 CFR
Part 530

(From 1981 "New York Port
Handbook")

New York/New Jersey Port District



Appendix B to 46 CFR Part 530

Motor Carrier Preference Slip
(See § 530.4)

No. _____

TIME STAMP

STEVEDORING CO. INC.

LOCATION (Pier/Berth/Shed) _____

MOTOR CARRIER _____

The above indicated vehicle could not be serviced today. Preference for service will be given the next business day at _____ a.m./p.m.

D/R's _____ Pkgs./Pieces _____ WEIGHT _____

D/O's _____ Pkgs./Pieces _____ WEIGHT _____

CONTAINER # _____ GATEMAN _____

FEDERAL MARITIME COMMISSION

46 CFR PART 540

SECURITY FOR THE PROTECTION OF THE PUBLIC

SUBPART A—PROOF OF FINANCIAL RESPONSIBILITY, BONDING AND CERTIFICATION OF FINANCIAL RESPONSIBILITY FOR INDEMNIFICATION OF PASSENGERS FOR NONPERFORMANCE OF TRANSPORTATION

Sec.
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Form 132A.
Form 133A.

SUBPART B—PROOF OF FINANCIAL RESPONSIBILITY, BONDING AND CERTIFICATION OF FINANCIAL RESPONSIBILITY TO MEET LIABILITY INCURRED FOR DEATH OR INJURY TO PASSENGERS OR OTHER PERSONS ON VOYAGES

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Form FMC–133B.

SUBPART C—ASSESSMENT, REMISSION, AND MITIGATION OF CIVIL PENALTIES

540.30 Scope.

Sec.
540.31 Definitions.
540.32 Procedure.
540.33 Petition for remission or mitigation of penalty.
540.34 Settlement; execution of agreement form.
540.35 Referral to Department of Justice.
540.36 Payment of penalties.
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Appendix A—Example of Settlement Agreement to be used under 46 CFR §§ 540.30–540.36.

Appendix B—Example of promissory note to be used under 46 CFR § 540.36.

AUTHORITY: 5 U.S.C. 552, 553; Secs. 2 and 3, Pub. L. 89–777, 80 Stat. 1356–1358 (46 U.S.C. app. 817e, 817d); Sec. 43 of the Shipping Act, 1916 (46 U.S.C. app. 841a); Sec. 17 of the Shipping Act of 1984 (46 U.S.C. app. 1716).

SUBPART A—PROOF OF FINANCIAL RESPONSIBILITY, BONDING AND CERTIFICATION OF FINANCIAL RESPONSIBILITY FOR INDEMNIFICATION OF PASSENGERS FOR NONPERFORMACE OF TRANSPORTATION

§ 540.1 Scope.

(a) The regulations contained in this subpart set forth the procedures whereby persons in the United States who arrange, offer, advertise or provide passage on a vessel having berth or stateroom accommodations for 50 or more passengers and embarking passengers at U.S. ports shall establish their financial responsibility or, in lieu thereof, file a bond or other security for obligations under the terms of ticket contracts to indemnify passengers for nonperformance of transportation to which they would be entitled. Included also are the qualifications required by the Commission for issuance of a Certificate (Performance) and the basis for the denial, revocation, modification, or suspension of such Certificates.

(b) Failure to comply with this part may result in denial of an application for a certificate. Vessels operating without the proper certificate may be denied clearance and their owners may also be subject to a civil penalty of not more than $5,000 in addition to a civil penalty of $200 for each passage sold, such penalties to be assessed by the Federal Maritime Commission (46 U.S.C. app. 91, 817d and 817e).

§ 540.2 Definitions.

As used in this subpart, the following terms shall have the following meanings:

(a) *"Person"* includes individuals, corporations, partnerships, associations, and other legal entities existing under or authorized by the laws of the United States or any State thereof or the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States, or the laws of any foreign country.

(b) *"Vessel"* means any commercial vessel having berth or stateroom accommodations for 50 or more passengers and embarking passengers at U.S. ports.

(c) *"Commission"* means the Federal Maritime Commission.

(d) *"United States"* includes the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States.

(e) *"Berth or stateroom accommodations"* or *"passenger accommodations"* includes all temporary and all permanent passenger sleeping facilities.

(f) *"Certificate (Performance)"* means a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation issued pursuant to this subpart.

(g) *"Passenger"* means any person who is to embark on a vessel at any U.S. port and who has paid any amount for a ticket contract entitling him to water transportation.

(h) *"Passenger revenue"* means those monies wherever paid by passengers who are to embark at any U.S. port for water transportation and all other accommodations, services and facilities relating thereto.

(i) *"Unearned passenger revenue"* means that passenger revenue received for water transportation and all other accommodations, services, and facilities relating thereto not yet performed.

(j) *"Insurer"* means any insurance company, underwriter, corporation, or association of underwriters, ship owners' protection and indemnity association, or other insurer acceptable to the Commission.

(k) *"Evidence of insurance"* means a policy, certificate of insurance, cover note, or other evidence of coverage acceptable to the Commission.

§ 540.3 Proof of financial responsibility, when required.

No person in the United States may arrange, offer, advertise or provide passage on a vessel unless a Certificate (Performance) has been issued to or covers such person.

§ 540.4 Procedure for establishing financial responsibility.

(a) In order to comply with section 3 of Pub. L. 89–777 (80 Stat. 1357, 1358) enacted November 6, 1966, there must be filed an application on Form FMC–131 for a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation. Copies of Form FMC–131 may be obtained from the Secretary, Federal Maritime Commission, Washington, D.C. 20573, or at the Commission's offices at New York, N.Y.; New Orleans, La.; San Francisco, Calif; Miami, Fla.; Los Angeles, Calif.; Hato Rey, P.R.; and Chicago, Ill.

(b) An application for a Certificate (Performance) shall be filed in duplicate with the Secretary, Federal Maritime Commission, by the vessel owner

or charterer at least 60 days in advance of the arranging, offering, advertising, or providing of any water transportation or tickets in connection therewith except that any person other than the owner or charterer who arranges, offers, advertises, or provides passage on a vessel may apply for a Certificate (Performance). Late filing of the application will be permitted only for good cause shown. All applications and evidence required to be filed with the Commission shall be in English, and any monetary terms shall be expressed in terms of U.S. currency. The Commission shall have the privilege of verifying any statements made or any evidence submitted under the rules of this subpart. An application for a Certificate (Performance) shall be accompanied by a filing fee remittance of $1,600.

(c) The application shall be signed by a duly authorized officer or representative of the applicant with a copy of evidence of his or her authority. In the event of any material change in the facts as reflected in the application, an amendment to the application shall be filed no later than five (5) days following such change. For the purpose of this subpart, a material change shall be one which (1) results in a decrease in the amount submitted to establish financial responsibility to a level below that required to be maintained under the rules of this subpart, or (2) requires that the amount to be maintained be increased above the amount submitted to establish financial responsibility. Notice of the application for, issuance, denial, revocation, suspension, or modification of any such Certificate shall be published in the *Federal Register.*

§ 540.5 Insurance, guaranties, escrow accounts, and self-insurance.

Except as provided in § 540.9(j), the amount of coverage required under this section and § 540.6(b) shall be in an amount determined by the Commission to be no less than 110 percent of the unearned passenger revenue of the applicant on the date within the 2 fiscal years immediately prior to the filing of the application which reflects the greatest amount of unearned passenger revenue, except that the Commission, for good cause shown, may consider a time period other than the previous 2-fiscal-year requirement in this section or other methods acceptable to the Commission to determine the amount of coverage required. Evidence of adequate financial responsibility for the purposes of this subpart may be established by one or a combination (including § 540.6 Surety Bonds) of the following methods:

(a) Filing with the Commission evidence of insurance, issued by an insurer, providing coverage for indemnification of passengers in the event of the nonperformance of water transportation.

(1) Termination or cancellation of the evidence of insurance, whether by the assured or by the insurer, and whether for nonpayment of premiums, calls or assessments or for other cause, shall not be effected (i) until notice in writing has been given to the assured or to the insurer and to the Secretary of the Commission at its office, in Washington, D.C. 20573, by certified mail, and (ii) until after 30 days expire from the

date notice is actually received by the Commission, or until after the Commission revokes the Certificate (Performance), whichever occurs first. Notice of termination or cancellation to the assured or insurer shall be simultaneous to such notice given to the Commission. The insurer shall remain liable for claims covered by said evidence of insurance arising by virtue of an event which had occurred prior to the effective date of said termination or cancellation. No such termination or cancellation shall become effective while a voyage is in progress.

(2) The insolvency or bankruptcy of the assured shall not constitute a defense to the insurer as to claims included in said evidence of insurance and in the event of said insolvency or bankruptcy, the insurer agrees to pay any unsatisfied final judgments obtained on such claims.

(3) No insurance shall be acceptable under these rules which restricts the liability of the insurer where privity of the owner or charterer has been shown to exist.

(4) Paragraphs (a)(1) through (a)(3) of this section shall apply to the guaranty as specified in paragraph (c) of this section.

(b) Filing with the Commission evidence of an escrow account, acceptable to the Commission, for indemnification of passengers in the event of nonperformance of water transportation.

(c) Filing with the Commission a guaranty on Form FMC–133A, by a guarantor acceptable to the Commission, for indemnification of passengers in the event of nonperformance of water transportation.

(d) Filing with the Commission for qualification as a self-insurer such evidence acceptable to the Commission as will demonstrate continued and stable passenger operations over an extended period of time in the foreign or domestic trade of the United States. In addition, applicant must demonstrate financial responsibility by maintenance of working capital and net worth, each in an amount calculated as in the introductory text of this section, except that the Commission, for good cause shown, may waive the requirement as to the amount of working capital. The Commission will take into consideration all current contractual requirements with respect to the maintenance of such working capital and/or net worth to which the applicant is bound. Evidence must be submitted that the working capital and net worth required above are physically located in the United States. This evidence of financial responsibility shall be supported by and subject to the following which are to be submitted on a continuing basis for each year or portion thereof while the Certificate (Performance) is in effect:

(1) A current quarterly balance sheet, except that the Commission, for good cause shown, may require only an annual balance sheet;

(2) A current quarterly statement of income and surplus, except that the Commission, for good cause shown, may require only an annual statement of income and surplus;

(3) An annual current balance sheet and an annual current statement of income and surplus to be certified by appropriate certified public accountants;

(4) An annual current statement of the book value or current market value of any assets physically located within the United States together with a certification as to the existence and amount of any encumbrances thereon;

(5) An annual current credit rating report by Dun and Bradstreet or any similar concern found acceptable to the Commission;

(6) A list of all contractual requirements or other encumbrances (and to whom the applicant is bound in this regard) relating to the maintenance of working capital and net worth;

(7) All financial statements required to be submitted under this section shall be due within a reasonable time after the close of each pertinent accounting period;

(8) Such additional evidence of financial responsibility as the Commission may deem necessary in appropriate cases.

§ 540.6 Surety bonds.

(a) Where financial responsibility is not established under § 540.5, a surety bond shall be filed on Form FMC–132A. Such surety bond shall be issued by a bonding company authorized to do business in the United States and acceptable to the Commission for indemnification of passengers in the event of nonperformance of water transportation.

(b) In the case of a surety bond which is to cover all passenger operations of the applicant subject to these rules, such bond shall be in an amount calculated as in the introductory text of § 540.5.

(c) In the case of a surety bond which is to cover an individual voyage, such bond shall be in an amount determined by the Commission to equal the gross passenger revenue for that voyage.

(d) The liability of the surety under the rules of this subpart to any passenger shall not exceed the amount paid by any such passenger, except that, no such bond shall be terminated while a voyage is in progress.

§ 540.7 Evidence of financial responsibility.

Where satisfactory proof of financial responsibility has been given or a satisfactory bond has been provided, a Certificate (Performance) covering specified vessels shall be issued evidencing the Commission's finding of adequate financial responsibility to indemnify passengers for nonperformance of water transportation. The period covered by the Certificate (Performance) shall be indeterminate, unless a termination date has been specified thereon.

§ 540.8 Denial, revocation, suspension, or modification.

(a) Prior to the denial, revocation, suspension, or modification of a Certificate (Performance), the Commission shall advise the applicant of its intention to deny, revoke, suspend, or modify and shall state the reasons therefor. If the applicant, within 20 days after the receipt of such advice, requests

a hearing to show that the evidence of financial responsibility filed with the Commission does meet the rules of this subpart, such hearing shall be granted by the Commission, except that a Certificate (Performance) shall become null and void upon cancellation or termination of the surety bond, evidence of insurance, guaranty, or escrow account.

(b) A Certificate (Performance) may be denied, revoked, suspended, or modified for any of the following reasons:

(1) Making any willfully false statement to the Commission in connection with an application for a Certificate (Performance);

(2) Circumstances whereby the party does not qualify as financially responsible in accordance with the requirements of the Commission;

(3) Failure to comply with or respond to lawful inquiries, rules, regulations or orders of the Commission pursuant to the rules of this subpart.

(c) If the applicant, within 20 days after notice of the proposed denial, revocation, suspension, or modification under paragraph (b) of this section, requests a hearing to show that such denial, revocation, suspension, or modification should not take place, such hearing shall be granted by the Commission.

§ 540.9 Miscellaneous.

(a) If any evidence filed with the application does not comply with the requirements of this subpart, or for any reason fails to provide adequate or satisfactory protection to the public, the Commission will notify the applicant stating the deficiencies thereof.

(b) Any financial evidence submitted to the Commission under the rules of this subpart shall be written in the full and correct name of the person to whom the Certificate (Performance) is to be issued, and in case of a partnership, all partners shall be named.

(c) The Commission's bond (Form FMC–132A), guaranty (Form FMC–133A), and application (Form FMC–131) forms are hereby incorporated as a part of the rules of this subpart. Any such forms filed with the Commission under this subpart must be in duplicate.

(d) Any securities or assets accepted by the Commission (from applicants, insurers, guarantors, escrow agents, or others) under the rules of this subpart must be physically located in the United States.

(e) Each applicant, insurer, escrow agent and guarantor shall furnish a written designation of a person in the United States as a legal agent for service of process for the purposes of the rules of this subpart. Such designation must be acknowledged, in writing, by the designee. In any instance in which the designated agent cannot be served because of its death, disability, or unavailability, the Secretary, Federal Maritime Commission, will be deemed to be the agent for service of process. A party serving the Secretary in accordance with the above provision must also serve the Certificant, insurer, escrow agent, or guarantor, as the case may be, by registered mail at its last known address on file with the Commission.

(f) [RESERVED]

(g) Financial data filed in connection with the rules of this subpart shall be confidential except in instances where information becomes relevant in connection with hearings which may be requested by applicant pursuant to § 540.8(a) or 540.8(b).

(h) Every person who has been issued a Certificate (Performance) must submit to the Commission a semiannual statement of any changes that have taken place with respect to the information contained in the application or documents submitted in support thereof. Negative statements are required to indicate no change. Such statements must cover every 6-month period of the fiscal year immediately subsequent to the date of the issuance of the Certificate (Performance). In addition, the statements will be due within 30 days after the close of every such 6-month period.

(i) [RESERVED]

(j) The amount of (1) insurance as specified in § 540.5(a), (2) the escrow account as specified in § 540.5(b), (3) the guaranty as specified in § 540.5(c), or (4) the surety bond as specified in § 540.6, shall not be required to exceed 10 million dollars (U.S.).

(k) Every person in whose name a Certificate (Performance) has been issued shall be deemed to be responsible for any unearned passage money or deposits in the hands of its agents or of any other person or organization authorized by the certificant to sell the certificant's tickets. Certificants shall promptly notify the Commission of any arrangements, including charters and subcharters, made by it or its agent with any person pursuant to which the certificant does not assume responsibility for all passenger fares and deposits collected by such person or organization and held by such person or organization as deposits or payment for services to be performed by the certificant. If responsibility is not assumed by the certificant, the certificant also must inform such person or organization of the certification requirements of Public Law 89–777 and not permit use of its name or tickets in any manner unless and until such person or organization has obtained the requisite Certificate (Performance) from the Commission.

Form FMC-131

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C. 20573

APPLICATION FOR CERTIFICATE OF FINANCIAL RESPONSIBILITY

In compliance with the provisions of Public Law 89-777 and 46 CFR Part 540, application is hereby made for a Certificate of Financial Responsibility (check one or both as applicable):

[ ] for indemnification of passengers for nonperformance. [ ] Initial application [ ] Certificate has previously been applied for (if so, give date of application and action taken thereon).

[ ] to meet liability incurred for death or injury to passengers or other persons. [ ] Initial application [ ] Certificate has previously been applied for (if so, give date of application and action taken thereon).

INSTRUCTIONS

Submit two (2) typed copies of the application to the Secretary, Federal Maritime Commission, Washington, D.C. 20573. The application is in four parts: Part I—General; Part II—Performance; Part III—Casualty and Part IV—Declaration. Applicants must answer all questions in Part I and Part IV, then Parts II and/or Part III as appropriate. Instructions relating to Part II and Part III are contained at the beginning of the respective part. If the information required to be submitted under 46 CFR Part 540 has been previously submitted under other rules and regulations of the Commission, state when and for what reason such information was submitted. If previously submitted, it is not necessary to resubmit. If additional space is required, supplementary sheets may be attached.

PART I—GENERAL

ANSWER ALL QUESTIONS

1. (a) Legal business name:

(b) English equivalent of legal name if customarily written in language other than English:

(c) Trade name or names used:

2. (a) State applicant's legal form of organization, i.e., whether operating as an individual, corporation, partnership, association, joint stock company, business trust, or other organized group of persons (whether incorporated or not), or as a receiver, trustee, or other liquidating agent, and describe current business activities and length of time engaged therein.

(b) If a corporation, association, joint stock company, business trust, or other organization, give:

Name of State or country in which incorporated or organized.

Date of the incorporation or organization.

(c) If a partnership, give name and address of each partner:

3. Give following information regarding any person or company controlling, controlled by, or under common control with you (answer only if applying as a self-insurer under Part II or Part III).

Name	Address	Business and relationship to you

4. In relation to the passenger transportation engaged in by you to or from U.S. ports:

Do you own all the vessels? [ ] Yes [ ] No (If "No" indicate the nature of the arrangements under which those not owned by you are available to you (e.g., bareboat, time, voyage, or other charter, or arrangement).)

5. Name of each passenger vessel having accommodations for 50 or more passengers and embarking passengers at U.S. ports:

Name	Country of registry	Registration No.	Maximum number of berth or stateroom accommodations

6. Submit a copy of passenger ticket or other contract evidencing the sale of passenger transportation.

7. Name and address of applicant's U.S. agent or other person authorized to accept legal service in the United States.

PART II—PERFORMANCE

Answer items 8–15 if applying for Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance. If you are filing evidence of insurance, escrow account, guaranty or surety bond under Subpart A of 46 CFR Part 540 and providing at least ten (10) million dollars (U.S.) of coverage, you need not answer questions 10–15.

8. If you are providing at least ten (10) million dollars (U.S.) of coverage, state type of evidence and name and address of applicant's insurer, escrow agent, guarantor or surety (as appropriate).

9.* A Certificate (Performance) is desired for the following proposed passenger voyage or voyages: (Give itinerary and indicate whether the Certificate is for a single voyage, multiple voyages or all voyages scheduled annually.)

* The filing of sailing schedules will be acceptable in answers to this question.

Vessel	Vessel date	Voyage itinerary

10. Items 11–15 are optional methods; answer only the one item which is applicable to this application. Check the appropriate box below:

[ ] Insurance (item 11).
[ ] Escrow (item 12).
[ ] Surety bond (item 13).
[ ] Guaranty (item 14).
[ ] Self-insurer (item 15).

11. (a) Total amount of performance insurance which is to be computed in accordance with §540.5 of 46 CFR Part 540. (Evidence of insurance must be filed with the Federal Maritime Commission before a Certificate (Performance) may be issued.)

(b) Method by which insurance amount is determined (attach data substantiating that amount is not less than that prescribed in §540.5 of 46 CFR Part 540.)

(c) Name and address of applicant's insurer for performance policy.

12. (a) Name and address of applicant's escrow agent. (Applicants may pledge cash or U.S. Government securities, in lieu of a surety bond, to fulfill the indemnification provisions of Public Law 89–777.)

(b) Total escrow deposit which is to be computed in accordance with §540.5 of 46 CFR Part 540. (Escrow agreement must be filed with the Federal Maritime Commission before a Certificate (Performance) will be issued.) Cash $_____. U.S. Government Securities $_____.

(c) Method by which escrow amount is determined (attach data substantiating that amount is not less than that prescribed by §540.5 of 46 CFR Part 540).

13. (a) Total amount of surety bond in accordance with §540.6 of 46 CFR Part 540. (The bond must be filed with the Federal Maritime Commission before a Certificate (Performance) may be issued.)

(b) Method by which bond amount is determined (attach data substantiating that amount is not less than that prescribed in §540.6 of 46 CFR Part 540).

(c) Name and address of applicant's surety on performance bond.

14. (a) Total amount of guaranty which is to be computed in accordance with §540.5 of 46 CFR Part 540. (Guaranty must be filed with the Federal Maritime Commission before a Certificate (Performance) may be issued.)

(b) Method by which guaranty amount is determined (attach data substantiating that amount is not less than that prescribed in §540.5 of 46 CFR Part 540).

(c) Name and address of applicant's guarantor.

15. If applicant intends to qualify as a self-insurer for a Certificate (Performance) under § 540.5 of 46 CFR Part 540, attach all data, statements, and documentation required therein.

PART III—CASUALTY

ANSWER ITEMS 16–22 IF APPLYING FOR CERTIFICATE OF FINANCIAL RESPONSIBILITY TO MEET LIABILITY INCURRED FOR DEATH OR INJURY TO PASSENGERS OR OTHER PERSONS

16. Name of passenger vessel subject to section 2 of Public Law 89–777 operated by you to or from U.S. ports which has largest number of berth or stateroom accommodations. State the maximum number of berth or stateroom accommodations.

17. Amount of death or injury liability coverage based on number of accommodations aboard vessel named in item 16 above, calculated in accordance with § 540.24 of 46 CFR Part 540.

ITEMS 18–22 ARE OPTIONAL METHODS; ANSWER ONLY THE ONE ITEM WHICH IS APPLICABLE TO THIS APPLICATION

18. (a) Total amount of applicant's insurance. (Evidence of the insurance must be filed with the Federal Maritime Commission before a Certificate (Casualty) will be issued.)

(b) Name and address of applicant's insurer.

19. (a) Total amount of surety bond. (Bond must be filed with the Federal Maritime Commission before a Certificate (Casualty) will be issued.)

(b) Name and address of applicant's surety for death or injury bond.

20. (a) Total amount of escrow deposit. (Escrow agreement must be filed with the Federal Maritime Commission before a Certificate (Casualty) will be issued.)

(b) Name and address of applicant's escrow agent.

21. (a) Total amount of guaranty. (Guaranty must be filed with the Federal Maritime Commission before a Certificate (Casualty) will be issued.)

(b) Name and address of applicant's guarantor.

22. If applicant intends to qualify as a self-insurer for a Certificate (Casualty) under § 540.24(c) of 46 CFR Part 540, attach all data, statements and documentation required therein.

PART IV—DECLARATION

This application is submitted by or on behalf of

(a) Name.

(b) Name and title of official.

(c) Home office—Street and number.

(d) City.

(e) State or country.

(f) ZIP Code.

(g) Principal office in the United States—Street and number.

(h) City.

(i) State.

I declare that I have examined this application, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct and complete.

By_____
(Signature of official)

_____
(Date)

Comments:

Form FMC–132A

PASSENGER VESSEL SURETY BOND

[46 CFR PART 540]

Know all men by these presents, that We _____ (Name of applicant), of _____ (City), _____ (State and country), as Principal (hereinafter called Principal), and _____ (Name of surety), a company created and existing under the laws of _____ (State and country) and authorized to do business in the United States as Surety (hereinafter called Surety) are held and firmly bound unto the United States of America in the penal sum of _____, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas the Principal intends to become a holder of a Certificate (Performance) pursuant to the provisions of Subpart A of Part 540 of Title 46, Code of Federal Regulations and has elected to file with the Federal Maritime Commission such a bond to insure financial responsibility and the supplying transportation and other services subject to Subpart A of Part 540 of Title 46, Code of Federal Regulations, in accordance with the ticket contract between the Principal and the passenger, and

Whereas this bond is written to assure compliance by the Principal as an authorized holder of a Certificate (Performance) pursuant to Subpart A of Part 540 of Title 46, Code of Federal Regulations, and shall insure to the benefit of any and all passengers to whom the Principal may be held legally liable for any of the damages herein described.

Now, therefore, the condition of this obligation is such that if the Principal shall pay or cause to be paid to passengers any sum or sums for which the Principal may be held legally liable by reason of the Principal's failure faithfully to provide such transportation and other accommodations and services in accordance with the ticket contract made by the Principal and the passenger while this bond is in effect for the supplying of transportation and other services pursuant to and in accordance with the provisions of Subpart A of Part 540 of Title 46, Code of Federal Regulations, then this obligation shall be void, otherwise, to remain in full force and effect.

The liability of the Surety with respect to any passenger shall not exceed the passage price paid by or on behalf of such passenger.

The liability of the Surety shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penalty of the bond, but in no event shall the Surety's obligation hereunder exceed the amount of said penalty. The Surety agrees to furnish written notice to the Federal Maritime Commission forthwith of all suits filed, judgments rendered, and payments made by said Surety under this bond.

This bond is effective the _____ day of _____, 19_____, 12:01 a.m., standard time at the address of the Principal as stated herein and shall continue in force until terminated as hereinafter provided. The Principal or the Surety may at any time terminate this bond by written notice sent by certified mail to the other and to the Federal Maritime Commission at its office in Washington, D.C., such termination to become effective thirty (30) days after actual receipt of said notice by the Commission, except that no such termination shall become effective while a voyage is in progress. The Surety shall not be liable hereunder for any refunds due under ticket contracts made by the Principal for the supplying of transportation and other services after the termination of this bond as herein provided, but such termination shall not affect the liability of the Surety hereunder for refunds arising from ticket contracts made by the Principal for the supplying of transportation and other services prior to the date such termination becomes effective.

In witness whereof, the said Principal and Surety have executed this instrument on _____ day of _____, 19_____

PRINCIPAL

Name _____

By _____
(Signature and title)

Witness _____

SURETY

[SEAL] Name _____

By _____
(Signature and title)

Witness _____

Only corporations or associations of individual insurers may qualify to act as surety, and they must establish to the satisfaction of the Federal Maritime Commission legal authority to assume the obligations of surety and financial ability to discharge them.

Form FMC–133A

GUARANTY IN RESPECT OF LIABILITY FOR NONPERFORMANCE, SECTION 3 OF THE ACT

1. Whereas _____ (Name of applicant) (Hereinafter referred to as the "Applicant") is the Owner or Charterer of the passenger Vessel(s) specified in the annexed Schedule ("the Vessels"), which are or may become engaged in voyages to or from United States ports, and the Applicant desires to establish its financial responsibility in accordance with Section 3 of Public Law 89–777, 89th Congress, approved November 6, 1966 ("the Act") then, provided that the Federal Maritime Commission ("FMC") shall have accepted, as sufficient for that purpose, the Applicant's application, supported by this Guaranty, and provided that FMC shall issue to the Applicant a Certificate (Performance) ("Certificate"), the undersigned Guarantor hereby guarantees to discharge the Applicant's legal liability to indemnify the passengers of the Vessels for nonperformance of transportation within the meaning of Section 3 of the Act, in the event that such legal liability has not been discharged by the Applicant within 21 days after any such passenger has obtained a final judgment (after appeal, if any) against the Applicant from a United States Federal or State Court of competent jurisdiction, or has become entitled to payment of a specified sum by virtue of a compromise settlement agreement made with the Applicant, with the approval of the Guarantor, whereby, upon payment of the agreed sum, the Applicant is to be fully, irrevocably and unconditionally discharged from all further liability to such passenger for such nonperformance.

2. The Guarantor's liability under this Guaranty in respect to any passenger shall not exceed the amount paid by such passenger; and the aggregate amount of the Guarantor's liability under this Guaranty shall not exceed $_____.

3. The Guarantor's liability under this Guaranty shall attach only in respect of events giving rise to a cause of action against the Applicant, in respect of any of the Vessels, for nonperformance of transportation within the meaning of Section 3 of the Act, occurring after the Certificate has been granted to the Applicant, and before the expiration date of this Guaranty, which shall be the earlier of the following dates:

(a) The date whereon the Certificate is withdrawn, or for any reason becomes invalid or ineffective; or

(b) The date 30 days after the date of receipt by FMC of notice in writing (including telex or cable) that the Guarantor has elected to terminate this Guaranty except that:

(i) If, on the date which would otherwise have been the expiration date under the foregoing provisions (a) or (b) of this Clause 3, any of the Vessels is on a voyage whereon passengers have been embarked at a United States port, then the expiration date of this Guaranty shall, in

respect of such Vessel, be postponed to the date on which the last passenger on such voyage shall have finally disembarked; and,

(ii) Such termination shall not affect the liability of the Guarantor for refunds arising from ticket contracts made by the Applicant for the supplying of transportation and other services prior to the date such termination becomes effective.

4. If, during the currency of this Guaranty, the Applicant requests that a vessel owned or operated by the Applicant, and not specified in the annexed Schedule, should become subject to this Guaranty, and if the Guarantor accedes to such request and so notifies FMC in writing (including telex or cable), then, provided that within 30 days of receipt of such notice, FMC shall have granted a Certificate, such Vessel shall thereupon be deemed to be one of the Vessels included in the said Schedule and subject to this Guaranty.

5. The Guarantor hereby designates _____, with offices at _____, as the Guarantor's legal agent for service of process for the purposes of the Rules of the Federal Maritime Commission, Subpart A of Part 540 of Title 46, Code of Federal Regulations, issued under Section 3 of Public Law 89–777 (80 Stat. 1357, 1358), entitled "Security for the Protection of the Public."

_____
(Place and Date of Execution)

_____
(Type Name of Guarantor)

_____
(Type Address of Guarantor)

By_____
(Signature and Title)

SCHEDULE OF VESSELS REFERRED TO IN CLAUSE 1

VESSELS ADDED TO THIS SCHEDULE IN ACCORDANCE WITH CLAUSE 4

SUBPART B—PROOF OF FINANCIAL RESPONSIBILITY, BONDING AND CERTIFICATION OF FINANCIAL RESPONSIBILITY TO MEET LIABILITY INCURRED FOR DEATH OR INJURY TO PASSENGERS OR OTHER PERSONS ON VOYAGES

§540.20 Scope.

The regulations contained in this subpart set forth the procedures whereby owners or charterers of vessels having berth or stateroom accommodations for 50 or more passengers and embarking passengers at U.S. ports shall establish their financial responsibility to meet any liability which may be incurred for death or injury to passengers or other persons on voyages

to or from U.S. ports. Included also are the qualifications required by the Commission for issuance of a Certificate (Casualty) and the basis for the denial, revocation, suspension, or modification of such Certificates.

§ 540.21 Definitions.

As used in this subpart, the following terms shall have the following meanings:

(a) "*Person*" includes individuals, corporations, partnerships, associations, and other legal entities existing under or authorized by the laws of the United States or any state thereof or the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States, or the laws of any foreign country.

(b) "*Vessel*" means any commercial vessel having berth or stateroom accommodations for 50 or more passengers and embarking passengers at U.S. ports.

(c) "*Commission*" means the Federal Maritime Commission.

(d) "*United States*" includes the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States.

(e) "*Berth or stateroom accommodations*" or "*passenger accommodations*" includes all temporary and all permanent passenger sleeping facilities.

(f) "*Certificate (Casualty)*" means a Certificate of Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages issued pursuant to this subpart.

(g) "*Voyage*" means voyage of a vessel to or from U.S. ports.

(h) "*Insurer*" means any insurance company, underwriter, corporation or association of underwriters, ship owners' protection and indemnity association, or other insurer acceptable to the Commission.

(i) "*Evidence of insurance*" means a policy, certificate of insurance, cover note, or other evidence of coverage acceptable to the Commission.

(j) For the purpose of determining compliance with § 540.22, "passengers embarking at United States ports" means any persons, not necessary to the business, operation, or navigation of a vessel, whether holding a ticket or not, who board a vessel at a port or place in the United States and are carried by the vessel on a voyage from that port or place.

§ 540.22 Proof of financial responsibility, when required.

No vessel shall embark passengers at U.S. ports unless a Certificate (Casualty) has been issued to or covers the owner or charterer of such vessel.

§ 540.23 Procedure for establishing financial responsibility.

(a) In order to comply with section 2 of Pub. L. 89–777 (80 Stat. 1357, 1358) enacted November 6, 1966, there must be filed an Application on Form FMC–131 for a Certificate of Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages. Copies of Form FMC–131 may be obtained from the Secretary, Federal Maritime Commission, Washington, D.C. 20573, or at the Commis-

sion's offices at New York, N.Y.; New Orleans, La.; San Francisco, Calif.; Miami, Fla.; Los Angeles, Calif.; Hato Rey, P.R.; and Chicago, Ill.

(b) An application for a Certificate (Casualty) shall be filed in duplicate with the Secretary, Federal Maritime Commission, by the vessel owner or charterer at least 60 days in advance of the sailing. Late filing of the application will be permitted only for good cause shown. All applications and evidence required to be filed with the Commission shall be in English, and any monetary terms shall be expressed in terms of U.S. currency. The Commission shall have the privilege of verifying any statements made or any evidence submitted under the rules of this subpart. An application for a Certificate (Casualty) shall be accompanied by a filing fee remittance of $800.

(c) The application shall be signed by a duly authorized officer or representative of the applicant with a copy of evidence of his authority. In the event of any material change in the facts as reflected in the application, an amendment to the application shall be filed no later than five (5) days following such change. For the purpose of this subpart, a material change shall be one which (1) results in a decrease in the amount submitted to establish financial responsibility to a level below that required to be maintained under the rules of this subpart, or (2) requires that the amount to be maintained be increased above the amount submitted to establish financial responsibility. Notice of: the application for, issuance, denial, revocation, suspension, or modification of any such Certificate shall be published in the *Federal Register*.

§ 540.24 Insurance, surety bonds, self-insurance, guaranties, and escrow accounts.

Evidence of adequate financial responsibility for the purposes of this subpart may be established by one of the following methods:

(a) Filing with the Commission evidence of insurance issued by an insurer providing coverage for liability which may be incurred for death or injury to passengers or other persons on voyages in an amount based upon the number of passenger accommodations aboard the vessel, calculated as follows:

Twenty thousand dollars for each passenger accommodation up to and including 500; plus

Fifteen thousand dollars for each additional passenger accommodation between 501 and 1,000; plus

Ten thousand dollars for each additional passenger accommodation between 1,001 and 1,500; plus

Five thousand dollars for each passenger accommodation in excess of 1,500;

Except that, if the applicant is operating more than one vessel subject to this subpart, the amount prescribed by this paragraph shall be based upon the number of passenger accommodations on the vessel being so operated which has the largest number of passenger accommodations.

(1) Termination or cancellation of the evidence of insurance, whether by the assured or by the insurer, and whether for nonpayment of premiums, calls or assessments, or for other cause, shall not be effected (i) until notice in writing has been given to the assured or to the insurer and to the Secretary of the Commission at its office in Washington, D.C. 20573, by certified mail, and (ii) until after 30 days expire from the date notice is actually received by the Commission, or until after the Commission revokes the Certificate (Casualty), whichever occurs first. Notice of termination or cancellation to the assured or insurer shall be simultaneous to such notice given to the Commission. The insurer shall remain liable for claims covered by said evidence of insurance arising by virtue of an event which had occurred prior to the effective date of said termination or cancellation. No such termination or cancellation shall become effective while a voyage is in progress.

(2) The insolvency or bankruptcy of the assured shall not constitute a defense to the insurer as to claims included in said evidence of insurance and in the event of said insolvency or bankruptcy, the insurer agrees to pay any unsatisfied final judgments obtained on such claims.

(3) No insurance shall be acceptable under these rules which restricts the liability of the insurer where privity of the owner or charterer has been shown to exist.

(4) Paragraphs (a)(1) through (a)(3) of this section shall apply to the guaranty as specified in paragraph (d) of this section.

(b) Filing with the Commission a surety bond on Form FMC–132B issued by a bonding company authorized to do business in the United States and acceptable to the Commission. Such surety bond shall evidence coverage for liability which may be incurred for death or injury to passengers or other persons on voyages in an amount calculated as in paragraph (a) of this section, and shall not be terminated while a voyage is in progress.

(c) Filing with the Commission for qualification as a self-insurer such evidence acceptable to the Commission as will demonstrate continued and stable passenger operations over an extended period of time in the foreign or domestic trade of the United States. In addition, applicant must demonstrate financial responsibility by maintenance of working capital and net worth, each in an amount calculated as in paragraph (a) of this section. The Commission will take into consideration all current contractual requirements with respect to the maintenance of working capital and/or net worth to which the applicant is bound. Evidence must be submitted that the working capital and net worth required above are physically located in the United States. This evidence of financial responsibility shall be submitted on a continuing basis for each year or portion thereof while the Certificate (Casualty) is in effect:

(1) A current quarterly balance sheet, except that the Commission, for good cause shown, may require only an annual balance sheet;

(2) A current quarterly statement of income and surplus except that the Commission, for good cause shown, may require only an annual statement of income and surplus;

(3) An annual current balance sheet and an annual current statement of income and surplus to be certified by appropriate certified public accountants;

(4) An annual current statement of the book value or current market value of any assets physically located within the United States together with a certification as to the existence and amount of any encumbrances thereon;

(5) An annual current credit rating report by Dun and Bradstreet or any similar concern found acceptable to the Commission;

(6) A list of all contractual requirements or other encumbrances (and to whom the applicant is bound in this regard) relating to the maintenance of working capital and net worth;

(7) All financial statements required to be submitted under this section shall be due within a reasonable time after the close of each pertinent accounting period;

(8) Such additional evidence of financial responsibility as the Commission may deem necessary in appropriate cases.

(d) Filing with the Commission a guaranty on Form FMC-133B by a guarantor acceptable to the Commission. Any such guaranty shall be in an amount calculated as in paragraph (a) of this section.

(e) Filing with the Commission evidence of an escrow account, acceptable to the Commission, the amount of such account to be calculated as in paragraph (a) of this section.

(f) The Commission will, for good cause shown, consider any combination of the alternatives described in paragraphs (a) through (e) of this section for the purpose of establishing financial responsibility.

§ 540.25 Evidence of financial responsibility.

Where satisfactory proof of financial responsibility has been established, a Certificate (Casualty) covering specified vessels shall be issued evidencing the Commission's finding of adequate financial responsibility to meet any liability which may be incurred for death or injury to passengers or other persons on voyages. The period covered by the certificate shall be indeterminate unless a termination date has been specified therein.

§ 540.26 Denial, revocation, suspension, or modification.

(a) Prior to the denial, revocation, suspension, or modification of a Certificate (Casualty), the Commission shall advise the applicant of its intention to deny, revoke, suspend, or modify, and shall state the reasons therefor. If the applicant, within 20 days after the receipt of such advice, requests a hearing to show that the evidence of financial responsibility filed with the Commission does meet the rules of this subpart, such hearing shall be granted by the Commission, except that a Certificate (Casualty) shall

become null and void upon cancellation or termination of evidence of insurance, surety bond, guaranty, or escrow account.

(b) A Certificate (Casualty) may be denied, revoked, suspended, or modified for any of the following reasons:

(1) Making any willfully false statement to the Commission in connection with an application for a Certificate (Casualty);

(2) Circumstances whereby the party does not qualify as financially responsible in accordance with the requirements of the Commission;

(3) Failure to comply with or respond to lawful inquiries, rules, regulations, or orders of the Commission pursuant to the rules of this subpart.

(c) If the applicant, within 20 days after notice of the proposed denial, revocation, suspension, or modification under paragraph (b) of this section, request a hearing to show that such denial, revocation, suspension, or modification should not take place, such hearing shall be granted by the Commission.

§ 540.27 Miscellaneous.

(a) If any evidence filed with the application does not comply with the requirements of this subpart, or for any reason, fails to provide adequate or satisfactory protection to the public, the Commission will notify the applicant stating the deficiencies thereof.

(b) Any financial evidence submitted to the Commission under the rules of this subpart shall be written in the full and correct name of the person to whom the Certificate (Casualty) is to be issued, and in case of a partnership, all partners shall be named.

(c) The Commission's bond (Form FMC–132B), guaranty (Form FMC–133B), and application (Form FMC–131 as set forth in Subpart A of this part) forms are hereby incorporated as a part of the rules of this subpart. Any such forms filed with the Commission under this subpart must be in duplicate.

(d) Any securities or assets accepted by the Commission (from applicants, insurers, guarantors, escrow agents, or others) under the rules of this subpart must be physically located in the United States.

(e) Each applicant, insurer, escrow agent, and guarantor shall furnish a written designation of a person in the United States as legal agent for service of process for the purposes of the rules of this subpart. Such designation must be acknowledged, in writing, by the designee. In any instance in which the designated agent cannot be served because of death, disability, or unavailability, the Secretary, Federal Maritime Commission, will be deemed to be the agent for service of process. A party serving the Secretary in accordance with the above provision must also serve the certificant, insurer, escrow agent, or guarantor, as the case may be, by registered mail, at its last known address on file with the Commission.

(f) In case of any charter arrangements involving a vessel subject to the regulations of this subpart, the vessel owner (in the event of a subcharter,

the charterer shall file) must within 10 days file with the Secretary of the Commission evidence of any such arrangement.

(g) Financial data filed in connection with the rules of this subpart shall be confidential except in instances where information becomes relevant in connection with hearings which may be requested by applicant pursuant to § 540.26(a) § 540.26(b).

(h) Every person who has been issued a Certificate (Casualty) must submit to the Commission a semiannual statement of any changes that have taken place with respect to the information contained in the application or documents submitted in support thereof. Negative statements are required to indicate no change. Such statements must cover every 6-month period commencing with the first 6-month period of the fiscal year immediately subsequent to the date of the issuance of the Certificate (Casualty). In addition, the statements will be due within 30 days after the close of every such 6-month period.

Form FMC–132B
(5–67)

FEDERAL MARITIME COMMISSION

Surety Co. Bond No. _____

FMC Certificate No. _____

PASSENGER VESSEL SURETY BOND (46 CFR Part 540)

Know all men by these presents, that we _____ (Name of applicant), of _____ (City), _____ (State and country), as Principal (hereinafter called Principal), and _____ (name of surety), a company created and existing under the laws of _____ (State and country) and authorized to do business in the United States, as Surety (hereinafter called Surety) are held and firmly bound unto the United States of America in the penal sum of _____, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas, the Principal intends to become a holder of a Certificate (Casualty) pursuant to the provisions of Subpart B of Part 540 of Title 46, Code of Federal Regulations, and has elected to file with the Federal Maritime Commission such a bond to insure financial responsibility to meet any liability it may incur for death or injury to passengers or other persons on voyages to or from U.S. ports, and

Whereas, this bond is written to assure compliance by the Principal as an authorized holder of a Certificate (Casualty) pursuant to Subpart B of Part 540 of Title 46, Code of Federal Regulations, and shall inure to the benefit of any and all passengers or other persons to whom the Principal may be held legally liable for any of the damages herein described.

Now, therefore, the condition of this obligation is such that if the Principal shall pay or cause to be paid to passengers or other persons any sum or sums for which the Principal may be held legally liable by reason of the Principal's failure faithfully to meet any liability the Principal may incur for death or injury to passengers or other persons on voyages to or from U.S. ports, while this bond is in effect pursuant to and in accordance with the provisions of Subpart B of Part 540 of Title 46, Code of Federal Regulations, then this obligation shall be void, otherwise, to remain in full force and effect.

The liability of the Surety with respect to any passenger or other persons shall in no event exceed the amount of the Principal's legal liability under any final judgment or settlement agreement, except that, if the aggregate amount of such judgments and settlements exceeds an amount computed in accordance with the formula contained in section 2(a) of Public Law 89–777, then the Surety's total liability under this surety bond shall be limited to an amount computed in accordance with such formula.

The Surety agrees to furnish written notice to the Federal Maritime Commission forthwith of all suits filed, judgments rendered, and payments made by said Surety under this bond.

This bond is effective the _____ day of _____, 19_____, 12:01 a.m., standard time, at the address of the Principal as stated herein and shall continue in force until terminated as hereinafter provided. The Principal or the Surety may at any time terminate this bond by written notice sent by certified mail to the other and to the Federal Maritime Commission at its office in Washington, D.C., such termination to become effective thirty (30) days after actual receipt of said notice by the Commission, except that no such termination shall become effective while a voyage is in progress. The Surety shall not be liable hereunder for any liability incurred for death or injury to passengers or other persons on voyages to or from U.S. ports after the termination of this bond as herein provided, but such termination shall not affect the liability of the Surety hereunder for such liability incurred for death or injury to passengers or other persons on voyages to or from U.S. ports prior to the date such termination becomes effective.

In witness whereof, the said Principal and Surety have executed this instrument on the _____ day of _____, 19_____.

Name _____ PRINCIPAL

By _____
(Signature and title)

Witness _____

Name _____ SURETY

By _____ [SEAL]
(Signature and title)

Witness _____

Only corporations or associations of individual insurers may qualify to act as Surety, and they must establish to the satisfaction of the Federal Maritime Commission legal authority to assume the obligations of surety and financial ability to discharge them.

Form FMC–133B
(5–67)

FEDERAL MARITIME COMMISSION

Guaranty No. _____

FMC Certificate No. _____

GUARANTY IN RESPECT OF LIABILITY FOR DEATH OR INJURY, SECTION 2 OF THE ACT

1. Whereas_____ (Name of Applicant) (Hereinafter referred to as the "Applicant") is the Owner or Charterer of the passenger Vessel(s) specified in the annexed Schedule ("the Vessels"), which are or may become engaged in voyages to or from U.S. ports, and the Applicant desires to establish its financial responsibility in accordance with section 2 of Public Law 89–777, 89th Congress, approved November 6, 1966 ("the Act") then, provided that the Federal Maritime Commission ("FMC") shall have accepted, as sufficient for that purpose, the Applicant's application, supported by this Guaranty, and provided that FMC shall issue to the Applicant a Certificate (Casualty) ("Certificate"), the undersigned Guarantor hereby guarantees to discharge the applicant's legal liability in respect of claims for damages for death or injury to passengers or other persons on voyages of the Vessels to or from U.S. ports, in the event that such legal liability has not been discharged by the Applicant within 21 days after any such passenger or other person, or, in the event of death, his or her personal representative, has obtained a final judgment (after appeal, if any) against the Applicant from a U.S. Federal or State Court of competent jurisdiction, or has become entitled to payment of a specified sum by virtue of a compromise settlement agreement made with the Applicant, with the approval of the Guarantor, whereby, upon payment of the agreed sum, the Applicant is to be fully, irrevocably and unconditionally discharged from all further liability to such passenger or other person, or to such personal representative, with respect to such claim.

2. The Guarantor's liability under this Guaranty shall in no event exceed the amount of the Applicant's legal liability under any such judgment or settlement agreement, except that, if the aggregate amount of such judgments and settlements exceeds an amount computed in accordance with the formula contained in section 2(a) of the Act, then the Guarantor's total liability under this Guaranty shall be limited to an amount computed in accordance with such formula.

3. The Guarantor's liability under this Guaranty shall attach only in respect of events giving rise to causes of action against the Applicant in respect of any of the Vessels for damages for death or injury within the meaning of section 2 of the Act, occurring after the Certificate has been granted to the Applicant and before the expiration date of this Guaranty, which shall be the earlier of the following dates:

(a) The date whereon the Certificate is withdrawn, or for any reason becomes invalid or ineffective; or

(b) The date 30 days after the date of receipt by FMC of notice in writing (including telex or cable) that the Guarantor has elected to terminate this Guaranty, except that if, on the date which would otherwise have been the expiration date of this Guaranty under the foregoing provisions of this Clause 3, any of the Vessels is on a voyage in respect of which such Vessel would not have received clearance in accordance with section 2(e) of the Act without the Certificate, then the expiration date of this Guaranty shall, in respect of such Vessel, be postponed to the date on which the last passenger on such voyage shall have fully disembarked.

4. If, during the currency of this Guaranty, the Applicant requests that a vessel owned or operated by the Applicant, and not specified in the annexed Schedule, should become subject to this Guaranty, and if the Guarantor accedes to such request and so notifies FMC in writing (including telex or cable), then provided that, within 30 days of receipt of such notice FMC shall have granted a Certificate, such vessel shall thereupon be deemed to be one of the Vessels included in the said Schedule and subject to this Guaranty.

5. The Guarantor hereby designates _____, with offices at _____, as the Guarantor's legal agent for service of process for the purposes of the Rules of the Federal Maritime Commission, Subpart B of Part 540 of Title 46, Code of Federal Regulations, issued under section 2 of the Public Law 89–777 (80 Stat. 1357, 1358), entitled "Security for the Protection of the Public."

_____
(Place and Date of Execution)

_____
(Name and Guarantor)

_____
(Address of Guarantor)

By _____
(Name and Title)

SCHEDULE OF VESSELS REFERRED TO IN CLAUSE 1

VESSELS ADDED TO THIS SCHEDULE IN ACCORDANCE WITH CLAUSE 4

SUBPART C—ASSESSMENT, REMISSION, AND MITIGATION OF CIVIL PENALTIES

§ 540.30 Scope.

Sections 2 and 3 of Pub. L. 89–777 subject any person who violates the provisions of those sections to a civil penalty of not more than $5,000 in addition to a civil penalty of $200 for each passage sold, such penalties to be assessed by the Federal Maritime Commission. These sections further provide that such penalties may be "remitted or mitigated" by the Commission "upon such terms as they in their discretion shall deem proper." This subpart sets forth regulations prescribing standards and procedures for the collection, mitigation, and remission of civil penalties incurred under sections 2 and 3 of Pub. L. 89–777, and the rules and regulations promulgated pursuant thereto.[1]

§ 540.31 Definitions.

As used in this subpart, the following terms shall have the following meanings:

(a) "*Person*" includes individuals, corporations, partnerships, associations, and other legal entities existing under or authorized by the laws of the United States or any State thereof or the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, or any territory or possession of the United States, or the laws of any foreign country.

(b) "*Commission*" means the Federal Maritime Commission.

(c) "*The Act*" means Public Law 89–777 (80 Stat. 1356, 1357, 1358).

(d) "*Offender*" means any person charged with a violation.

§ 540.32 Procedure.

(a) If it is adjudged or otherwise determined that a violation has occurred and it is decided to invoke a statutory penalty, a registered letter will be sent to the offender informing him of the nature of the violation, the statutory and factual basis of the penalty, and the amount of the penalty. This notification shall further advise the offender that, within 20 days, or such longer period as the Commission in its discretion may allow, he or she may either pay the penalty demanded or petition for the remission or mitigation of such penalty.

(b) All correspondence, petitions, forms, or other instruments regarding the collection, remission or mitigation of any penalty under this subpart should be addressed to the Bureau of Hearing Counsel, Federal Maritime Commission, Washington, D.C. 20573.

§ 540.33 Petition for remission or mitigation of penalty.

(a) An offender may submit any oral or written material or information in answer to the notification letter explaining, mitigating, showing extenuating circumstances, or, where there has been no formal proceeding on the

[1] Sections 2(d) and 3(d) of Pub. L. 89–777 authorize the Federal Maritime Commission to prescribe such regulations as may be necessary to carry out the provisions of secs. 2 and 3.

merits, denying the violation. Material or information so presented will be considered in making the final determination as to whether to mitigate the penalty and the amount for which it will be mitigated, or whether to remit it in full.

(b) When no penalty is invoked or the penalty is remitted, no further action by the offender will be necessary. When the penalty is mitigated, such mitigation will be made conditional upon the full payment within 15 days or such longer period as the Commission in its discretion may allow unless the offender within that time executes a promissory note as provided by § 540.36.

§ 540.34 Settlement; execution of agreement form.

When a statutory penalty is mitigated and the offender agrees to settle for that amount, he or she shall be provided with a Settlement Agreement Form (Appendix A), to be signed, in duplicate, and returned. This form, after reciting the nature of the violation, will contain a statement evidencing the offender's agreement to settlement of the Commission's penalty claim for the amount set forth in the agreement and shall also embody an "approval and acceptance" provision. Upon settlement of the penalty in the agreed amount, one copy of the Settlement Agreement shall be returned to the debtor with the "Approval and Acceptance" thereon signed by the Director, Bureau of Hearing Counsel.

§ 540.35 Referral to Department of Justice.

(a) The Commission will refer violations to the Department of Justice with the recommendation that action be taken to collect the full statutory penalty when:

(1) The offender, within the prescribed time, does not explain the violation, petition for mitigation or remission, or otherwise respond to letters or inquiries.

(2) The offender, having responded to such letters or inquiries, fails or refuses to pay the statutory or mitigated penalty, as determined by the Commission, within the prescribed time.

(b) No action looking to the remission or mitigation of a penalty shall be taken on any petition, irrespective of the amount involved, if the case has been referred to the Department of Justice for collection.

§ 540.36 Payment of penalties.

Payment of penalties by the offender shall be made by:

(a) A bank cashier's check or other instrument acceptable to the Commission.

(b) Regular installments by check after the execution of a promissory note containing a confess-judgment agreement (Appendix B).

(c) A combination of the alternatives described in paragraphs (a) and (b) of this section. All checks or other instruments submitted in payment of claims shall be made payable to "Federal Maritime Commission."

§ 540.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
540.4 (Form FMC–131)	3072–0012
540.5	3072–0011
540.6	3072–0011
540.8	3072–0011
540.9	3072–0011
540.23 (Form FMC–131)	3072–0012
540.24	3072–0011
540.26	3072–0011
540.27	3072–0011

APPENDIX A—EXAMPLE OF SETTLEMENT AGREEMENT TO BE USED UNDER 46 CFR §§ 540.30–540.36

SETTLEMENT AGREEMENT
FMC FILE NO. _____

This Agreement is entered into between: (1) the Federal Maritime Commission and, (2) _____ hereinafter referred to as Respondent.

WHEREAS, the Commission is considering the institution of an assessment proceeding against Respondent for the recovery of civil penalties provided under the _____ Act _____, for _____ alleged violations(s) of Section(s) _____ .

WHEREAS, this course of action is the result of practices believed by the Commission to have been engaged in by Respondent to wit;

_____

_____.

WHEREAS, the parties are desirous of expeditiously settling the matter according to the conditions and terms of this Agreement and wish to avoid the delays and expense which would accompany agency litigation concerning these penalty claims; and,

WHEREAS, Section _____ of the _____ Act _____ authorizes the Commission to collect and compromise civil penalties arising from the alleged violation(s) set forth and described above; and,

WHEREAS, the Respondent has terminated the practices which are the basis of the alleged violation(s) set forth herein, and has instituted and indicated its willingness to maintain measures designed to eliminate, discourage and prevent these practices by Respondent or its officers, employees and agents.

NOW THEREFORE, in consideration of the premises herein, and in compromise of all civil penalties arising from the violation(s) set forth and described herein that may have occurred between _____ (date) and _____ (date), the undersigned Respondent herewith tenders to the Federal Maritime Commission a bank cashier's check in the sum of $_____, upon the following terms of settlement:

1. Upon acceptance of this agreement of settlement in writing by the Director of the Bureau of Hearing Counsel of the Federal Maritime Commission, this instrument shall forever bar the commencement or institution of any assessment proceeding or other claims for recovery of civil penalties from Respondent arising from the alleged violations set forth and described herein, that have been disclosed by Respondent to the Commission and that occurred between _____ (date) and _____ (date).

2. The undersigned voluntarily signs this instrument and states that no promises or representations have been made to the Respondent other than the agreements and consideration herein expressed.

3. It is expressly understood and agreed that this Agreement is not to be construed as an admission of guilt by undersigned Respondent to the alleged violations set forth above.

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

BY:_____

TITLE:_____

DATE:_____

Approval and Acceptance

The above Terms and Conditions and Amount of Consideration are hereby Approved and Accepted:

By the Federal Maritime Commission:

(S) _____
(Hearing Counsel)

(S) _____
Director, Bureau of Hearing Counsel

_____
Date

APPENDIX B—EXAMPLE OF PROMISSORY NOTE TO BE USED UNDER 46 CFR § 540.36

PROMISSORY NOTE CONTAINING AGREEMENT FOR JUDGMENT FMC FILE NO. _____

For value received, _____ promises to pay to the Federal Maritime Commission (the Commission) the principal sum of $_____ ($_____) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

$_____ ($_____) within _____ months of execution of the settlement agreement by the Director of the Bureau of Hearing Counsel;

$_____ ($_____) within _____ months of execution of the agreement;

$_____ ($_____) within _____ months of execution of the agreement;

[Further payments if necessary]

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 of the execution of this Promissory Note by the Director of the Bureau of Hearing Counsel, and be computed at the rate of [_____ percent (_____%) per annum.]

If any payment of principal or interest shall remain unpaid for a period of ten (10) 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, _____ (Respondent) does hereby authorize and empower any U.S. attorney, any of its assistants or any attorney of any court of record, Federal or State, to appear for him or her, and to enter and confess judgment against _____ (Respondent) 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 _____ (Respondent) 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.

_____ (Respondent) 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 Respondent 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.

BY:_____

TITLE:_____

DATE:_____

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–26

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS SUBJECT TO THE SHIPPING ACT OF 1984

SUSPENSION OF REPORTING REQUIREMENTS

September 11, 1984

ACTION: Interim Rules.

SUMMARY: The Commission amends its Interim Rules governing agreements by ocean common carriers and other persons subject to the Shipping Act of 1984. These amendments, issued pursuant to the interim rulemaking authority provided in the Act, defer implementation of the Interim Rule provisions requiring: (1) a conference or other agreement body to specify, in reports of meetings, what documents have been distributed to its members, and (2) the agreement body to maintain and file an index of documents with the Commission.

DATE: September 14, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984 (1984 Act), Public Law 98–237, 98 Stat. 67, 46 U.S.C. app. 1701–1720 became effective on June 18, 1984. Section 17(b) of the 1984 Act authorizes the Commission to prescribe interim rules without adhering to the normal notice and comment procedures under the Administrative Procedure Act (5 U.S.C. 553). On May 29, 1984, the Commission published an Interim Rule and Request for Comments implementing those provisions of the Act which govern agreements by ocean common carriers and other persons subject to the 1984 Act (26 F.M.C. 681). This Interim Rule became effective on June 18, 1984. Interested persons were given 90 days from the date of publication in the *Federal Register* in which to comment on the interim rules.

The Commission has now been requested by certain conferences to immediately suspend the requirement in section 572.704 that conferences maintain and file with the Commission an index of documents, and the related requirement in section 572.703(b) that meeting reports:

> ". . . shall specify any documents distributed by the conference or other agreement to inform or assist the members on such matters. . . ."

occurring within the scope of the agreement and which are being discussed or considered by the membership.*

Section 704 of the Interim Rule provides:

> "(a) Each agreement required to file minutes pursuant to § 572.703 shall maintain an index of all reports, circulars, notices, statistics, analytical studies, or other documents, not otherwise filed with the Commission pursuant to this subpart, which are distributed to the member lines.
>
> "(b) Each index required by paragraph (a) of this section shall be filed with the Commission on a quarterly basis, the first to be filed for the period ending September 30, 1984, and for each succeeding quarterly period thereafter. Each index must be certified by an official of the agreement as true and correct."

Upon consideration of the emergency comments, we have determined to grant the interim relief requested, and defer implementation of these requirements pending issuance of a Final Rule. This action is not a determination on the ultimate merit of these comments which will be considered in connection with the issuance of a final rule. Accordingly, section 572.704 is being amended to provide that for the index of documents the first period to be reported is that ending "March 31, 1985" rather than "September 30, 1984." Also, section 572.703 is amended to provide that minutes need not specify documents which are distributed until January 1, 1985.

List of Subjects in 46 CFR Part 572.

> Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and record keeping requirements.

Therefore, pursuant to 5 U.S.C. 553, and sections 5, 6, and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1704, 1705 and 1716), the Commission amends Title 46, Code of Federal Regulations, Part 572, Subpart G, as follows:

1. In § 572.703 revise paragraph (b) to read as follows:

§ 572.703 Filing of minutes

* * * * *

(b) *Content of Minutes.* Conferences, interconference agreements, agreements between a conference and one or more ocean common carriers, pooling agreements, equal access agreements, discussion agreements, marine terminal conferences, and marine terminal rate fixing agreements shall, through a designated official, file with the Commission a report of each meeting describing all matters within the scope

* In addition to the comments seeking immediate relief, numerous other comments have been filed regarding the Interim Rule. These other comments require no immediate attention and are not addressed in this notice. They will be considered at a later date.

of the agreement which are discussed or considered at any such meeting, shall specify any documents distributed by the conference or other agreement to inform or assist the members on such matters, and shall indicate the action taken. These reports need not disclose the identity of parties that participated in discussions, or the votes taken. Reports of meetings filed with the Commission in accordance with this requirement need not specify documents that were distributed until January 1, 1985.

2. In § 572.704, *Index of Documents*, in paragraph (b), remove "September 30, 1984" and insert "March 31, 1985."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 582]

DOCKET NO. 84–25

CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

September 17, 1984

ACTION: Final Rules.

SUMMARY: These Final Rules modify the Commission's regulations requiring the filing of certifications of company practices to combat rebating in the foreign commerce of the United States to bring them into conformity with the Shipping Act of 1984 which expands the application of the annual certification requirement from vessel operating common carriers to all common carriers.

DATES: Final Rules effective October 22, 1984, except Section 582.3 which will become effective December 15, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984 (1984 Act) (46 U.S.C. app. 1701–1720) was enacted on March 20, 1984 and became effective on June 18, 1984.

Section 15(b) of the 1984 Act (46 U.S.C. app. 1714(b)) makes substantive changes to the previous requirements of section 21(b) of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. 820(b)), regarding the certification of company policies and efforts to combat rebating in the foreign commerce of the United States. The fundamental change is the expansion of the certification requirements to all common carriers from the former limited application to vessel operating common carriers only.

On May 29, 1984, the Commission published in the *Federal Register*, 49 FR 22294 (26 F.M.C. 676) an Interim Rule and Request for Comments which implements the 1984 Act's certification requirements. The Interim Rule reflected changes in definitions and application contained in the 1984 Act, particularly the requirement that every non-vessel-operating common carrier (NVO), as well as every vessel operating common carrier, in the foreign commerce file an annual anti-rebating certification.

The Interim Rule also reflected the altered statutory scheme of the 1984 Act under section 15(b) which permits the Commission to require certification from "any shipper, shippers' association, marine terminal operator, ocean freight forwarder or broker." The Interim Rule did not require periodic certifications from entities other than those mandated by statute, but

provided that the Commission, "in its discretion", could make such requirements applicable to shippers, shippers' associations, marine terminal operators, freight forwarders and brokers.

Comments in response to the Interim Rule and Request For Comments were received from five parties. Sea-Land Service, Inc. and The National Maritime Council filed comments supporting adoption of the Interim Rule as a Final Rule.

NAVTRANS International Forwarding, Inc. (NAVTRANS), a licensed ocean freight forwarder and subsidiary of North American Van Lines, opposes the Interim Rule with respect to its discretionary application to ocean freight forwarders in 46 CFR 582.2. NAVTRANS points out that it is required to file an annual, anti-rebating certification on March 1 of each year under 46 CFR 510.35 of the Commission's current freight forwarder regulations, and maintains that the requirement of certification of the same basic information at the Commission's discretion under 46 CFR 582.2 would be "costly, unnecessary and administratively burdensome."

Section 582.5(b) of the Interim Rule makes clear that the certifications which may be required from persons enumerated in section 582.1 will be occasional rather than periodic, since they are to be submitted "on the date designated" and "thereafter, as the Commission may direct." The requirement for annual certifications from ocean freight forwarders is continued in Docket No. 84–19, *Licensing of Ocean Freight Forwarders.*, and the regulations at 46 CFR Part 510 promulgated therein 49 FR 36296, Sept. 14, 1984. In view of the continuing requirement for both annual certification and notification to shippers under those rules, we agree with NAVTRANS that the inclusion in this Rule of freight forwarders among those from whom the Commission may occasionally require certification under section 582.2 is unnecessary and duplicative. We therefore have deleted the reference to freight forwarders in section 582.2 of the Final Rule. We have, however, added a new paragraph (b) to section 581.1, *Scope*, cross-referencing the anti-rebating certification requirements for freight forwarders contained in 46 CFR Part 510.[1]

The Inter-American Freight Conference (IAFC) submitted comments suggesting several technical amendments to the Interim Rule and taking issue with the penalties established in section 582.1(b) and the requirement of section 582.4 that a new certificate be filed upon appointment of a new Chief Executive Officer (CEO) of a common carrier.

IAFC argues that, because the general penalty of no more than $25,000 per day for violations of the 1984 Act wilfully and knowingly committed is established for violations for which no other penalty is provided, it is inapplicable to section 15(b) which contains a specific penalty of no more than $5,000 per day for failure to file an anti-rebating certificate.

[1] The existing subsection (b) of 582.1 is being redesignated as subsection (c) without change.

We agree that the language "unless otherwise provided in this Act" would appear to preclude application of the $25,000 penalty for wilfull and knowing violations of sections specifying lesser penalties. We have, therefore, deleted the $25,000 penalty provision from the Final Rule, thereby limiting the penalty for failure to file the required reports to $5,000 for each day the violation continues.

In response to IAFC's comments, we have also deleted from the Final Rule section 582.4[2] which required that a certificate be filed each time a new CEO is appointed. While the rules in section 582.2 require that the CEO act as certifying official, the CEO's responsibility in this regard is to act as authorized spokesman for the corporation. Because the certification is filed on behalf of the company, not the individual officer, we see no need for renewal upon each change of personnel.[3] The technical wording changes suggested by IAFC to assure that the language of the regulations tracks the statute have also been adopted.

The North European Conferences (Conferences) filed joint comments generally supporting the Commission's Interim Rule and urging adoption as a Final Rule.[4] The Conferences, however, propose significant additional coverage and enforcement mechanisms. The Conferences urge the Commission to actively enforce the anti-rebating certification requirement and to issue and enforce a variety of new regulations against foreign-domiciled NVO's operating in the U.S. import trades, foreign-domiciled, as well as domestic, cargo brokers and freight forwarders, and shippers' associations. The thrust of these proposals is that the anti-rebating certification requirements should be applied equally to the U.S. import and export trades, and that various enforcement mechanisms are available to accomplish that end. While the Conferences' proposals appear to raise legitimate issues, they exceed those noticed in the Interim Rule, and therefore are beyond the scope of this proceeding. The Commission will consider making these proposals the subject of rules in a separate proceeding.

One additional item needs be addressed. Section 582.2 of the Interim Rule required that every common carrier submit an annual anti-rebating certificate by its Chief Executive Officer, and section 582.3 required that each common carrier file by September 18, 1984 a provision in each of its tariffs noting, *inter alia,* that "such [anti-rebating] policy has been certified to the Federal Maritime Commission in accordance with the Ship-

[2] Section 582.5 of the Interim Rule is hereby renumbered as section 582.4.

[3] In doing so, we reverse a decision we made in adopting the original anti-rebating certification rules issued under the 1916 Act, based on statutory language similar to that of the 1984 Act. We simply see no regulatory purpose to be served by continuation of this requirement; *CF.* Docket 79–65, 45 FR 12794, (1980).

[4] The North European Conferences are: 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, North Europe-U.S. South Atlantic Rate Agreement and U.S. South Atlantic-Europe Rate Agreement.

ping Act of 1984 and the regulations of the Commission set forth in 46 CFR Part 582." No comment was received with respect to the interrelationship of these provisions, or their relationship to the certifications previously filed by vessel operating common carriers pursuant to the 1916 Act and the Commission's regulations which were codified at 46 CFR Part 552. We note, however, that the certification requirements of the two Acts being almost identical, it appears to be duplicative and unnecessary to require vessel operating common carriers who filed an anti-rebating certification on or before May 15, 1984 to file an additional certification before September 18, 1984 merely to comply with the recitation to be filed in their tariffs by that date that their compliance with the 1984 Act has been certified to the Commission. The Commission will, therefore, regard the anti-rebating certificate filed by each vessel operating common carrier on or before May 15, 1984 under the 1916 Act to constitute compliance with the requirement of the 1984 Act and section 582.2 for the 1984 annual certificate.

The NVO certification, being a new requirement, is a different matter. The Interim Rule required an NVO to file an anti-rebating policy statement in its tariff on or before September 18, 1984. Because that statement must make reference to the fact that a CEO certification has been filed with the Commission, it was our intention that the CEO certification also be filed on or before September 18, 1984. It now appears, however, that some confusion or uncertainty exists regarding what was actually required from NVO's by the Interim Rule. As a result and to allow NVO's adequate time to comply with the newly imposed certification requirement, the date by which NVO's must file the initial CEO certification and the date for all common carriers (including NVO's) to file the tariff provision under the 1984 Act shall be deferred until December 15, 1984. Further certifications will be required on May 15, 1985 and each subsequent May 15.

The Federal Maritime Commission has determined that this final rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of Subjects in Part 582.

Cargo; Cargo vessels; Exports; Foreign relations; Freight forwarders; Imports; Maritime carriers; Rates and fares; Reporting and recordkeeping requirements; Water carriers; Water transportation.

These final rules are subject to review and editing of form before publication in the Code of Federal Regulations. Users are requested to notify the Commission of any omissions and typographical-type errors in order that corrections can be made before the Commission's CFR book goes to press in January, 1985.

For the reasons set out in the preamble, and pursuant to the authority set forth in the Authority Citation, Part 582 of Subchapter D, Chapter IV of Title 46, Code of Federal Regulations is revised to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 582]

CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

Sec.

582.1 Scope.

582.2 Form of certification.

582.3 Tariff notification.

582.4 Reporting requirements.

582.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

APPENDIX A—CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

AUTHORITY: 5 U.S.C. 553; secs. 2, 3, 8, 10, 13, 15, 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1707, 1709, 1712, 1714, 1715, and 1716).

§ 582.1 Scope.

(a) The requirements set forth in this part are binding upon every common carrier by water in the foreign commerce of the United States and, at the discretion of the Commission, will be applicable to any shipper, shippers' association, marine terminal operator, or broker.

(b) Information obtained under this part will be used to maintain continuous surveillance over common carrier activities and to provide a deterrent against rebating practices. Failure to file the required reports may result in a civil penalty of not more than $5,000 for each day such violation continues.

NOTE: Ocean freight forwarders certify their anti-rebating policies and efforts pursuant to §§ 510.21 and 510.25 of this chapter.

§ 582.2 Form of Certification.

The Chief Executive Officer, *i.e.* the most senior officer within the company designated by the board of directors, owners, stockholders or controlling body as responsible for the direction and management of the company, of each common carrier and, when so ordered at the discretion of the Commission, the Chief Executive Officer of any shipper, shippers' association, marine terminal operator or broker, shall file with the Secretary, Federal Maritime Commission, a written certification, under oath, as set forth in the format Appendix A to this part attesting to the following:

(a) (1) That it is the stated policy of the filing company that the payment, solicitation or receipt of any rebate by the company, which is unlawful under the provisions of the Shipping Act of 1984, is prohibited; and

(2) That such company policy was promulgated recently (together with the date of such promulgation) to each owner, officer, employee, and agent thereof;

(b) The details of the efforts made within the company or otherwise to prevent or correct illegal rebating; and

(c) That the filing company will fully cooperate with the Commission in its efforts to end those illegal practices.

§ 582.3 Tariff Notification.

(a) Each common carrier shall file a provision in each of its tariffs that shall read substantially as follows:

> (Name of Company) has a policy against the payment of any rebate by the company or by any officer, employee, or agent thereof, which payment would be unlawful under the United States Shipping Act of 1984. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act of 1984 and the regulations of the Commission set forth in 46 CFR Part 582.

(b) When the common carrier's tariff is a conference or rate agreement tariff, the common carrier shall ensure that the conference or rate agreement publishes the common carrier's tariff provision set forth in paragraph (a) of this section in the tariff.

(c) The anti-rebate tariff provision, as set forth in paragraph (a) of this section, shall be effective upon filing.

§ 582.4 Reporting requirements.

(a) Every common carrier required by this part to file a written certification as provided for in § 582.2 shall file such certification on or before May 15 of each year.

(b) Every person other than a common carrier who is ordered by the Commission to file a written certification under § 582.2 shall file the initial certification on the date designated by the Commission and, thereafter, as the Commission may direct.

§ 582.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement.

Section	Current OMB Control No.
582.2 through 582.4	3072–0028

APPENDIX A TO 46 CFR, PART 582

(Name of Filing Company)

Certification of Company Policies and Efforts to Combat Rebating in the Foreign Commerce of the United States.

Pursuant to the requirements of section 15(b) of the Shipping Act of 1984, and Federal Maritime Commission regulations promulgated pursuant thereto, (46 CFR Part 582), I _____, Chief Executive Officer of (name of company), state under oath that:

1. It is the policy of (name of company) that the payment, solicitation, or receipt of any rebate which is unlawful under the provisions of the Shipping Act of 1984 is prohibited.

2. On or before , 19 , such company policy was promulgated to each owner, officer, employee and agent of (name of company) who is directly or indirectly connected with commercial ocean shipping, import or export sales or purchasing.

3. [Set forth the details of measures instituted by the filing company otherwise to eliminate or prevent the payment of illegal rebates in the foreign commerce of the United States].

4. (Name of company) affirms it will fully cooperate with the Federal Maritime Commission in any investigation of illegal rebating and with the Commission's efforts to end such illegal practices.

(S)
Chief Executive Officer

Subscribed and sworn to before me this day of 19 .

Notary Public

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–32

AMENDMENTS TO RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

ACTION: Interim rule and request for comments.

SUMMARY: This rule adds sections to 46 CFR Part 572 to state Commission policy that an agreement filed pursuant to the Shipping Act of 1984 must be definite, complete and specific with regard to the authority contained therein. The rule establishes guidelines for distinguishing between impermissible open-ended authority and allowable interstitial authority. This statement of policy and rule is necessary to enable the Commission to evaluate the impact of an agreement, to monitor its operations, and to clarify the scope of the antitrust immunity contained therein.

DATE: Interim rule effective September 17, 1984. Comments on or before October 17, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984 (46 U.S.C. app. 1701–1720) (hereinafter referred to as "the Act" or "the 1984 Act") requires the Commission to conduct both a technical and substantive review of agreements filed pursuant to section 5 of the Act (46 U.S.C. app. 1704). Section 5 requires that a true copy of every agreement within the scope of the Act be filed with the Commission. Under section 6(b) of the Act (46 U.S.C. app. 1705(b)), the Commission must conduct a preliminary review to determine whether an agreement meets the requirements of section 5. The Commission is authorized to reject agreements that do not meet these requirements. Under section 6(g) (46 U.S.C. app. 1705(g)), the Commission must review an agreement to determine whether it is substantially anticompetitive and is likely to result in an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. In performing its review functions under section 6, the Commission must observe strict timeframes which are mandated by statute.

The 1984 Act also places an obligation on the Commission to monitor operations conducted pursuant to an agreement. In this regard, the Commission's responsibility to evaluate an agreement under section 6(g) continues after an agreement becomes effective. In addition, section 10 of the Act

(46 U.S.C. app. 1709) enumerates certain acts which are prohibited. Section 10(a)(2) prohibits a person from operating under an agreement required to be filed under section 5 that has not become effective under section 6. Section 10(a)(3) prohibits a person from operating under an agreement required to be filed under section 5 except in accordance with the terms of the agreement.

Section 7 of the Act (46 U.S.C. app. 1706) provides for an exemption from the antitrust laws for certain enumerated categories of agreements. Section 7(a)(2) states, in relevant part, that the antitrust laws do not apply to:

> . . . any activity or agreement within the scope of this Act, whether permitted under or prohibited by this Act, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place. . . .

In order to ensure that the Commission may adequately fulfill its responsibilities under the Act to review and monitor agreements and to ensure that agreements are stated with sufficient precision to determine the scope of the antitrust immunity conferred upon them, the Commission is amending its rules governing agreements by ocean common carriers and other persons subject to the Act (46 CFR Part 572).[1] These amendments consist of a new rule stating Commission policy regarding the clarity, completeness and specificity required of agreements and a new rule which distinguishes between impermissible open-ended authority and allowable interstitial authority.

I. ADDITION TO SUBPART A—GENERAL PROVISIONS

Section 572.103—Policies

The addition to Subpart A, § 572.103, adds a new paragraph (g) which states Commission policy regarding the clarity, completeness and specificity required in agreements. An agreement filed under the Shipping Act of 1984 must be clear and definite in its terms, must embody the complete present understanding of the parties and must set forth the specific authorities and conditions under which the members of the agreement will conduct

[1] On May 29, 1984, the Commission published Interim Rules which implement those provisions of the Shipping Act of 1984 which govern agreements by ocean common carriers and other persons subject to the Act (49 FR 22296). These rules were issued pursuant to authority contained in section 17(b) of the Act (46 U.S.C. app. 1716(b)) to issue interim rules without observing the normal notice and comment procedures required by the Administrative Procedure Act (5 U.S.C. 553). The preamble to these rules stated that persons could file emergency comments prior to the effective date for consideration by the Commission. A number of such comments were received, and on June 14, 1984, the Commission published amendments to its interim agreements' rules making certain modifications and corrections in these rules (49 FR 24697). These Interim Rules, as amended, went into effect on June 18, 1984. They are codified in Title 46 of the Code of Federal Regulations as Part 572.

their operations and regulate the relationships among the agreement members.

An agreement should be sufficiently clear and definite in its essential terms so as to apprise the Commission of the activities which will be undertaken pursuant to the agreement so that the Commission may evaluate its probable economic impact. At the same time, the Commission does not interpret the 1984 Act to require agreements to be drafted to a degree of exactitude that deprives the parties of a reasonable extent of commercial flexibility—within clearly defined parameters—to respond to changing trade conditions.

One purpose of this policy is to ensure that the Commission may fulfill its responsibility to review an agreement prior to its effectiveness. Under section 6(g) of the Act, the Commission is charged with making an analysis of the competitive impact of an agreement. This evaluation would be made difficult or impossible where an agreement is vague, incomplete or contains open-ended authority.

A second purpose of this policy is to enable the Commission to monitor operations under an agreement once it has gone into effect. The Commission's role as a monitoring agency has been heightened under the 1984 Act which generally allows most agreements to go into effect after a brief waiting period. Because of this shift in emphasis in the regulatory regime, it becomes even more important to have an agreement which is clear, complete and definite. In this regard, it should be noted that section 10(a)(2) prohibits any person from operating under an agreement that has not become effective and that section 10(a)(3) prohibits any person from operating under an agreement except in accordance with its terms. It is, therefore, also in the interest of the parties to an agreement to state their agreement with precision.

Finally, agreement authority should be stated completely and specifically in order to avoid, to the maximum degree possible, any ambiguity concerning antitrust immunity for any activity conducted under the agreement. Exemptions from the antitrust laws are generally strictly and narrowly construed. The 1984 Act, however, extends antitrust immunity to an activity undertaken or entered into "with a reasonable basis to conclude that it is pursuant to an agreement on file with the Commission and in effect when the activity took place." The risk of assuming that a particular activity is pursuant to a stated authority is one that is undertaken by the parties to an agreement. In order for the parties to avoid difficult issues regarding the scope of antitrust coverage, the Commission believes it is best that agreement activities and authorities be stated as clearly as possible.

The Shipping Act of 1984 does not affect previously established Commission policy regarding the clarity, completeness and specificity required in agreements. Accordingly, the new policy statement in § 572.103(g) merely represents a codification of that established policy. There is, however, a

greater need for such a restatement of policy under the 1984 Act to enable the Commission to carry out its review functions within strict statutory deadlines and adequately monitor subsequent operations.

II. ADDITION TO SUBPART D—FILING AND FORM OF AGREEMENTS

Section 572.406—Clear and Definite Agreements

The addition to Subpart D adds a new § 572.406 which establishes guidelines for the completeness required of agreements and distinguishes between impermissible open-ended authority and permitted interstitial authority.

Section 572.406(a) requires that an agreement reflect the full and complete *present* understanding of the parties as to its essential terms. The agreement must set forth in adequate detail the procedures and arrangements under which the activity permitted by the agreement is to take place once the agreement becomes effective. For example, an agreement which merely stated that the parties are authorized "to operate a joint service," without indicating the number, or range of vessels, committed to the service would not be deemed to reflect the full understanding of the parties. Such a deficiency would defeat any meaningful Commission review. Similarly, a statement in a joint service agreement which authorized the parties to "acquire substitute or additional tonnage" would result in a situation where the Commission would be unable to evaluate the economic impact of the agreement on the trade under section 6(g). Finally, a filed agreement which referred to or was governed by another agreement not filed with the Commission would be incomplete. It should be noted that operation under an agreement which is incomplete may constitute a violation of section 10(a)(3) of the Act.

Section 572.406(a) also requires that agreements be specific as to the understanding of the parties. Agreements should specify the authority of the agreement and the activities to be conducted under it. The rule does not contemplate that every activity be enumerated in detail. However, general grants of authority which do not specify the activities under the agreement are not favored. For example, an agreement which, as it authority, merely recited the statutory language of section 4(a)(1)–(7) of the Act would require some further clarification. Otherwise, review of such an agreement would be virtually meaningless. Such general statements of authority, even where clarified by subsequent refinement, should be avoided.

Section 572.406(b) proscribes the use of clauses in agreements which contain open-ended authority unless such provisions expressly state that any further such agreement cannot become operative unless filed and effective under the 1984 Act. A problem of open-ended authority arises where an agreement allow for *future* substantive modification of an agreement without specifically requiring filing under section 5. Such general authority to make future modifications without filing with the Commission would

subvert the Commission's ability to review and monitor an agreement. Because any such future modifications to an agreement would generally become effective within 45 days after the amendment is filed with the Commission, there is no undue burden or delay in gaining effectiveness of an agreement.

Section 572.406(c) provides that activities which may reasonably be viewed as interstitial to a stated agreement authority need not be expressly stated. For example, authority to establish OCP rates would be viewed as interstitial to general ratemaking authority. However, establishment of a tariffed contract rate system would not be interstitial. Changes in the terms and conditions of a charter party underlying a space charter agreement would generally be interstitial. However, changes in the number of vessels (or range of number of vessels) and definition of vessel capacity (or range of capacities) dedicated in a joint service or space charter agreement would not. The rule allows flexibility to make changes for tariff matters or routine operational and administrative matters having no anticompetitive effect.

The rule does not state how the Commission will treat an agreement that is not sufficiently specific, complete and definite. In most cases, such deficiencies could probably be corrected through informal discussions between the Commission's staff and the parties. An agreement which is severely deficient, however, may be rejected, investigated or subject to a formal request for additional information or to challenge in the court under section 11(h) of the Act.

III. CONCLUSION

This rule is being published as an interim rule, pursuant to section 17(b) of the Act, with opportunity for comment. It will become effective on publication and will serve as an interim rule until such time as a final rule supersedes it. All interested persons have been provided 30 days to comment on the interim rule. This interim rule and all comments filed within the 30-day period will be used as the basis for a final rule pursuant to the requirements of the Administrative Procedure Act (5 U.S.C. 553).

The Chairman of the Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*), that these rules will not have a significant economic impact on a substantial number of small entities, within the meaning of that Act.

OMB clearance for the interim rules in 46 CFR 572 has been granted under OMB Number 3072–0045. These interim amendments will also be submitted, and comments on the information collection aspects of the amendments may be made at the time the interim rules are formally submitted to OMB as Final Rules.

List of Subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime Carriers.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 5, 6, 7, 10 and 17 of the Shipping Act

of 1984 (46 U.S.C. app. 1704, 1705, 1706, 1709, 1716), the Federal Maritime Commission hereby amends Title 46, Code of Federal Regulations, Part 572, Subchapter D as follows:

1. In Subpart A, § 572.103, add a new paragraph (g) to read as follows:

§ 572.103 Policies.

* * * * *

(g) An agreement filed under the Shipping Act of 1984 must be clear and definite in its terms, must embody the complete understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will conduct their present operations and regulate the relationships among the agreement members.

2. In Subpart D, add a new § 572.406 to read as follows:

§ 572.406 Clear and Definite Agreements

(a) Any agreement required to be filed by the Act and the rules of this Part shall be the complete agreement among the parties and shall specify in detail the substance of the understanding of the parties.

(b) Except as provided in paragraph (c) of this section, open-ended or vague agreement which contemplate a further agreement or give the parties authority to discuss and/or negotiate a further agreement, the terms of which are not fully set forth in the enabling agreement, will be permitted only if the enabling agreement indicates that any such further agreement cannot go into effect unless filed and effective under the Act;

(c) Further specific agreements or understandings which are established pursuant to express enabling authority in an agreement are considered interstitial and are permitted without further filing under section 5 of the Act only when the further agreement concerns: (1) routine operational or administrative matters which will have no anticompetitive effect; or (2) establishment of tariff rates, rules, and regulations which are routine and ordinary.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–22

NOTICE TO RESCIND PORTWIDE EXEMPTIONS GRANTED TO THE PORTS OF PENSACOLA, PORT EVERGLADES AND TAMPA, FLORIDA, PURSUANT TO SECTION 510.33(e) OF GENERAL ORDER 4 AND DISCONTINUANCE OF PROCEEDING

September 19, 1984

By notice dated April 14, 1982, the Commission instituted Docket No. 82–22, *Notice of Intent to Review Certain Portwide Exemptions Granted Pursuant to Section 510.33(e) of General Order 4,* for the purpose of determining whether portwide exemptions granted by the Commission some seventeen years ago to the ports of Pensacola, Port Everglades and Tampa, Florida, were still justified.

The proceeding in Docket No. 82–22 has been held in abeyance pending final action by the Commission on proposed revisions to 46 CFR Part 510 in Docket No. 83–35, *Licensing of Independent Ocean Freight Forwarders.* The proposed revisions under review in Docket No. 83–35 subsequently were incorporated into an interim rule proceeding, Docket No. 84–19, *Licensing of Ocean Freight Forwarders,* which proposed rules to implement the Shipping Act of 1984 (46 U.S.C. app. 1701–1720). The proceeding in Docket No. 83–35 was discontinued by notice served April 24, 1984.

On August 15, 1984, the Commission adopted Final Rules in Docket No. 84–19. One of the revisions adopted modified 46 CFR 510.33(e), redesignated as 46 CFR 510.23(e) in the Final Rules, to allow compensation to be paid to a forwarder who requests a carrier or its agent to perform forwarding functions if such carrier or agent is a licensed ocean freight forwarder. With this allowance, the portwide exemption provision contained in the rules became unnecessary and it was deleted in the Final Rules.

The issue of whether to continue the portwide exemptions in three Florida ports which is the subject of Docket No. 82–22 has thus become moot. Moreover, with the deletion of the exemption provision from the rules, the exemptions granted to the three Florida ports, identified above, have no force and effect. Accordingly, these exemptions will be rescinded.

By a separate notice, all other outstanding exemptions granted by the Commission will be rescinded also.

THEREFORE, IT IS ORDERED, that the portwide exemptions granted to the ports of Pensacola, Port Everglades and Tampa, Florida, are hereby rescinded;

IT IS FURTHER ORDERED, that Docket No. 82–22 is hereby discontinued;

IT IS FURTHER ORDERED, that a notice of these actions be published in the *Federal Register*.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 502, 512 AND 531]

GENERAL ORDERS 11, 16 AND 38; DOCKET NO. 84–2

AMENDMENT OF CERTAIN REGULATIONS GOVERNING COMMON CARRIERS BY WATER IN THE DOMESTIC OFFSHORE COMMERCE OF U.S.

September 25, 1984

ACTION: Notice of Discontinuance.

SUMMARY: The Federal Maritime Commission discontinues this rulemaking proceeding on the basis that the proposed regulation amendments cannot be adopted given existing statutory requirements. This discontinuance will result in no modifications to current regulatory requirements.

DATE: This action is effective September 28, 1984.

SUPPLEMENTARY INFORMATION:

PROCEEDING

On January 26, 1984, the Federal Maritime Commission[1] (Commission or FMC) issued a notice of proposed rulemaking (January Notice) in the above-captioned proceeding proposing amendments to its regulations implementing the Intercoastal Shipping Act, 1933 (ISA) (46 U.S.C. app. 843 *et seq.*). Essentially, these amendments would exempt carriers serving the Puerto Rico/Virgin Islands domestic offshore trade from the otherwise applicable financial data reporting requirements and 60-day advance notice requirement for the implementation of general rate increases and decreases.

The January Notice was issued in response to a Petition for Rulemaking filed by Sea-Land Service, Inc. (Sea-Land Petition) on September 12, 1983, requesting the same relief. A notice of filing of the Sea-Land Petition was published in the *Federal Register*, 48 FR 44091 of Sep. 27, 1983, and comments of interested parties were solicited.

Although twenty-two parties responded to the Sea-Land Petition, the responses failed to provide sufficient information for assessing the impact of the proposal on Commission programs. This rulemaking was instituted to provide interested parties with that opportunity.

The January Notice requested commentators to specifically address the following matters:

[1] Commissioner Moakley dissented to the issuance of the Notice of Proposed Rulemaking on the basis that the relief sought is beyond the Commission's statutory authority to grant.

1. If no financial data are submitted by carriers in the Puerto Rico/Virgin Islands trade, how can the Commission effectively review the reasonableness of a general rate increase prior to its effective date?

a. If this proposed rule is adopted, how will interested persons effectively exercise their statutory right to protest general rate increases?

2. If the proposed rule were adopted, can an adequate system of general rate increase review operate within 60 days as required by the statute?

a. Assuming authority exists to establish a thirty-day review period as Sea-land has proposed, can the requisite rate review be accomplished within thirty days?

3. If the Commission should order an investigation of a proposed general rate increase, can such an investigation be completed within 180 days as required by the statute in the absence of pre-filed financial data and supporting evidentiary materials by the carrier?

4. To what extent is port-to-port service competitive with intermodal service by carries in the Puerto Rico/Virgin Islands trades?

a. What are the regulatory requirements imposed on carriers subject to ICC jurisdiction in these trades?

b. What specific differences between ICC and FMC regulatory requirements impose a competitive disadvantage on FMC regulated carriers?

c. Can the needs of shippers in this trade the adequately served if carriers offer only intermodal service subject to ICC jurisdiction.

This request, however, was without prejudice to the commentators addressing any other matters which they viewed as warranting consideration. The Commission's Bureau of Hearing Counsel was directed to participate in the proceeding.

Sixteen parties filed comments in response to the January Notice. Ten parties generally supported the rulemaking proposal,[2] while seven opposed it.[3]

The threshold issue addressed by most parties is whether section 35 of the Shipping Act, 1916 (46 U.S.C. app. 833a) gives the Commission the authority to grant the relief requested by Sea-Land. Those supporting the proposal argue an interpretation of section 35 that would allow the

[2] Comments in support of the rulemaking proposal were filed by Sea-Land Service, Inc., the U.S. Department of Transportation, The Transportation Institute, Houston Port Bureau, Inc., Jacksonville Port Authority, Delaware River Port Authority, E.I. DuPont DeNemours & Co., R.J. Reynolds Tobacco Co., Lubrizol Corporation and PPG Industries, Inc.

[3] Comments in opposition to the rulemaking proposal were filed by the Government of the Virgin Islands, the Legislature of the Virgin Islands, Hawaii Department of Commerce and Consumer Affairs, U.S. Military Sealift Command, Puerto Rico Manufacturer Association, IBP, Inc., and Hearing Counsel.

Commission substantial authority, while those opposing the proposal argue an interpretation which would allow exemptions that have only a *de minimis* effect on commerce. While Hearing Counsel states that section 35 gives the Commission sufficient authority to implement the proposed amendments, it also is of the opinion that such amendments are "contrary to the intent of Congress" and "would leave the Commission in a position of being unable to meaningfully review the propriety of rate increase applications within the required statutory time frame." DOT urges an *ad hoc* carrier-by-carrier approach rather than a trade-wide approach.

With regard to the Commission's specific questions concerning pre-effective date review and the 180-day investigation limitation, opinions were divided along similar lines. Parties supporting the proposed amendments argue that there should be no problem in meeting the deadlines or that the deadlines are irrelevant because competition in the trade supplemented by shipper complaint proceedings are sufficient in themselves to regulate rates. Those opposing the amendments argue that adequate review would be impossible, that competition in the trade is inadequate to regulate rates and that the statutory right to protest rate increases would be effectively abrogated by this rulemaking. Hearing Counsel takes the position that the Commission's staff could not properly evaluate rate increases under the proposed amendments, but did not express an opinion on the general need for rate of return regulation in the domestic offshore trades.

The Commission's questions in the January Notice concerning the relationship between port-to-port and intermodal services in these trades also prompted a similar division of opinions. Those supporting the rulemaking are generally of the opinion that Interstate Commerce Commission (ICC) regulatory requirements are very minimal, that Sea-Land as the only port-to-port service offeror in the trade is at a competitive disadvantage, and that the Commission should reduce its regulatory requirements to the level of the ICC. Those opposing the rulemaking generally argue that the services are not directly in competition with each other, that while there are differences between ICC and FMC regulation, they impose no competitive disadvantage on any one carrier in the trade, and that rather than reduce its regulatory requirements, the FMC should seek more effective jurisdiction in the trade to strengthen its regulatory control over rates. The only matter the parties agree upon here is that there is a clear and continuing need for port-to-port service in the trade.

Few alternatives to the proposed amendments were offered. One suggestion advanced is that the Commission should utilize a data-base computer model to establish reasonable rate levels in the trade on the basis of industry-average cost, revenue and financial data. Hearing Counsel proposed that, in lieu of the proposed amendments, consideration should be given to alternative avenues of regulatory relief including: (1) increasing the threshold level of trade revenue for financial data filing requirements; (2) increasing the threshold level of individual and annual aggregate general

rate increases for financial data filing requirements from 3% and 9% to 15% and 25%, respectively; and (3) eliminating the requirement that carriers file historical data with general rate increases.

DISCUSSION

The Commission has determined that it could not adopt the amendments proposed in this rulemaking and still carry out the statutory duties and responsibilities imposed by sections 3 and 4 of the Intercoastal Shipping Act, 1933, particularly as amended in 1978 by P.L. 95–475.[4]

Contrary to the assertions of the parties supporting this proposal, the effect of this rulemaking would not be the removal of "unnecessary regulations." Obtaining financial data from a carrier and giving interested parties as well as the Commission adequate time to review such materials prior to the effective date of a general rate increase would, in the context of other requirements and limitations of the Act, appear necessary to determining "what constitutes a just and reasonable rate of return or profit for common carriers" serving this trade. 46 U.S.C. § 845(a). *See* S. Rep. No. 1240, 95th Cong., 2d Sess. 9–10 (1978).

In this regard, we agree with the position taken by Hearing Counsel and others that both elements of the Commission's regulatory activity which Sea-Land wishes abandoned, *i.e.* advance 60-day notice and financial information reporting requirements, are critical and complementary to the statutory scheme contemplated by the ISA. It does not appear economically or practically possible for the Commission's staff and interested third parties to review and respond to a proposed general revenue rate increase prior to its effective date without the benefit of some advance on-going carrier financial data of the kind provided in the periodic reports and without an adequate notice period. Without the data and the time to analyze it, the Commission would be without the means to make an assessment of the reasonableness of the rate increase as contemplated by the statute.

Nor does the suggested "investigate and refund" alternative advanced by Sea-Land appear viable under the circumstances. Section 3 of the ISA imposes certain statutory conditions and requirements on the initiation and conduct of rate investigations instituted pursuant to that section. One of these mandates that:

The Commission shall not order a hearing . . . unless the Commission publishes in the *Federal Register the reasons, in detail, why it considers*

[4] The 1978 amendments to the ISA are the source of many of the Commission regulations which Sea-Land and this rulemaking proposed to change or eliminate. The features of the 1978 amendments most relevant here are those which: (1) require that the Commission, "by regulation," prescribe guidelines for the determination of what constitutes a just and reasonable rate of return; (2) require the Commission to give reasons for any rate hearing instituted and strictly delineate the issues to be resolved in that hearing; and (3) impose restrictive time limits on the completion of the various phases of the hearing. Many of the specific regulations put at issue in this rulemaking were promulgated in direct fulfillment of these amendments; most as a means of enabling the Commission to meet the strict statutory scheduling deadlines established.

such a hearing to be necessary and the specific issues to be resolved by such hearing. (Emphasis added).

The lack of advance carrier supplied financial data would, in our opinion, render the Commission unable to meet this threshold statutory requirement that the Commission indicate up front the scope of any rate investigation. Without the necessary data, the Commission would not be in a position to give reasons for the investigation, specify "in detail" the issues to be investigated, or fashion an appropriate hearing order. Accordingly, Sea-Land's recommendation that the Commission, in lieu of requiring advance notice and pre-filed financial data, could investigate all general rate increases and utilize the refund authority of the Act to compensate shippers if the rates are found too high is not an acceptable alternative.

Moreover, even if the Commission were somehow able to specify the investigation issues without the benefit of pre-filed carrier data, it is not likely that the Commission could obtain the data during the course of the investigation and complete that investigation within the 180-day limit imposed by the statute.

Therefore, the proposed amendments to the advance notice and reporting requirements taken together would, if adopted, generally render section 3 of the ISA unenforceable as it applies to the Puerto Rico/Virgin Islands trades. The ultimate effect would be to discontinue FMC review functions and shift the burden of proof in all general revenue rate proceedings to shippers and the domestic offshore governments in complaint cases. This would be contrary to the regulatory scheme contemplated by the ISA and the legislative determinations made in connection with the 1978 amendments to the ISA. *See* S. Rep. No. 1240, 95th Cong., 2d Sess. 6–7 (1978).

To the extent the Intercoastal Shipping Act, 1933 prescribes a clear and definite statutory scheme of regulation which the Commission is charged with enforcing, neither the exemption provision of section 35 nor the rule-making provision of section 43 of the Shipping Act, 1916 (46 U.S.C. app. 841a) provides the authority to repeal or substantially amend that scheme. The legislative history of section 35 indicates that the exemption authority was to be used to exempt requirements "which are *not of significance* in the overall design of regulation contemplated" (emphasis added). *See* H. Rep. No. 2248, 89th Cong., 2d Sess. 1, 4 (1966). Therefore, any "deregulation" initiatives must still comport with the legislative intent underlying the Act, be harmonized with the statutory scheme, and rely upon a rational factual basis. *See generally, Motor Vehicle Man. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 103 S. Ct. 2856, 51 U.S.L.W. 4945, 4956–4957 (1983); *U.S. v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982). That standard could not be met on the basis of the record established in this proceeding.

The major focus of many of the comments submitted in support of the proposed amendments has been to argue the virtues of deregulation

generally, or specifically in the U.S./Puerto Rico-Virgin Islands trades,[5] and the alleged disadvantage that Sea-Land's FMC regulated services are experiencing vis-a-vis those regulated by the ICC. Whatever the merits of these arguments, and the commentators offer differing and opposing views, they do not address the central issue raised by the rulemaking or the more critical questions posed by the Commission in its January Notice. The issue here is not whether existing rate regulation is good or bad or having an adverse impact on carriers subject to it, but rather *whether the "deregulation" contemplated by the Sea-Land proposals can properly be effected within the framework of the current statutorily mandated scheme.* It is on this point that the record in this proceeding fails to provide critical information. The comments favoring the rulemaking generally consist of little more than broad conclusory statements of position on the desirability of the Sea/Land proposals. None of these comments is informative or responsive to the January Notice to the extent that they explain how the Commission could adopt the Sea-Land proposals and still make a meaningful assessment of general rate increases consistent with statutory requirements. *See generally, Farmers Union Cent. Exchange v. F.E.R.C.*, 734 F.2d 1486 (D.C. Cir 1984); *Cross-Sound Ferry Services, Inc., v. I.C.C.* No. 83–2155 (D.C. Cir. July 6, 1984).

The Commission, notwithstanding its efforts to give interested parties every opportunity to do so, has simply not been provided with the manner or method by which it can accommodate Sea-Land's proposals and at the same time carry out its statutory duty to oversee the validity of general rate increases. The proposals would simply leave the Commission in the position of being unable to review, and make reasoned decisions with respect to, these rate increases within the required statutory time frame.

CONCLUSION

The record of this proceeding does not demonstrate any legal or factual basis upon which the Commission could properly adopt the proposals under consideration.

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

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[5] The level of competition in the U.S.-Puerto Rico/Virgin Islands trades is offered as a reason for reducing or eliminating existing rate regulation. While the Commission recognizes the competitive realities of this trade it must also be recognized that Congress was aware of the extent of such competition when if formulated the 1978 amendments to the ISA which established the substance of the present regulatory approach. *See* S. Rep. No. 1240, 95th Cong., 2d Sess. 2–3 (1978).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1102

APPLICATION OF UNITED STATES ATLANTIC & GULF-JAMAICA AND HISPANIOLA STEAMSHIP FREIGHT ASSOCIATION AND SEA-LAND SERVICE, INC. FOR THE BENEFIT OF UNITED BRANDS FOR CHIQUITA INTERNATIONAL TRADING CO.

ORDER DENYING PETITION FOR RECONSIDERATION

October 12, 1984

On June 15, 1984, the Commission served an Order Partially Adopting Initial Decision in this proceeding 26 F.M.C. 605 (1984). The Order affirmed the Initial Decision's grant of permission to Sea-Land Service, Inc, (Sea-Land), as a member of the United States Atlantic and Gulf/Jamaica and Hispaniola Steamship Freight Association (the Freight Association), to refund freight charges on certain shipments of pineapple pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)). However, we reversed the Initial Decision to the extent it permitted such refunds on shipments that occurred more than 180 days prior to the filing of Sea-Land's application, because section 18(b)(3) explicitly requires that an application for refund or waiver of freight charges "must be filed within one hundred and eighty days from the date of shipment."

Sea-Land and the Freight Association filed on July 16, 1984 a Petition for Reconsideration of the Commission's Order. The Petition alleges errors of fact and law by the Commission.[1] The arguments of law have primary importance, concerning as they do the extent of our "special docket" jurisdiction under section 18(b)(3).

The Commission is well aware that *Nepera Chemical Inc. v. FMC*, 662 F.2d 18 (D.C. Cir. 1981) (*Nepera*), instructs us to administer the provisions of section 18(b)(3) with the goal of effectuating, whenever possible, the statute's remedial purposes. *Nepera* holds that the corrective tariff that is one of the statute's four jurisdictional requirements need not state with mathematical exactitude the refund or waiver rate, so long as it fairly reflects the original intentions of the carrier and the shipper. The Petition would have the Commission apply a similar liberal construction of the jurisdictional requirement at issue here. However, unlike the statutory language involved in *Nepera*—"the rate upon which such refund or waiver

[1] To the extent the Petition alleges errors of law, it is subject to summary rejection. Rule 261 of the Commission's Rules of Practice and Procedure governing petitions for reconsideration, 46 C.F.R. §502.261, does not permit such allegations. *Filing of Petitions for Reconsideration and Stay*, 22 F.M.C. 351 (1979). However, the Commission will waive the requirements of Rule 261 and consider the Petition on its merits.

would be based"—180 days is a precise term that is not amenable to a variety of interpretations.[2] The Congress had to choose a cut-off date beyond which the Commission would not be authorized to consider refund or waiver applications, in order to eliminate stale or dated claims. To a certain extent, such a date or time period will always be somewhat arbitrary and can lead to arbitrary results. Nevertheless, Congress has expressed its will by specifying a deadline of 180 days and the Commission does not believe the holding or rationale of *Nepera* would support a result in this case that evades or ignores that requirement.[3]

The Petition contends that a "waiver" of the 180-day requirement is supported by *Pacific Westbound Conference for the Benefit of Minnesota Mining & Manufacturing Co., 21 S.R.R. 793 (1982) and Pacific Westbound Conference for the Benefit of Mitsui and Co. (U.S.A.), Inc.*, 25 F.M.C. 350, 21 S.R.R. 1275 (1982). To the extent those decisions conflict in part with the result in this case, they are overruled. Finally, the "factual error" alleged by the Petition, *i.e.*, that there may have been other shippers shipping pineapple before the 180-day deadline who would benefit from an extension of that deadline, is actually dependent upon a favorable resolution of the legal issue, *i.e.*, that the Commission has the power to grant such an extension. However, the Commission has concluded that we have no such power.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration is hereby denied.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[2] It should be noted that, while the Commission in other cases has calculated the 180 days liberally in order to grant relief to shippers, *e.g., Sea-Land Service, Inc. for the Benefit of G.F. Tujague, Inc.*, 22 S.R.R. 619 (1984), there is no dispute or uncertainty over that calculation here.

[3] Even if it is assumed *arguendo* that *Nepera* does apply to the 180-day requirement, that would not change the result here. If Sea-Land's application had involved shipments that had departed only one or two days beyond the deadline and if the carrier had furnished a satisfactory explanation why its application had been delayed, a Commission order granting the application as it applied to such shipments might be consistent with *Nepera*. But the facts in this case are quite different. Sea-Land's application was filed on November 9, 1983. The 180-day perlod mandated by section 18(b)(3) extended back to May 13, 1983. Of the 38 shipments of pineapple listed on the application, only five that sailed on May 14 were within the deadline. The other shipments were dated May 7, April 30 and April 9, 1983, *i.e.*, 186, 193 and 214 days before the filing of the carrier's application. Granting the application as it applies to those shipments would stretch the 180-day requirement beyond recognition, particularly where the carrier has furnished no explanation why the filing of its application was delayed for so long (Sea-Land and the other members of the Freight Association corrected the erroneous rate on May 5, 1983 and the new rate took effect ten days later).

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–48

ALASKA MARITIME AGENCIES, INC., ET AL.

v.

PORT OF ANACORTES, ET AL.

NOTICE

October 15, 1984

Notice is given that no exceptions have been filed to the September 4, 1984, 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. 83–48
ALASKA MARITIME AGENCIES, INC., ET AL.

v.

PORT OF ANACORTES, ET AL.

F. Conger Fawcett for complainants.

Frederick L. Shreves, II for port of Hueneme, Port of Long Beach, Port of Los Angeles, Port of Oakland, Port of Richmond, Port of San Diego, Port of San Francisco, and Encinal Terminals, respondents.

John W. Angus, III for Port of Anacortes, Port of Astoria, Port of Bellingham, Port of Everett, Port of Grays Harbor, Port of Longview, Port of Olympia, Port of Port Angeles, Port of Portland, Port of Seattle, Port of Tacoma, and Port of Vancouver, respondents.

Perrin Love for the Port of Anchorage, respondent.

Edward J. Sheppard, IV for Port of Sacramento, respondent.

Dennis Lindsay for Bunge Corporation, Cargill, Inc., Columbia Grain, Inc., Continental Grain Company, and United Grain Corporation, respondents.

W. Martin Tellegan for the Port of Benicia, respondent.

David E. Schricker for the Port of Redwood City, respondent.

Bruce H. Jackson for the Port of Stockton, respondent.

Cyrus C. Guidry for the Board of Commissioners of the Port of New Orleans, intervenor.

Carl S. Parker, Jr., for the Board of Trustees of the Galveston Wharves, intervenor.

J. Alton Boyer for the Association of Ship Brokers and Agents (U.S.A.), Inc., intervenor.

Aaron W. Reese, as Hearing Counsel, intervenor.

INITIAL DECISION[1] AND ORDER APPROVING SETTLEMENT OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized October 15, 1984

This proceeding began as a complaint initially filed by twenty-four steamship agencies against thirty-two public or quasi-public port and terminal facilities located on the West Coast of the United States.[2] The complaint

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

[2] The complainants named were Alaska Maritime Agencies, Inc.; Cascade Shipping Co.; Dodwell of Washington; Fred F. Noonan Company, Inc.; Freighters Company; Fritz Maritime Agencies; General Steamship Corporation, Ltd.; Green Ocean Agencies; Hapag-Lloyd Agencies; International Shipping Company, Inc.; Interocean Steamship Corporation; Kerr Steamship Company, Inc.; Lilly Shipping Agencies; Matson Agencies, Inc.; Monitor Steamship Agency, Inc.; Murphy Shipping Co., Inc., North Star Terminal & Stevedoring Co.; Norton, Lilly & Co., Olympic Steamship Company, Inc.; Seaspray Steamship Agency, Inc.; Sunrise Shipping Agency, Inc.; Transmarine Navigation Corporation; Transpacific Transportation Company; and Williams, Dimond & Co.

alleges that, "the Respondents' tariff provisions and practices . . . purporting to hold agents liable, as principals, for port/terminal charges" constituted a violation of sections 16 and 17 of the Shipping Act, 1916. It also alleges that section 15 of the Shipping Act was violated because the "Respondents' tariff provisions and practices . . . (were) adopted and enforced by collective action . . . (which) operate to the detriment of the commerce of the United States (and) are contrary to public policy and therefore contrary to the public interest. . . . " (Parentheses supplied.) In the Answer to the Complaint all of the respondents denied that there was any violation of sections 15, 16 and 17 of the Shipping Act, 1916, and the case proceeded with initial discovery requests. There were also several petitions to intervene which were acted upon.[3]

Due to the number of parties involved as well as the number of counsel, this proceeding was well monitored from its inception and several prehearing conferences were held. Through the efforts of the parties and their counsel it become apparent early that there was a possible basis of settlement, and that the settlement should be explored before large expenditures of time and money were made in discovery. Several meetings were held and ultimately all of the parties generally agreed to settlement of these cases on the following basis:

(1) The tariffs involved will be rewritten and filed in accordance with the agreements made between the parties, upon final approval by the Commission.

(2) On the effective date of the tariffs the Complainants will file a motion to withdraw the complaints and dismiss this proceeding, with prejudice, in accordance with the terms of the settlement agreement.

(3) If in good faith, after using its best efforts to implement and operate under the provisions of the agreements any party wishes to withdraw and cancel the agreement, as to that party only, it may do so upon 60 days written notice delivered by certified mail to all parties.

In our view the agreements here should be approved. In essence, the parties, rather than elect the long and costly legal process that might be

The respondents named were Port of Anacortes; Port of Anchorage; Port of Astoria; Port of Bellingham; Benicia Port Terminal Co.; Port of Everett; Port of Greys Harbor; Hueneme, Port of Oxnard Harbor; Port of Long Beach; Port of Longview; Port of Los Angeles; Port of Oakland; Port of Olympia; Port of Port Angeles; Port of Portland; Port of Redwood City; Port of Richmond; Port of Sacramento; Port of San Diego; Port of San Francisco; Port of Seattle; Port of Stockton; Port of Tacoma; Port of Vancouver (Washington); Encinal Terminals; Bunge Grain Terminal; Cargill, Incorporated; Columbia Grain, Inc.; Continental Grain Company; Los Angeles Harbor Grain Terminal; Stockton Elevators; and United Grain Corporation.

[3] Petitions to Intervene were filed by Hearing Counsel; the Port of New Orleans; Galveston Wharves; and the Association of Shipbrokers and Agents. All the petitions were acted upon in various ways as disclosed in the record. Their disposition is not material to this Decision and Order.

involved,[4] have first chosen to be innovative by filing new tariffs. While there is no assurance that the provisions in the new tariffs will resolve all the issues involved, it is our view that if the parties approach the problems which might arise reasonably and in good faith, where they have control over each set of circumstances, the results may be much better than they would be under some inflexible, legal "rule of thumb." Whatever the ultimate result we compliment all the parties and their counsel in this proceeding for their effort in effecting a viable settlement of which we approve. Wherefore, it is,

Ordered, that the agreements entered into by the parties are hereby approved and, after final Commission approval, shall be implemented within the time periods set forth in the agreements themselves.[5] It is,

Further Ordered, that the record does not now indicate that there are either any issues remaining in this proceeding that need to be decided or that any party desires any further trial. Therefore, there is no need to set down a date for hearing. Should any party disagree, he is hereby ordered to file a trial brief no later than September 17, 1984, indicating the precise issue to be tried, the law upon which he relies, the number and identity of witnesses, the estimated time the trial will take, and any other matter he deems pertinent. If any further trial is necessary it will not affect or delay the approval of the settlements herein involved.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[4] At the time of settlement the parties to the proceeding had changed due to various circumstances. There were then twenty-six complainants and thirty-two respondents. Beaufort Navigation, Inc. and Overseas Shipping Company were added to the original complainants. Of the original respondents, Stockton Elevators is no longer in business under that name and has been taken over by one of the five remaining grain elevators who have agreed to this settlement. Los Angeles Harbor Grain Terminal never appeared in the proceeding and since the complainants will withdraw their complaint as to all respondents, their absence as a party in settlement is immaterial.

[5] Each of the agreements is made a part of this Initial Decision and Order Approving Settlement by reference. Copies of the agreements are attached to those copies of this Decision and Order which are being distributed to the Commission. Those copies of this Decision and Order which are being served on the parties do not have copies of the agreements attached since they are already in the possession of the parties and/or are part of the public record of this proceeding.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–14

FIL-AMERICAN TRADING CO., INC.

v.

THE MAERSK LINE STEAMSHIP COMPANY

NOTICE

October 17, 1984

Notice is given that no exceptions have been filed to the September 11, 1984, 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

NO. 84–14

FIL-AMERICAN TRADING CO., INC.

v.

THE MAERSK LINE STEAMSHIP COMPANY

Complainant did not comply with the provisions of tariff Rule 36 of the Pacific Westbound Conference Local and Overland Freight Tariff No. FMC–23 so cannot take advantage of the tariff unitization allowance.

The Statute of Limitations set forth in section 22 of the Shipping Act, 1916, cannot and should not be waived.

Claims for damages with respect to shipments dated prior to March 26, 1982, unless payment of freight charges brings the claim into good standing, are barred by the two year statute of limitations of the Shipping Act, 1916.

Complainant's willingness to re-evaluate its claim as well as restate it comes too late. The litigation should come to an end.

Complainant cannot recover from respondent on the basis of a moral obligation—it is not recognized by the law as adequate to set in motion the machinery of justice.

Robert V. LoForti, President, Fil-American Trading Co., Inc., for Complainant.

Karen S. Ostrow and *Marc J. Fink,* Billig, Sher & Jones, P.C., for Respondent.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Finalized October 17, 1984

This complaint case was brought by the Fil-American Trading Co., Inc., against the Maersk Line Steamship Company alleging that the Fil-American Trading Co., Inc., has been subjected to the payment of rates for transportation by the respondent which were, when exacted, unjust and unreasonable in violation of section 18(b)(3) of the Shipping Act, 1916.

The complainant asserts the failure of Maersk Line to class shipments per the Unitized Rule during the period ending August 5, 1983, has resulted in overcharges. The complainant alleges that he has been damaged in the sum of $10,256.15 and seeks reparation of that sum or such other sum as the Commission may determine to be proper. He seeks also an order commanding the respondent to cease and desist from the alleged violations of the Act and to establish and put in force and apply in future such other rates as the Commission may determine to be lawful. In addition,

[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).

the complainant asks the Commission to waive the two-year Statute of Limitations.

Respondent, in its answer and affirmative defense to the complaint, filed May 14, 1984, denied the averments of the complaint, except admitted that it was subject to the Act and that the Unitized Rule was not applied, and pointed out the complainant had failed to attach the bills of lading.

BACKGROUND

The complaint in this case, on the stationery of Fil-American Trading Co., Inc., dated February 15, 1984, was received in the Office of the Secretary of this Commission on February 21, 1984. Under date of March 5, 1984, the Secretary sent the following:

Mr. Robert V. LoForti

> Returned herewith is your complaint against Maersk Line Steamship Company. The following defects are noted:
>
> (1) The complaint should be submitted in an original and 15 copies.
>
> (2) A $50.00 filing fee should accompany the complaint.
>
> (3) Many of the overcharge claims are clearly barred by the two-year statute of limitations; this limitation cannot be waived.
>
> In addition, it would be to your advantage to explain more fully the nature of the complaint. The mere allegation set forth in Paragraph IV does not fully outline the violation alleged against the carrier.

The complaint, with addendums to Paragraph IV, was received in the Office of the Secretary March 26, 1984. On April 9, 1984, the complaint was served upon the respondent Maersk Line Steamship Company. Notice of the filing of the complaint and assignment of the Presiding Administrative Law Judge was served April 11, 1984, published in the *Federal Register*, Vol. 49, No. 75, Tuesday, April 17, 1984, page 15134.

The Commission's Office of Energy and Environmental Impact, under date of April 24, 1984, issued a categorical exclusion for this Docket No. 84–14, having examined the subject proceedings and determined that no environmental analysis need be undertaken nor environmental documents prepared in connection with this docket.

Attorney Ostrow telephoned the Presiding Administrative Law Judge on April 24, 1984, and advised she had just been retained by respondent, wanted enlargement of time to answer complaint. She was directed to put request in writing.

On April 24, 1984, the respondent, through its counsel, filed a motion for an enlargement of time of three weeks from April 30, 1984 to May 21, 1984, in which to file its response to the complaint. By notice served April 25, 1984, the time for filing a response to the complaint was extended from April 30, 1984 to May 14, 1984.

Respondent Maersk Line's Answer and Affirmative Defense was filed May 14, 1984. At the same time the respondent filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. Said motion was denied May 31, 1984, because the hearing which will be represented in writing had not been received and there was still the possibility of amendment of the pleadings.

By notice served May 15, 1984, a prehearing conference was announced pursuant to Rule 94 of the Commission's Rules of Practice and Procedure, 46 CFR 502.94 to be held on Tuesday, June 12, 1984, in Washington, D.C. In a letter dated May 23, 1984 (received May 29, 1984), the complainant stated, among other things, that regretfully, the company has neither the personnel nor the resources to permit attending either a prehearing conference or a formal hearing in Washington, and requested that any hearings be conducted in San Francisco. The prehearing conference scheduled for June 12, 1984, was cancelled by notice served May 31, 1984.

Upon review of the record herein up to above noted points, the Presiding Administrative Law Judge *found* and *concluded* and served notice May 31, 1984, that this proceeding can and should be conducted without oral testimony and cross-examination. The procedural schedule to be followed enunciated: Complainant's case to be submitted in writing on or before June 22, 1984; respondent to submit its case in opposition on or before July 16, 1984; the complainant to submit its closing brief on or before July 26, 1984.

Complainant telephoned the Presiding Administrative Law Judge on June 5, 1984, requesting an extension of time—he was directed that he put the request in writing.

In a letter dated June 5, 1984, the complainant requested a week's extension to June 29, 1984, to submit its case in writing.

Complainant's case in writing dated June 19, 1984, received June 20, 1984.

Respondent's attorney telephoned the President Administrative Law Judge on July 10, 1984, requesting extension of time to write brief. She was instructed to reduce the request to writing. Respondent, on July 10, 1984, filed a motion for enlargement of time of two weeks, from July 16 to July 30, 1984, in which to reply to complainant's reply to respondent's motion to dismiss. This motion was denied as the respondent's motion to dismiss had been denied by notice served May 31, 1984 (reiterated in notice served July 11, 1984). In the notice served July 11, 1984, each party was granted additional time because of apparent misunderstanding, as follows: Respondent to submit its case in opposition to complainant's case on or before July 23, 1984; complainant to submit its closing brief on or before August 3, 1984.

In a letter dated July 16, 1984 (received July 19, 1984), the complainant wrote among other things, he did not understand "closing brief." Answer

to this procedural query was supplied by the Presiding Administrative Law Judge served July 20, 1984.

Respondent filed Opposition to Complainant's Claim for Overcharges July 23, 1984.

Complainant in a letter dated July 26, 1984 (received July 30, 1984), made its last pleading in the case, stating, among other things, "Fil-American Trading Co., Inc., readily concedes that the Bills of Lading submitted in support of our claim were not prepared properly for (the then) application of the Unitized Rule. This was error."

The July 26, 1984, letter of complainant also stated, "This is a restatement of our case, and we again call to your attention that we deem Maersk Line morally responsible to have discovered this error, rather than ourselves."

From exhibits, together with all papers and requests filed in this proceeding, the Presiding Administrative Law Judge finds the following:

Facts

The complaint is an exporter of books and magazines from San Francisco, California, to Bangkok, Thailand.

The respondent is a common carrier by water, engaged in transportation between San Francisco and Bangkok, and as such is subject to the provisions of the Shipping Act, 1916, as amended (admitted by respondent in its answer to the complaint).

The Conference's Unitized Rule was not applied. (Complaint and Answer to Complaint; Complainant wrote in his letter of July 26, 1984 "Fil-American Trading Co., Inc. readily concedes that the Bills of Lading submitted in support of our claim were not prepared properly for (the then) application of the Unitized Rule.")

Discussion, Reasons, Findings and Conclusions

The complaint filed in this case contains a prayer that the Commission will waive the two-year State of Limitations. The respondent in its Answer denied that the Statute of Limitations set forth in section 22 of the Shipping Act, 1916, can or should be waived. And, respondent added as an affirmative defense the complaint is barred by the Statute of Limitations set forth in section 22 of the Shipping Act, 1916.

Respondent's opposition to claim for overcharges (received July 23, 1984) points out that the complaint herein was filed March 26, 1984. Accordingly, any claim for damages with respect to shipments dated prior to March 26, 1982, is barred and must be denied. (The Presiding Judge adds, unless payments is later and precludes the tolling of the statute.) In support of its position the respondent cites *Fiat-Allis France Materiels* v. *Atlantic Container Line,* Docket No. 79–64, 22 F.M.C. 544 (1980), which states that under the Shipping Act, 1916, the statute of limitations is "jurisdic-

tional." Failure to comply with section 22 leaves the Commission without power to order a respondent to pay reparation. And, to show the statute of limitations is tolled only by a filing of the complaint with the Commission, cites *Kelco, Division of Merck & Co.* v. *Johnson ScanStar,* Docket No. 80–73, 23 F.M.C. 849 (1981).

The complainant, other than making the prayer in the complaint that the Commission waive the two-year statute of limitations set forth in section 22 of the Shipping Act, 1916, apparently has accepted that the prayer cannot be granted. The Presiding Administrative Law Judge agrees with and accepts the position of the respondent. Any shipments not paid for subsequent to March 26, 1982, are barred by the statute of limitations under the two-year statute of limitations of the Shipping act, 1916.

Among matters stated in the complainant's letter of June 19, 1984, is, "Enclosed please find copies of all the bills of lading applicable to our complaint against Maersk Line. Each one bears our notation of payment, by date and check number."

The bills of lading submitted with the June 19, 1984, letter total 103.

The latter also says, "All of these bills of lading are listed by date and number on a separate sheet, noting the quantity of skids. These are then regrouped by date, at prevailing rates, with the applicable quantity of skids, multiplied by .189M3, and then totaled. This constitutes the overcharge . . . In order to prove our claim, we are submitting 2 examples of bills of lading, after corrections had been made . . . we are attempting to offer proof of our claim, by contrasting overcharged bills of lading with one referring to the unitized rule.

Respondent in its opposition to claim for overcharges filed July 23, 1984, argues that the complainant has submitted two bills of lading which pertain to shipments subsequent to the period for which it is claiming overcharges. Since the unitization allowance was applied to those shipments, Fil-American apparently believes that these documents support its claim. The complainant is clearly mistaken in this regard however. Indeed those bills prove that no unitization allowance should be applied to the shipments herein at issue.

Respondent says further, in order to take advantage of the unitization allowance (or discount) a shipper is obligated to comply with the provisions of Tariff Rule 36 of the Pacific Westbound Conference Local and Overland Freight Tariff No. FMC–23; that Fil-American did not comply with the provisions of Rule 36.

The respondent further asserts, even if Rule 36 did not preclude recovery herein, it is quite clear that Fil-American has erroneously calculated any alleged overcharges, pointing out that Rule 36.5 provides that the actual weight or measurement of the pallet (as defined in this Rule) shall be excluded when computing freight charges and terminal receiving charges, but such exclusion shall not exceed ten percent (10%) of the total gross weight (when cargo is freighted on a weight basis) or the total gross

measurement of the unit (when cargo is freighted on a measurement basis). Fil-American totally disregarded this 10% cap in calculating its claim for overcharges.

As examples, the respondent referred to Bills of Lading Nos.:

	No. of skids	10% of Total Meas.	No. of Skids x .189
SFO–F–60930 dated July 8, 1983	2	.2469	.378
SFO–F–61401 dated July 15, 1983	2	.2710	.378
SFO–F–62051 dated July 30, 1983	2	.2993	.378

Respondent says that in all three instances, the measurement of the pallets in the shipment (2 pallets x .189 = .378) exceeds 10% of the measurement of the shipment. Pursuant to Rule 36.5 the allowance in each of those instances would be limited to that 10% cap. Thus, says the respondent, the complainant has grossly misstated the amount of any overcharges.

Fil-American in its July 26, 1984, letter states it is willing and able to re-evaluate the claim; and also readily concedes that the Bills of Lading submitted in support of its claim were not prepared properly for (the then) application of the Unitized Rule. This was error.

Complainant is too late to make further amendments to its complaint or restate its case. It cannot be allowed because it would be unfair to the respondent and would ignore that litigation after a reasonable time should be completed. That is the situation here. The Presiding Administrative Law Judge, upon review of Rule 36 of Tariff No. FMC–23 and the record herein *finds* and *concludes* that the respondent's position is well taken and adopts it.

In an addendum to Paragraph IV of the complaint the complainant wrote, "It is presumed that an established and experienced carrier, such as Maersk Line, was aware that shipments were being delivered incorrectly classed, and therefore had the obligation to cause corrections to be instituted. This was not done. This failure on the part of Maersk Line is the direct cause of the overcharges, payments for which, Maersk Line accepted right along."

Fil-American claimed in its letter of June 19, 1984, "This company has been a loyal client of Maersk Line for over thirty years, and has delivered skids for shipment in proper form for application of the unitized rule for many years . . . Maersk Line is under as much obligation to correct overcharges as undercharges. We find it difficult to envision that the line would accept a bill of lading with the application of the unitized rule, if the skids were not in proper condition." And, in its letter of July 26, 1984, the complainant submitted that, ". . . Maersk Line accepted the incorrectly classed skids over a long period of time without initiating any corrective or suggestive measures . . . We deem Maersk Line morally responsible to have discovered this error, rather than ourselves."

The 103 bills of lading submitted by the complainant contain the name of the forwarding agent, and on each bill of lading the forwarding agent is the same. Query, does the claimant deem that forwarding agent to have any responsibility or as much responsibility as complainant would place on the respondent in such a situation as here presented?

A moral obligation has been defined as a duty which one owes, and which he ought to perform, but which he is not legally bound to fulfill. *Black's Law Dictionary* defines moral obligation as "a duty which is valid and binding in conscience and according to natural justice, but is not recognized by the law as adequate to set in motion the machinery of justice; that is, one which rests upon ethical considerations alone, and is not imposed or enforced by positive law. A duty which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability." Thus, it is clear that the complainant cannot be served by the claim of moral obligation.

Fil-American in its July 26, 1984 letter announced it is willing and able to re-evaluate the claim applying 10% reduction or reduction on the basis of .189M3 as pertinent. And, called its July 26, 1984 letter a restatement of its case. However, it did not change its basic case. Today, amendments to complaints are rather freely permitted. Complainant did amend the complaint once, but further amendment under the circumstances is not to be entertained.

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes*, in addition to the *findings* and *conclusions* hereinabove, that the complainant has not proved by a preponderence of the evidence that he should recover in this case.

Wherefore, it is *ordered*:

(A) Recovery is denied.

(B) Proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–50

JACKSONVILLE MARITIME ASSOCIATION, INC., AMOCO TRANSPORT COMPANY, AND McGIFFIN & COMPANY, INC.

v.

THE CITY OF JACKSONVILLE

ORDER DISMISSING COMPLAINT

October 31, 1984

By complaint filed against the City of Jacksonville, Florida (Respondent), Jacksonville Maritime Association, Inc., Amoco Transport Company, and McGiffin & Company, Inc. (Complainants) alleged that the establishment of an ordinance providing for a "User Fee" on vessels anchored in storage on the Saint John's River and the assessment of that Fee on five tankers laid up in storage in the Saint John's River violated section 17 of the Shipping Act, 1916 (the Act), 46 U.S.C. § 816.[1] The Commission's Bureau of Hearing Counsel, Delta Steamship Lines, Inc., Trailer Marine Transport Corporation, and Crowley Towing and Transportation Co., intervened in the proceeding.

Administrative Law Judge Charles E. Morgan issued an Initial Decision in which he dismissed the complaint with respect to the five tankers, but retained jurisdiction over the Respondent under sections 1 and 17 of the Act until Respondent amended its "User Fee" ordinance to preclude its application on common carriers by water anchored in the river while engaged in the transportation of property.

The proceeding is before the Commission on Exceptions of Hearing Counsel.

BACKGROUND

Five tankers, the AMOCO MILFORD HAVEN—owned by Complainant Amoco Transport Company, Inc., the OLYMPIC GATE, the OLYMPIC GAMES, the OLYMPIC GRACE, and the OLYMPIC DESTINY—the owners of which were represented by Complainant McGiffin & Company, were

[1] Section 17 provides in relevant part that:

> [E]very other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property . . . . 46 U.S.C. § 816.

The Shipping Act of 1984 (46 U.S.C. app. § 1701) generally superseded the Shipping Act, 1916 (46 U.S.C. § 801), as it applies to the ocean foreign commerce. Section 10(d)(1) of the 1984 Act (46 U.S.C. app. § *1709(d)(1)*) contains substantially the same provisions as section 17 of the 1916 Act.

anchored and resting on the bottom in ballast in the Saint John's River from about December 3, 1981 through December 15, 1983.

In May 1982, Respondent enacted an ordinance providing for the assessment of a "User Fee" on vessels of more than 100 feet primarily used for the transportation of goods and passengers, anchored in storage in the Saint John's River for more than 48 hours. Excluded are ships anchored for repairs or being repaired at a shipyard. The fee amounts to fifty cents per foot per day with a maximum charge of two hundred and fifty dollars per day. A fine of five hundred dollars per day is provided for non-payment after collection is attempted.[2] Respondent collected approximately five hundred thousand dollars in User Fees from the owners of the five tankers in question.

The Jacksonville Maritime Association, Inc., and others challenged the reasonableness of the ordinance in a civil action filed in the United States District Court for the Middle District of Florida. The Court deferred the matter to the primary jurisdiction of the Commission and dismissed the case without prejudice.[3] Thereupon, on October 13, 1983, Complainants filed their complaint with the Commission.

DISCUSSION

The threshold issue to be determined in this proceeding is whether Respondent, the City of Jacksonville, through its "User Fee" ordinance, is furnishing terminal facilities to common carriers by water so as to be subject to regulation as an "other person" subject to the Act within the meaning of section 1 thereof. Section 1 defines the term "other person" as "any person not included in the term 'common carrier by water,' carrying on the business of . . . furnishing . . . terminal facilities in connection with a common carrier by water." 46 U.S.C. § 801.

No party to this proceeding argues that anchorage in the river is of itself a terminal operation, or that the lay-up of vessels in the river is the form of storage recognized to be a terminal facility.[4] The Commission has by rule defined a "terminal facility" as:

> . . . one or more structures comprising a terminal unit, and include . . . wharves, warehouses, covered and/or open storage-spaces, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for

[2] Ordinance No. 82-419-162 amending Chapter 310, Ordinance Code of the City of Jacksonville, effective May 19, 1982.

[3] *Jacksonville Maritime Association, Inc., et al. v. City of Jacksonville*, 551 F.Supp. 1130 (M.D. Fla. 1982). Complainants also filed suit in the Circuit Court of Duval County, Florida, challenging the ordinance as an invalid tax under the laws of the State of Florida.

[4] Furnishing of warehouse "or other terminal facility" has been described as:

> [receipt of] custody of property from a common carrier by water or its agent after unloading at a dock or pier, and keeping custody thereof within the geographic confines of an ocean terminal facility, such as a warehouse adjacent to the dock or pier, until custody of the property is relinquished to an inland carrier or to the consignee. *Investigation of Storage Practices*, 6 F.M.B. 301 at 313-314. (1961).

> the transmission, care and convenience of cargo and/or passengers in the interchange of the same between land and water carriers or between two water carriers. 46 C.F.R. § 515.6.[5]

The Presiding Officer based his finding of jurisdiction over the Respondent on the premise that the language of the ordinance was susceptible of being interpreted to include common carriers by water anchored in the river in the regular course of their business of receiving or delivering property at terminal facilities. This conclusion was reached by a strict construction of the ordinance requiring that any ambiguity be construed against the drafter.

However, the ordinance appears to be more specific than given credit by the Presiding Officer. Although it does not specifically exclude from its coverage common carriers anchored in the river while awaiting servicing at a terminal facility, the User Fee is applicable not to every vessel anchored in the river for more than 48 hours but only those "anchored in storage." Unless the plain meaning produces unreasonable results, ordinary words ought to be given their conventional meaning, especially when such interpretation reflects the stated purpose of the statute or ordinance involved. In its ordinary meaning the term "anchored in storage" refers to vessels laid-up and out of navigation rather than to ships actively engaged in the transportation of property. This interpretation reflects the stated purpose of the ordinance here, that is, discouraging the laying-up of vessels in storage in the Saint John's River.

Moreover, there also is no evidence showing that Respondent used the ordinance as a means of controlling access to terminal facilities. Intervenors Delta Steamship Lines, Inc., Trailer Marine Transport Corporation, and Crowley Towing and Transportation Co. concede that none of their vessels which called at the Port of Jacksonville was assessed the User Fee. Further, it is noted that the penalty for failure to pay the "User Fee" is a fine, and not a prohibition against the use of the port's terminal facilities.[6] This would distinguish the "User Fee" here from the matter at issue in *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal District*, 25 F.M.C. 59 (1982), a decision relied upon by both Complainants and Intervenors.[7]

Therefore, there is no evidence to support a conclusion that Respondent is furnishing terminal facilities in connection with common carriers by water engaged in the transportation of property within the meaning of section 1 of the Act, and, consequently, no basis on this record for asserting

[5] *See also* 46 C.F.R. 572.104(o).

[6] The authority to collect the fee is conferred upon the City of Jacksonville's Parking Officer, rather than upon the Jacksonville Port Authority.

[7] In the *Louis Dreyfus Corp.* decision, the Commission held that an entity which conditions access to terminal facilities upon the payment of a fee is itself deemed to be furnishing terminal facilities.

jurisdiction over the City of Jacksonville.[8] The complaint in this proceeding will therefore be dismissed for lack of jurisdiction.

THEREFORE, IT IS ORDERED, That the complaint filed in this proceeding is dismissed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[8] Subsequent to the Commission's meeting of October 3, 1984 in this matter, the City of Jacksonville by letter dated October 2, 1984, submitted a copy of Ordinance 84-994-503 which makes the User Fee inapplicable to common carriers "engaged in the normal course of business of receiving or delivering commercial cargoes at terminal facilities of the Port of Jacksonville." This removes any doubt as to the present intended scope of Respondent's "User Fee" ordinance.

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 500–505]

DOCKET NO. 84–20 FOR PART 505

FINAL RULES IN SUBCHAPTER A GENERAL AND ADMINISTRATIVE PROVISIONS

November 5, 1984

ACTION: Final Rules.

SUMMARY: The Federal Maritime Commission is making substantive changes to its standards of conduct for employees in Part 500 and in section 502.32 and purely technical, non-substantive changes to the rest of Subchapter A involving general and administrative rules of the agency. The parts affected by this rulemaking are Part 500 [Employee Responsibilities and Conduct]; Part 501 [Official Seal]; Part 502 [Rules of Practice and Procedure]; Part 503 [Public Information]; Part 504 [Procedures for Environmental Policy Analysis]; and Part 505 [Compromise, Assessment and Settlement of Civil Penalties]. The new Part 505 finalizes a previously published proposed rule. Except for Part 507, a new proposed rule involving handicapped persons employed by the agency, and which will not become final until 1985, the revision of all of Subchapter A is now completed.

DATE: Effective December 6, 1984.

SUPPLEMENTARY INFORMATION:

Revisions to all of Subchapter A were previously made by publication of a final rule on April 23, 1984 [49 FR 16994] and a proposed rule completely revising Part 505 [compromise of penalties] was published on May 3, 1984 [49 FR 18874] with a correction on June 1, 1984 [49 FR 22837].

In addition to making necessary, substantive changes to Part 500 [standards of conduct], as well as to parallel provisions in section 502.32, and finalizing the proposed rule on Part 505, a further review of all regulations in conjunction with the passage of the Shipping Act of 1984 on March 20, 1984, has revealed the necessity for further technical changes. These rules, therefore, finalize all of subchapter A under the revision program, i.e., Parts 500–505, inclusive, and are being set forth here in their entirety. [New Part 507, now a proposed rule dealing with handicapped employees, will become final in 1985.]

Accordingly, extensive changes in form beyond those made in the previous final rules are being made to improve style, readability and understandability. No changes in substance, however, are included, except in Part 500 and its counterpart in section 502.32. Because most of the parts affected involve purely internal agency matters and/or the changes are merely technical or stylistic, the rules are promulgated as final, without the need for comments, although their effective date will be 30 days after publication in the *Federal Register*.

The technical and style changes to all the rules reflect changes in nomenclature and Commission organization, correction of typographical errors and removal of superfluous verbiage. Outdated and obsolete provisions have also been deleted. To assist the user, various subdivisions of sections have been restructured and renumbered to facilitate citation. Also changed, where feasible, are citations to other laws required by recodifications and other statutory changes; references to the obsolete General Order system; "Provided, howevers"; and gender specific terms.

A part-by-part analysis of other changes follows:

PART 500

EMPLOYEE RESPONSIBILITIES AND CONDUCT

The revisions to Part 500 are being made in order to clarify the Commission's general Standards of Conduct. Prior to this revision, the Commission's regulations reflected almost word for word the language used in President Johnson's Executive Order 11222 of May 8, 1965 and the implementing regulations of the Office of Personnel Management at 5 CFR Part 735. The precise application of some of these regulations to the Commission has not always been clear. Thus, this revision constitutes a clarification of existing policy, and, in some respects, substantive changes. It also implements certain requirements of the Ethics in Government Act.

The revisions of Part 500 are deemed necessary in order to ensure the integrity of the agency and its individual employees, to conform to the spirit of the Executive Order, and to provide maximum guidance to Commission employees.

PART 501

OFFICIAL SEAL OF THE FEDERAL MARITIME COMMISSION

The only changes made to this part are statutory citations to reflect changes in law.

PART 502

RULES OF PRACTICE AND PROCEDURE

The major changes to this part reflect the changes to Part 500 involving practice by former Commission employees before the F.M.C. in section 502.32 which tracks the new restrictions in section 500.12, as well as

structural changes to, among others, Subparts S and T, to accommodate the policy of the Shipping Act of 1984 to allow claims or complaints against any person who may have violated the provisions of the new statute.

Otherwise, changes to this part clarify existing regulations, as well as, reflect new provisions of the Shipping Act of 1984 and style and technical changes referred to above. Some forms have been revised to reflect some of the changes in procedure occasioned by the Shipping Act of 1984.

PART 503

PUBLIC INFORMATION

In addition to style and technical changes described above, section 503.91, containing a table of OMB control numbers under the Paperwork Reduction Act for all parts in Chapter IV, is being deleted because such numbers will now appear in the final section for each, individual part affected.

PART 504 [PREVIOUSLY PART 547]

PROCEDURES FOR ENVIRONMENTAL POLICY ANALYSIS

In this part, no changes other than technical and style changes described above are being made.

PART 505

COMPROMISE, ASSESSMENT, SETTLEMENT AND COLLECTION OF CIVIL PENALTIES

This part was the subject of proposed rulemaking in Docket No. 84–20, published in the *Federal Register* on May 3, 1984 (49 FR 18874) with comments invited. The only comment received was from the National Maritime Council which stated that the proposed rule, if finalized, "* * * should allow a more expeditious and fair handling of penalty claims." Accordingly, no substantive changes are being made. A note has been added at the end of the rule indicating that the part is not subject to review by the Office of Management and Budget under the Paperwork Reduction Act.

The Federal Maritime Commission has determined that these rules are not "major rules" as defined in Executive Order 12291 dated February 17, 1981, because none of them will result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies that none of these rules will have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of subjects in Subchapter A, "General and Administrative Provisions":

46 CFR Part 500
Conduct standards; Government employees.

46 CFR Part 501
Seals and insignias.

46 CFR Part 502
Administrative practice and procedure; Reporting and recordkeeping requirements.

46 CFR Part 503
Classified information; Freedom of Information; Privacy; Sunshine Act.

46 CFR Part 504
Energy conservation; Environmental protection; Reporting and recordkeeping requirements.

46 CFR Part 505
Fines and penalties.

CORRECTIONS

These final rules are subject to review and editing of form before publication in the Code of Federal Regulations. Users are requested to notify the Commission of any omissions and typographical-type errors in order that corrections can be made before the Commission's CFR book goes to press in January, 1985.

Therefore, for the reasons discussed in the preamble and pursuant to the authority set forth in the Authority Citation for each part, Title 46, Code of Federal Regulations, Parts 500, 501, 502, 503, 504 and 505 are revised to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 500]

EMPLOYEE RESPONSIBILITIES AND CONDUCT

SUBPART A—GENERAL PROVISIONS

Sec.
500.101 Purpose.
500.102 Definitions.
500.103 [Reserved.]
500.104 [Reserved.]
500.105 Interpretation and advisory service.
500.106 Reviewing statements and reporting conflicts of interest.
500.107 Disciplinary and other remedial action.
500.108 Conflicts of interest.
500.109 Rereading the Standards of Conduct.

SUBPART B—GENERAL STANDARDS OF CONDUCT

500.201 Proscribed actions.
500.202 Gifts, entertainment, and favors.
500.203 Outside employment and other activity.
500.204 Financial interests.
500.205 Use of Government property.
500.206 Misuse of information.
500.207 Indebtedness.
500.208 Gambling, betting, and lotteries.
500.209 General conduct prejudicial to the Government.
500.210 Miscellaneous statutory provisions.
500.211 Release of confidential or nonpublic information.
500.212 Post employment conflict of interest; restriction of activities of certain Federal employees; procedures.

SUBPART C—SPECIAL GOVERNMENT EMPLOYEES STANDARDS OF CONDUCT

500.301 Application to special Government employees.
500.302 Special Government employees—Use of Government employment.
500.303 Special Government employees—Use of inside information.
500.304 Special Government employees—Coercion.
500.305 Special Government employees—Gifts.

SUBPART D—STATEMENTS OF EMPLOYMENT AND FINANCIAL INTERESTS; EXECUTIVE PERSONNEL FINANCIAL DISCLOSURE REPORTS

Sec.
500.401 [Reserved.]
500.402 [Reserved.]
500.403 Persons required to submit Statements of Employment and Financial Interests.
500.404 [Reserved.]
500.405 Time and place for submission of Statements of Employment and Financial Interests.
500.406 Annual Statements and Termination Reports.
500.407 Interests to be reported in Statements of Financial Interests and Annual Statements.
500.408 Information not known by the person reporting
500.409 Information exempted.
500.410 Confidentiality of Statements.
500.411 Conduct, employment or holdings otherwise prohibited and reporting otherwise required by law.
500.412 Executive Personnel Financial Disclosure Reports (SF 278).

AUTHORITY: 46 U.S.C. app. 1111; 18 U.S.C. 207, 208; 5 CFR Part 735; E.O. 11222 of May 8, 1965, 30 FR 6469, (3 CFR, 1965 Supp.).

SUBPART A—GENERAL PROVISIONS

§ 500.101 Purpose.

The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by Government employees and special Government employees is essential to assure the proper performance of the Government business and the maintenance of confidence by citizens in their Government. The avoidance of misconduct and conflicts of interest on the part of Government employees and special Government employees through informed judgment is indispensable to the maintenance of these standards. Reorganization Plan No. 7 of 1961, which established the Federal Maritime Commission, and section 201(b) of the Merchant Marine Act of 1936 (46 U.S.C. app. 1111(b)), provide that officials or employees of the Commission are prohibited from employment with, or to have any pecuniary interest in, or hold any official relationship with, carriers by water, shipbuilder contractors, or other persons, firms, associations or corporations with whom the Commission may have business relations. The following sections of this part are in accordance with the requirements of the Office of Personnel Management's regulations (5 CFR Part 735) under Executive Order 11222, dated May 8, 1965.

§ 500.102 Definitions.

For the purposes of this part:

(a) "*Commission*" means the Federal Maritime Commission unless otherwise designated.

(b) "*Employee*" means an employee of the Commission but does not include a special Government employee.

(c) "*Executive Order*" means Executive Order 11222 of May 8, 1965.

(d) "*OPM*" means the United States Office of Personnel Management.

(e) "*Person*" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, a foreign government or any other organization or institution.

(f) "*Special Government employee*" means a "special Government employee" as defined in section 202 of Title 18, United States Code, who is employed in the executive branch, but does not include a member of the uniformed services as defined in section 2101 of Title 5, United States Code.

§ 500.103 [Reserved.]

§ 500.104 [Reserved.]

§ 500.105 Interpretation and advisory service.

(a) The Chairman of the Commission shall designate an employee with the appropriate legal experience and in whom he or she has complete personal confidence to be the Counselor for the Commission on matters in connection with the regulations in this part. The Counselor shall also serve as the Commission's designee to OPM on matters covered by the regulations in this part. The Counselor shall exercise responsibility for effectuation and coordination of the Commission's regulations and provide counseling and interpretations on questions of conflicts of interest and other matters covered by the regulations in this part.

(b) The Chairman of the Commission shall designate one or more Deputy Counselors who shall be qualified and in a position to give authoritative advice and guidance on questions of conflicts of interest and on other matters covered by this part.

(c) Employees and special Government employees shall be notified of the availability of counseling services and of how and where these services are available. This notification shall be made within ninety (90) days after approval of the regulations in this part and periodically thereafter. In the case of a new employee or special Government employee appointed after this notification, notification shall be made at the time of his or her entrance on duty.

§ 500.106 Reviewing statements and reporting conflicts of interest.

(a) There is hereby established a system for the review of Statements of Employment and Financial Interests, Annual Statements, and Executive Personnel Financial Disclosure Reports submitted under Subpart D of this part. This system of review is designed to disclose conflicts of interest or apparent conflicts of interest on the part of employees or special Government employees.

(b) The Counselor or Deputy Counselor shall review each such Statement and Report. Whenever it appears to the Counselor that a Statement or Report contains evidence of a conflict of interest, he or she shall notify the person signing that statement and shall discuss with him or her the information which gives rise to the apparent or real conflict and offer him or her an opportunity to explain the conflict or appearance of conflict. If the conflict or appearance of conflict is not resolved after this discussion, the information concerning the conflict or appearance of conflict shall be reported to the Chairman of the Commission by the Counselor.

§ 500.107 Disciplinary and other remedial action.

(a) A violation of the regulations in this part by an employee or special Government employee may be cause for an appropriate disciplinary action which may be in addition to any penalty prescribed by law.

(b) If after consideration of the explanation of the employee as provided in § 500.106, and the Chairman decides that remedial action is required, the Chairman shall take immediate action to end the conflicts or appearance of conflicts of interest. Remedial action, whether disciplinary or otherwise, shall be effected in accordance with any applicable laws, executive orders, and regulations and may include, but is not limited to:

(1) Changes in assigned duties;

(2) Divestment by the employee or special Government employee of his or her conflicting interest;

(3) Disciplinary action; or

(4) Disqualification for a particular assignment.

§ 500.108 Conflicts of interest.

A Commission employee's or special Government employee's financial or pecuniary interest in an entity regulated by the Commission [such as, e.g., ocean common carriers, ocean freight forwarders and marine terminal operators (including their parent companies)], shall be deemed to create a conflict of interest. A Commission employee or special Government employee shall also be deemed to have a conflict of interest if a member of his or her immediate household is employed by an entity regulated by the Commission and his or her professional duties or assignments relate to or involve that family member's employer.

§ 500.109 Rereading the Standards of Conduct.

It is the responsibility of every Commission employee and special Government employee to become familiar with the Commission's Standards of Conduct and to reread them at least once a year.

SUBPART B—GENERAL STANDARDS OF CONDUCT

§ 500.201 Proscribed actions.

An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government.

§ 500.202 Gifts, entertainment, and favors.

(a) Except as provided in paragraphs (b) and (e) of this section, an employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with the Commission;

(2) Conducts operations or activities that are regulated by the Commission; or

(3) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duty.

(b) Exceptions to paragraph (a) of this section are as follows:

(1) This section shall not be construed to proscribe conduct involving obvious family or personal relationships (such as those between the parents, children, or spouse of the employee and the employee) when the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors.

(2) Under this section, Commission employees are permitted to accept food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where an employee may properly be in attendance.

(3) Under this section, employees are permitted to accept loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans.

(4) Under this section employees shall be permitted to accept unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars and other items of nominal intrinsic value.

(c) An employee shall not solicit contributions from another employee for a gift to an official superior, make a donation as a gift to an official supervisor, or accept a gift from an employee receiving less pay than himself or herself (5 U.S.C. 7351), except that this paragraph does not prohibit the use of a completely voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness, or retirement.

(d) An employee shall not accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided by the Constitution and by section 7342 of Title 5, United States Code.

(e) Neither this section or § 500.203 precludes an employee from receipt of bona fide reimbursement, unless prohibited by law, for expenses of

travel and such other necessary subsistence as is compatible with this part for which no Government payment or reimbursement is made. However, this paragraph does not allow an employee to be reimbursed, or payment to be made on his behalf, for excessive personal living expenses, gifts, entertainment or other personal benefits, nor does it allow an employee to be reimbursed by a person for travel on official business under agency orders when reimbursement is proscribed by Decision B–128527 of the Comptroller General, dated March 7, 1967 (46 Comp. Gen. 689).

§ 500.203 Outside employment and other activity.

(a) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his or her Government employment. Incompatible activities include but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expenses, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest; or

(2) Outside employment which tends to impair the employee's mental or physical capacity to perform his or her Government duties and responsibilities in an acceptable manner.

(b) An employee shall not receive any salary or anything of monetary value from a private source as compensation for his or her services to the Government (18 U.S.C. 209). This paragraph does not apply to special Government employees.

(c) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, the Executive Order, or the regulations in this part. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, and writing (including teaching, lecturing, or writing for the purpose of the special preparation of a person or class of persons for an examination of OPM or Board of Examiners for the Foreign Service), that is dependent on information obtained as a result of the employee's Government employment, except when that information has been made available to the general public or will be made available on request, or when the Chairman gives written authorization for the use of nonpublic information on the basis that the use is in the public interest. In addition, an employee who is a Presidential appointee covered by section 401(a) of the Executive Order shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance, the subject matter of which is devoted substantially to the responsibilities, programs, or operations of the Commission, or which draws substantially on official data or ideas which have not become part of the body of public information.

(d) [Reserved]

(e) This section does not preclude an employee from:

(1) Participation in the activities of national or State political parties not proscribed by law; or

(2) Participation in the affairs of or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service, or civic organization.

§ 500.204 Financial interests.

(a) An employee shall not:

(1) Have a direct or indirect financial interest in an entity regulated by the Commission as set forth in § 500.108;

(2) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his or her Government duties and responsibilities; or

(3) Engage in, directly or indirectly, a financial transaction as a result of, or primarily relying on, information obtained through his or her Government employment.

(b) This section does not preclude an employee from having a financial interest or engaging in financial transactions to the same extent as a private citizen not employed by the Government, so long as it is not prohibited by law, the Executive Order, the regulations contained in 5 CFR Part 735, or the regulations in this part.

§ 500.205 Use of Government property.

An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. An employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him or her.

§ 500.206 Misuse of information.

For the purpose of furthering a private interest, an employee shall not, except as provided in § 500.203(c), directly or indirectly use, or allow the use of, official information obtained through or in connection with his or her Government employment which has not been made available to the general public.

§ 500.207 Indebtedness.

An employee shall pay each just financial obligation in a proper and timely manner, especially one imposed by law such as Federal, State, or local taxes. For the purpose of this section, a "just financial obligation" means one acknowledged by the employee, or reduced to judgment by a court, or one imposed by law, such as Federal, State or local taxes; and "in a proper and timely manner" means in a manner which the Commission determines does not, under the circumstances, reflect adversely on the Government as his or her employer. In the event of dispute between an employee and an alleged creditor, this section does not require the Commission to determine the validity or amount of the disputed debt.

§ 500.208 Gambling, betting, and lotteries.

An employee shall not participate, while on Government-owned or leased property or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket. However, this section does not preclude activities:

(a) Necessitated by an employee's law enforcement duties; or

(b) Under section 3 of Executive Order 10927 or similar Commission approved activities.

§ 500.209 General conduct prejudicial to the Government.

An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

§ 500.210 Miscellaneous statutory provisions.

Each employee shall acquaint himself or herself with each statute that relates to his or her ethical and other conduct as an employee of this Commission and of the Government. The attention of Commission employees, is directed to the outside employment restriction in 46 U.S.C. app. 1111(b) and the following statutory provisions relating to ethical and other conduct.

(a) House Concurrent Resolution 175, 85th Congress, 2d Session, 72A Stat. B12 "Code of Ethics for Government Service."

(b) Chapter 11 of title 18, United States Code, relating to bribery, graft, and conflicts of interest, as appropriate to the employees concerned.

(c) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(d) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(e) The prohibition against the employment of a member of a Communist organization (50 U.S.C. 784).

(f) The prohibition against (1) the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and (2) the disclosure of confidential information (18 U.S.C. 1905).

(g) The provision relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(h) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

(i) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(j) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(k) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(l) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(m) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(n) The prohibition against (1) embezzlement of Government money or property (18 U.S.C. 641); (2) failing to account for public money (18 U.S.C. 643); and (3) embezzlement of the money or property of another person in the possession of an employee by reason of his or her employment (18 U.S.C. 654).

(o) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(p) The prohibition against certain political activities in Subchapter III of Chapter 73 of Title 5 U.S.C., and 18 U.S.C. 602, 603, 607, and 608.

(q) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

§ 500.211 Release of confidential or nonpublic information.

An employee shall not divulge to any unauthorized person any nonpublic or confidential Commission document or information, including the results of portions of Commission meetings closed to the public pursuant to 46 CFR 503, Subpart H, and comments made, information divulged or memoranda prepared incidental to such closed meetings, except pursuant to the procedure of 5 U.S.C. 552, 552a and 552b and 46 CFR 503 or as specifically directed by the Commission. Employees are also reminded of the provisions of §§ 555.5 and 555.6 of this Chapter, which relate to confidentiality of information obtained in the course of official Commission audits, and which provide for penalties for disclosure of confidential information.

§ 500.212 Post employment conflict of interest; restriction of activities of certain Federal employees; procedures.

Title V of the Ethics in Government Act proscribes certain activities by certain former federal employees (18 U.S.C. 207). The full text of the statute, OPM regulations and examples of how the restrictions and basic procedures apply are available from the Ethics Counselor. In summary, as applied to former Commission employees, the restrictions and basic procedures are as follows:

(a) *Restrictions.*

(1) No former Commission employee may represent in any formal or informal appearance or make any oral or written communication with intent to influence a U.S. Government agency in a particular matter involving a specific party or parties in which the employee participated personally and substantially while with the Commission.

(2) No former Commission employee may, within two years of terminating Commission employment, act as a representative in the manner described in paragraph (a) of this section, as to a particular matter which was actually pending under the employee's official responsibility within one year prior to termination of the employment.

(3) Former senior Commission employees (defined as Commissioners and members of the Senior Executive Service as designated by the Office of Government Ethics under 18 U.S.C. 207(d)(1)) may not, for two years after terminating Commission employment, assist in representing a person by personal presence at an appearance before the Government on a matter in which the former employee had participated personally and substantially while at the Commission.

(4) Former senior Commission employees, as defined in paragraph (c) of this section, are barred for one year from representing parties before the Commission or communicating with intent to influence the Commission, regardless of prior involvement in the particular proceeding.

(b) *Prior consent for appearance.*

(1) Prior to making any appearance, representation or communication described in paragraph (a) of this section, and, in addition to the requirements of Subpart B of the Commission's Rules of Practice (§§ 502.21–502.32 of this chapter), every former employee must apply for and obtain prior written consent of the Commission for each proceeding or matter in which such appearance, representation or communication is contemplated. Such consent will be given only if the Commission determines that the appearance, representation or communication is not prohibited by the Act, this section or other provisions of this chapter.

(2) To facilitate the Commission's determination that the intended activity is not prohibited, applications for written consent shall:

(i) Be directed to the Commission, state the former connection of the applicant with the Commission and date of termination of employment, and identify the matter in which the applicant desires to appear; and

(ii) Be accompanied by an affidavit to the effect that the matter for which consent is requested is not a matter in which the applicant participated personally and substantially while at the Commission and, as made applicable by paragraph (a) of this section, that the particular matter as to which consent is requested was not pending under the applicant's official responsibility within one year prior to termination of employment and that the matter was not one in which the former employee had participated personally and substantially while at the Commission. The statements contained in the affidavit shall not be sufficient if disproved by an examination of the files and records of the case.

(3) The applicant shall be promptly advised as to his or her privilege to appear, represent or communicate in the particular matter, and the application, affidavit and consent, or refusal to consent, shall be filed by the Commission in its records relative thereto.

(c) *Basic procedures for possible violations.* The following basic guidelines for administrative enforcement of restrictions on post employment activities are designed to expedite consultation with the Director of the Office of Government Ethics as required pursuant to section 207(j) of Title 18, United States Code.

(1) *Delegation.* The Chairman may delegate his or her authority under this subpart.

(2) *Initiation of administrative disciplinary hearing.*

(i) On receipt of information regarding a possible violation of 18 U.S.C. 207, and after determining that such information appears substantiated, the Chairman shall expeditiously provide such information, along with any comments or agency regulations, to the Director of the Office of Government Ethics and to the Criminal Division, Department of Justice. The Commission shall coordinate any investigation or administrative action with the Department of Justice to avoid prejudicing criminal proceedings, unless the Department of Justice communicates to the Commission that it does not intend to initiate criminal prosecution.

(ii) Whenever the Commission has determined after appropriate review that there is reasonable cause to believe that a former Commission employee has violated any provision of paragraph (a) of this section or 18 U.S.C. 207(a), (b), or (c), it may initiate an administrative disciplinary proceeding by providing the former Commission employee with notice as defined in paragraph (c)(3) of this section.

(3) *Adequate notice.*

(i) The Commission shall provide a former Commission employee with adequate notice of an intention to institute a proceeding and an opportunity for a hearing.

(ii) Notice to the former Commission employee must include:

(A) A statement of allegations (and the basis thereof) sufficiently detailed to enable the former Commission employee to prepare an adequate defense;

(B) Notification of the right to a hearing; and

(C) An explanation of the method by which a hearing may be requested.

(4) *Presiding official.*

(i) The presiding official at a proceeding under this section shall be an individual to whom the Chairman has delegated authority to make an initial decision (hereinafter referred to as "examiner").

(ii) The examiner must be a Commissioner (other than the Chairman), an administrative law judge, or an attorney employed by the Commission and shall be provided with appropriate administrative and secretarial support by the Commission.

(iii) The presiding official shall be impartial. No individual who has participated in any manner in the decision to initiate a proceeding may serve as an examiner in that proceeding.

(5) *Time, date and place.*

(i) The hearing shall be conducted at a reasonable time, date, and place.

(ii) In setting a hearing date, the presiding official shall give due regard to the former Commission employee's need for:

(A) Adequate time to prepare a defense properly, and

(B) An expeditious resolution of allegations that may be damaging to his or her reputation.

(6) *Hearing rights.* A hearing shall include, at a minimum, the following rights:

(i) To represent oneself or to be represented by counsel;

(ii) To introduce and examine witnesses and to submit physical evidence;

(iii) To confront and cross-examine adverse witnesses;

(iv) To present oral argument; and

(v) To receive a transcript or recording of the proceedings, on request.

(7) *Burden of proof.* In any hearing under this subpart, the Commission has the burden of proof and must establish substantial evidence of a violation.

(8) *Initial decision.*

(i) The examiner shall make a determination on matters exclusively of record in the proceeding, and shall set forth in the decision all findings of fact and conclusions of law relevant to the matters at issue.

(ii) Within a reasonable period of the date of an initial decision, as set by the Commission, either party may appeal the decision solely on the record to the Chairman. The Chairman shall base his or her decision solely on the record of the proceedings or those portions thereof cited by the parties to limit the issues.

(iii) If the Chairman modifies or reverses the initial decision, he or she shall specify such findings of fact and conclusions of law as are different from those of the examiner.

(9) *Administrative sanctions.* The Chairman may take appropriate action in the case of any individual who was found in violation of 18 U.S.C. 207 (a), (b), or (c) or the provisions of paragraph (a) of this section after a final administrative decision or who failed to request a hearing after receiving adequate notice, by:

(i) Prohibiting the individual from making, on behalf of any other person except the United States, any formal or informal appearance before, or, with the intent to influence, any oral or written communication to, the Commission on any matter of business for a period not to exceed five (5) years, which may be accomplished by directing Commission employees to refuse to participate in any such appearance or to accept any such communication; or

(ii) Taking other appropriate disciplinary action.

(10) *Judicial review.* Any person found to have participated in a violation of 18 U.S.C. 207 (a), (b), or (c) or the provisions of paragraph (a) of this section may seek judicial review of the administrative determination.

(11) *Consultation and review.* The procedures for administrative enforcement set forth in this section have been reviewed by the Director of the Office of Government Ethics.

SUBPART C—SPECIAL GOVERNMENT EMPLOYEES STANDARDS OF CONDUCT

§ 500.301 Application to special Government employees.

Unless specifically excepted by rule or by the Chairman of the Commission, the General Standards of Conduct contained in subpart B hereof (§§ 500.201 to 500.212), apply to special Government employees. Each special Government employee shall acquaint himself or herself with the General Standards, with each statute that relates to his or her ethical and other conduct as a special Government employee of the Commission and the Government, and with the following, minimum standards of this subpart governing the ethical and other conduct of special Government employees.

§ 500.302 Special Government employees—Use of Government employment.

A special Government employee shall not use his or her Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself, herself or another person, particularly one with whom he or she has family, business, or financial ties.

§ 500.303 Special Government employees—Use of inside information.

Except as provided in § 500.203(c), a special Government employee shall not use inside information obtained as a result of his or her Government employment for private gain for himself, herself or another person, either by direct action on his or her part or by counsel, recommendation, or suggestion to another person, particularly one with whom he or she has family, business or financial ties. For the purpose of this paragraph, "inside information" means information obtained under Government authority which has not become part of the body of the public information.

§ 500.304 Special Government employees—Coercion.

A special Government employee shall not use his or her Government employment to coerce, or give the appearance of coercing, a person to provide financial benefit to himself, herself or another person, particularly one with whom he or she has family, business, or financial ties.

§ 500.305 Special Government employees—Gifts.

Except as provided in § 500.203(b), a special Government employee, while so employed or in connection with his or her employment, shall not receive or solicit from a person having business with the Commission, anything of value as a gift, gratuity, loan, entertainment, or favor for himself, herself or another person, particularly one with whom he or she has family, business, or financial ties.

SUBPART D—STATEMENTS OF EMPLOYMENT AND FINANCIAL INTERESTS; EXECUTIVE PERSONNEL FINANCIAL DISCLOSURE REPORTS.

§ 500.401 [Reserved.]

§ 500.402 [Reserved.]

§ 500.403 Persons required to submit Statement of Employment and Financial Interests.

(a) The Chairman, the Commissioners, and all employees and special Government employees of the Commission, without exception, shall file Statements of Employment and Financial Interests and Annual Statements.

(b) Any employee or special Government employee who thinks his or her position has been improperly included under these regulations as one requiring the submission of a Statement of Employment and Financial Interests and Annual Statements is entitled to a review of this determination.

§ 500.404 [Reserved.]

§ 500.405 Time and place for submission of Statements of Employment and Financial Interests.

All Statements of Employment and Financial Interests shall be submitted to the Counselor designated under § 500.105 within thirty (30) days of the effective date of the employee's appointment, except that special Government employees shall submit such Statements on or prior to the effective date of their appointment.

§ 500.406 Annual Statements and Termination Reports.

(a) Changes in, or additions to, employment and financial interests shall be reported in an Annual Statement to be filed no later than May 15 of each year, the reporting period being the previous calendar year, except that special Government employees shall submit such Annual Statements no later than fifteen (15) calendar days following any change in, or addition to, their employment or financial interests.

(b) Notwithstanding the filing of the Annual Statement required by this section, each employee and special Government employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflict-of-interest provisions of section 208 of Title 18, United States Code, or Subpart B of this part.

(c) A Termination Report must also be filed upon an employee's termination of employment, the reporting period being the time which has not been covered by the previous initial or supplementary statement.

§ 500.407 Interests to be reported in Statements of Financial Interests and Annual Statements.

Each Statement of Employment and Financial Interests and each Annual Statement shall include all the employment and financial interests of the person reporting, as well as all employment and financial interests of such person's spouse, minor child, or other member of the immediate household. For the purpose of this section, "members of the immediate household"

means those blood relatives of the person reporting who are residents of the person's household. With respect to each position or financial interest reported in the Statement of Employment and Financial Interests and the Annual Statements, the person reporting shall specify whether such position or financial interest is held by (a) the person reporting, (b) the spouse, (c) a minor child, or (d) a blood relative residing in the household.

§ 500.408 Information not known by the person reporting.

If any information required to be included in a Statement of Employment and Financial Interests or an Annual Statement, including holdings placed in trust, is not known to the person reporting, but is known to another person, the person reporting shall request such other person to submit information on his or her behalf.

§ 500.409 Information exempted.

The regulations in this subpart do not require a person to submit any information in an Annual Statement of Employment and Financial Interests or in an Annual Statement relating to any connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization not conducted as a business enterprise. For the purpose of this section, education and other institutions doing research and development or related work involving grants of money from, or contracts with, the Government are deemed "business enterprises" and are required to be included in a person's Statement of Employment and Financial Interests and in the Annual Statement.

§ 500.410 Confidentiality of Statements.

The Commission shall hold each Statement of Employment and Financial Interests, and each Annual Statement, in the strictest confidence. The Commission shall not disclose any information contained in such Statements, except as provided by law. To ensure confidentiality, the Counselor authorized in § 500.105 to retain and review the Statements, shall be the sole custodian of the Statements and shall not disclose or authorize disclosure of information contained therein, except to carry out the purposes of this part.

§ 500.411 Conduct, employment or holdings otherwise prohibited and reporting otherwise required by law.

The submission of a Statement of Employment and Financial Interests or Annual Statement, as required by this subpart, does not in any way excuse the person submitting such Statement, from violations of the criminal provisions of section 208 of Title 18, United States Code, the provisions of section 201(b) of the Merchant Marine Act, 1936, (46 U.S.C. 1111(b)) or the provisions of Subpart B of this Part. Moreover, the submission of any such Statement is in addition to, and not in substitution for, or in derogation of, any similar reporting requirement imposed by law, order, or regulation.

§ 500.412 Executive Personnel Financial Disclosure Reports (SF 278).

(a) *Background.* The Ethics in Government Act of 1978 (P.L. 95–521) (the "Act") prescribes a public financial disclosure reporting requirement for certain officers and employees in addition to other requirements of this subpart. The requirements and procedures are set forth in detail in the Act as well as in implementing regulations of the Office of Government Ethics (5 CFR Part 734). This section will not reiterate these detailed requirements nor the instructions for filing that are contained in the Executive Personnel Financial Disclosure Report (SF 278).

(b) *Employees Required to File.* The following Commission employees are required to file the Executive Personnel Financial Disclosure Report:

(1) The five Commissioners;

(2) Officers and employees (including special Government employees) who have served in their position for sixty-one (61) days or more during the preceding calendar year, whose positions are classified and paid at GS–16 or above of the General Schedule, or whose basic rate of pay under other pay schedules is equal to or greater than the rate for GS–16. This category includes employees of the Senior Executive Service as designated by the Office of Government Ethics under 18 U.S.C. 207(d)(1).

(3) Officers or employees in any other position determined by the Director of the Office of Government Ethics to be of equal classification to GS–16;

(4) Administrative law judges;

(5) Employees in the excepted service in positions which are of a confidential or policymaking character including confidential assistants to the Commissioners, unless their positions have been excluded by the Director of the Office of Government Ethics;

(6) The Designated Agency Ethics Counselor.

(c) *Time of Filing.*

(1) Initial appointment—Within five (5) days after transmittal by the President to the Senate of the nomination to a position described in paragraph (b)(1) of this section or within thirty (30) days after first assuming a position described in paragraphs (b)(2), (b)(3), (b)(4), (b)(5), or (b)(6) of this section, a SF 278 must be filed.

(2) Incumbents. No later than May 15 annually, a SF 278 must be filed by incumbents of any of the positions listed in Paragraph (b) of this section.

(3) Terminations. No later than thirty (30) days after an incumbent of a position listed in Paragraph (b) of this section terminates that position, the individual shall file a SF 278.

(d) *Place of Filing.* All reports required to be filed by this section shall be submitted on or before the due date to the designated Agency Ethics Counselor.

(e) *Where to Seek Help.* To seek assistance in completing the Executive Personnel Financial Disclosure Report, an employee may contact the Commission Ethics Counselor or the Deputy Ethics Counselor.

(f) *Failure to Submit Report.* Falsification of, or knowing or willful failure to file or report information required to be reported by section 202 of the Act may subject the individual to a civil penalty and to internal disciplinary action, as well as criminal penalties under 18 U.S.C. 1001.

FEDERAL MARITIME COMMISSION

[46 CFR PART 501]

OFFICIAL SEAL OF THE FEDERAL MARITIME COMMISSION

Sec.
501.1 Purpose.
501.2 Description.
501.3 Design.

AUTHORITY: 46 U.S.C. app. 1111 and 1114; Reorganization Plan No. 7 of 1961, 26 FR 7315, August 12, 1961.

§ 501.1 Purpose.

To prescribe and give notice of the official seal of the Federal Maritime Commission.

§ 501.2 Description.

(a) Pursuant to section 201(c) of the Merchant Marine Act, 1936, as amended (46 U.S.C. app. 1111(c)), the Federal Maritime Commission hereby prescribes its official seal, as adopted by the Commission on August 14, 1961, the design of which is illustrated below and described as follows:

(1) A shield argent paly of six gules, a chief azure charged with a fouled anchor or; shield and anchor outlined of the third; on a wreath argent and gules, an eagle displayed proper; all on a gold disc within a blue border, encircled by a gold rope outlined in blue, and bearing in white letters the inscription "Federal Maritime Commission" in upper portion and "1961" in lower portion.

(2) The shield and eagle above it are associated with the United States of America and denote the national scope of maritime affairs. The outer rope and fouled anchor are symbolic of seamen and waterborne transportation. The date "1961" has historical significance, indicating the year in which the Federal Maritime Commission was created.

§ 501.3 Design.

FEDERAL MARITIME COMMISSION

[46 CFR PART 502]
RULES OF PRACTICE AND PROCEDURE

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AUTHORITY: 5 U.S.C. 552, 553, 559; 18 U.S.C. 207; secs. 18, 20, 22, 27 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 817, 820, 821, 826, 841(a)); secs. 6, 8, 9, 10, 11, 12, 14, 15, 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1705, 1707–1711, 1713–1716); sec. 204(b) of the Merchant Marine Act, 1936 (46 U.S.C. app. 1114(b)); and E.O. 11222 of May 8, 1965 (30 FR 6469).

SUBPART A—GENERAL INFORMATION

§ 502.1 Scope of rules in this part.

The rules in this part govern procedure before the Federal Maritime Commission, hereinafter referred to as the "Commission," under the Shipping Act, 1916, Merchant Marine Act, 1920, Intercoastal Shipping Act, 1933, Merchant Marine Act, 1936, Shipping Act of 1984, Administrative Procedure Act, and related acts, except that Subpart R of this part does not apply to proceedings subject to sections 7 and 8 of the Administrative Procedure Act, which are to be governed only by Subparts A to Q inclusive, of this part. They shall be construed to secure the just, speedy, and inexpensive determination of every proceeding. [Rule 1.]

§ 502.2 Mailing address; hours; filing of documents.

(a) Documents required to be filed in, and correspondence relating to, proceedings governed by this part should be addressed to "Federal Maritime Commission, Washington, D.C. 20573." The hours of the Commission are from 8:30 a.m. to 5 p.m., Monday to Friday, inclusive, unless otherwise provided by statute or executive order.

(b) Documents relating to matters pending before the Commission are to be filed with the Office of the Secretary, unless otherwise required by § 502.118(b)(4), in the case of exhibits in formal proceedings. Pleadings, correspondence or other documents relating to pending matters should not be submitted to the offices of individual Commissioners. Distribution to Commissioners and other agency personnel is handled by the Office of the Secretary, to ensure that persons in decision-making and advisory positions receive in a uniform and impersonal manner identical copies of submissions, and to avoid the possibility of ex parte communications within the meaning of § 502.11(b). These considerations apply to informal and oral communications as well, such as requests for expedited consideration. [Rule 2.]

§ 502.3 Compliance with rules or orders of Commission.

Persons named in a rule or order shall notify the Commission during business hours on or before the day on which such rule or order becomes effective whether they have complied therewith, and if so, the manner in which compliance has been made. If a change in rates is required, the notification shall specify the tariffs which effect the changes. [Rule 3.]

§ 502.4 Authentication of rules or orders of Commission.

All rules or orders issued by the Commission, in any proceeding covered by this part shall, unless otherwise specifically provided, be signed and authenticated by seal by the Secretary of the Commission in the name of the Commission. [Rule 4.]

§ 502.5 [Reserved.]

§ 502.6 [Reserved.]

§ 502.7 Documents in foreign languages.

Every document, exhibit, or other paper written in a language other than English and filed with the Commission or offered in evidence in any proceeding before the Commission under this part or in response to any rule or order of the Commission pursuant to this part, shall be filed or offered in the language in which it is written and shall be accompanied by an English translation thereof duly verified under oath to be an accurate translation. [Rule 7.]

§ 502.8 Denial of applications and notice thereof.

Except in affirming a prior denial or where the denial is self-explanatory, prompt written notice will be given of the denial in whole or in part of any written application, petition, or other request made in connection with any proceeding under this part, such notice to be accompanied by a simple statement of procedural or other grounds for the denial, and of any other or further administrative remedies or recourse applicant may have where the denial is based on procedural grounds. [Rule 8.]

§ 502.9 Suspension, amendment, etc., of rules in this part.

The rules in this part may, from time to time, be suspended, amended, or revoked, in whole or in part. Notice of any such action will be published in the *Federal Register*. [Rule 9.]

§ 502.10 Waiver of rules in this part.

Except to the extent that such waiver would be inconsistent with any statute, any of the rules in this part, except § 502.11 and § 502.153, may be waived by the Commission or the presiding officer in any particular case to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires. [Rule 10.]

§ 502.11 Disposition of improperly filed documents and ex parte communications.

(a) *Documents not conforming to rules.* Any pleading, document, writing or other paper submitted for filing which is rejected because it does not conform to the rules in this part shall be returned to the sender;

(b) *Ex parte communications.*

(1) No person who is a party to or an agent of a party to any proceeding as defined in § 502.61 or who directly participates in any such proceeding and no interested person outside the Commission shall make or knowingly cause to be made to any Commission member, administrative law judge, or Commission employee who is or may reasonably be expected to be involved in the decisional process of any such proceeding, an ex parte communication relevant to the merits of the proceedings;

(2) No Commission member, administrative law judge, or Commission employee who is or may reasonably be expected to be involved in the decisional process of any agency proceeding, shall make or knowingly cause to be made to any interested person outside the Commission or to any party to the proceeding or its agent or to any direct participant in a proceeding, an ex parte communication relevant to the merits of the proceeding. This prohibition shall not be construed to prevent any action authorized by paragraphs (b)(5), (b)(6) and (b)(7) of this section;

(3) "Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports or communications regarding purely procedural matters or matters which the Commission or member thereof, administrative law judge, or Commission employee is authorized by law or these rules to dispose of on an ex parte basis;

(4) Any Commission member, administrative law judge, or Commission employee who is or may reasonably be expected to be involved in the decisional process of any proceeding who receives, or who makes or knowingly causes to be made, an ex parte communication shall promptly transmit to the Secretary of the Commission:

(i) All such written communications;

(ii) Memoranda stating the substance of all such oral communications; and

(iii) All written responses and memoranda stating the substance of all oral responses to the materials described in paragraphs (b)(4)(i) and (b)(4)(ii) of this section;

(5) The Secretary shall place the materials described in subparagraph (4) of this paragraph in the correspondence part of the public docket of the proceeding and may take such other action as may be appropriate under the circumstances;

(6) Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party to a proceeding, the Commission or the presiding officer may, to the extent consistent with the interests of justice and the policy of the statutes administered by the Commission,

require the party to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the making of such communication;

(7) An ex parte communication shall not constitute a part of the record for decision. The Commission or the presiding officer may, to the extent consistent with the interests of justice and the policy of the statutes administered by the Commission, consider a violation of paragraph (b) of this section sufficient grounds for a decision adverse to a party who has knowingly caused such violation to occur and may take such other action as may be appropriate under the circumstances. [Rule 11.]

SUBPART B—APPEARANCE AND PRACTICE BEFORE THE COMMISSION

§ 502.21 Appearance.

(a) *Parties.* A party may appear in person or by an officer, partner, or regular employee of the party, or by or with counsel or other duly qualified representative, in any proceeding under the rules in this part. Any party or his or her representative may testify, produce and examine witnesses, and be heard upon brief and at oral argument if oral argument is granted.

(b) *Persons not parties.* One who appears in person before the Commission or a representative thereof, either by compulsion from, or request or permission of the Commission, shall be accorded the right to be accompanied, represented, and advised by counsel.

(c) *Special Requirement.* An appearance may be either general, that is, without reservation, or it may be special, that is, confined to a particular issue or question. If a person desires to appear specially, he or she must expressly so state when entering the appearance and, at that time, shall also state the questions or issues to which he or she is confining the appearance; otherwise, his or her appearance will be considered as general. [Rule 21.]

§ 502.22 Authority for representation.

Any individual acting in a representative capacity in any proceeding before the Commission may be required to show his or her authority to act in such capacity. [Rule 22.]

§ 502.23 Notice of appearance; written appearance; substitutions.

(a) Within twenty (20) days after service of an order or complaint instituting a proceeding, complainants, respondents, and/or petitioners named therein shall notify the Commission of the name(s) and address(es) of the person or persons who will represent them in the pending proceeding. Each person who appears at a hearing shall deliver a written notice of appearance to the reporter, stating for whom the appearance is made. All appearances shall be noted in the record. Petitions for leave to intervene shall indicate the name(s) and address(es) of the person or persons who

will represent the intervenor in the pending proceeding if the petition is granted. If an attorney or other representative of record is superseded, there shall be filed a stipulation of substitution signed both by the attorney(s) or representative(s) and by the party, or a written notice from the client to the Commission.

(b) A form of Notice of Appearance is set forth in Exhibit No. 1 to this subpart. This form also contains a request and authorization for counsel to be notified immediately of the service of decisions of the presiding officer and the Commission by collect telephone call or telegram. Copies of this form may be obtained from the Office of the Secretary. [Rule 23.]

§ 502.24 Practice before the Commission defined.

(a) Practice before the Commission shall be deemed to comprehend all matters connected with the presentation of any matter to the Commission, including the preparation and filing of necessary documents, and correspondence with and communications to the Commission, on one's own behalf or representing another. (See § 503.32).

(b) The term "Commission" as used in this subpart includes any bureau, division, office, branch, section, unit, or field office of the Federal Maritime Commission and any officer or employee of such bureau, division, office, branch, section, unit, or field office. [Rule 24.]

§ 502.25 Presiding officer defined.

"Presiding officer" means and shall include (a) any one or more of the members of the Commission (not including the Commission when sitting as such), (b) one or more administrative law judges or (c) one or more officers authorized by the Commission to conduct nonadjudicatory proceedings when duly designated to preside at such proceedings. (See Subpart J of this part.) [Rule 25.]

§ 502.26 Attorneys at law.

Attorneys at laws who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Commission. An attorney's own representation that he is such in good standing before any of the courts herein referred to will be sufficient proof thereof, if made in writing and filed with the Secretary. [Rule 26.]

§ 502.27 Persons not attorneys at law.

(a) Any person who is not an attorney at law may be admitted to practice before the Commission if he or she is a citizen of the United States and files proof to the satisfaction of the Commission that he or she possesses the necessary legal, technical, or other qualifications to render valuable service before the Commission and is otherwise competent to advise and assist in the presentation of matters before the Commission. Applications by persons not attorneys at law for admission to practice before the Commission shall be made on the forms prescribed therefor,

which may be obtained from the Secretary of the Commission, and shall be addressed to the Federal Maritime Commission, Washington, D.C. 20573, and shall be accompanied by a fee as required by §503.43(h) of this chapter.

(b) No person who is not a attorney at law and whose application has not been approved shall be permitted to practice before the Commission.

(c) Paragraph (b) of this section and the provisions of §§502.28, 502.29 and 502.30 shall not apply, however, to any person who appears before the Commission on his or her own behalf or on behalf of any corporation, partnership, or association of which he or she is a partner, officer, or regular employee. [Rule 27.]

§502.28 Firms and corporations.

Practice before the Commission by firms or corporations on behalf of others shall not be permitted. [Rule 28.]

§502.29 Hearings.

The Commission, in its discretion, may call upon the applicant for a full statement of the nature and extent of his or her qualifications. If the Commission is not satisfied as to the sufficiency of the applicant's qualifications, it will so notify him or her by registered mail, whereupon he or she shall be granted a hearing upon request for the purpose of showing his or her qualifications. If the applicant presents to the Commission no request for such hearing within twenty (20) days after receiving the notification above referred to, his or her application shall be acted upon without further notice. [Rule 29.]

§502.30 Suspension of disbarment.

The Commission may deny admission to, suspend, or disbar any person from practice before the Commission who it finds does not possess the requisite qualifications to represent others or is lacking in character, integrity, or proper professional conduct. Any person who has been admitted to practice before the Commission may be disbarred from such practice only after being afforded an opportunity to be heard. [Rule 30.]

§502.31 Statement of interest.

The Commission may call upon any practitioner for a full statement of the nature and extent of his or her interest in the subject matter presented by him or her before the Commission. [Rule 31.]

§502.32 Former employees.

Title V of the Ethics in Government Act proscribes certain activities by certain former federal employees (18 U.S.C. 207). In summary, as applied to former Commission employees, the restrictions and basic procedures are as follows:

(a) *Restrictions.*

(1) No former Commission employee may represent in any formal or informal appearance or make any oral or written communication with intent

to influence a U.S. Government agency in a particular matter involving a specific party or parties in which the employee participated personally and substantially while with the Commission.

(2) No former Commission employee may, within two years of terminating Commission employment, act as a representative in the manner described in paragraph (a)(1) of this section, as to a particular matter which was actually pending under the employee's official responsibility within one year prior to termination of the employment.

(3) Former senior Commission employees (defined as Commissioners and members of the Senior Executive Service as designated by the Office of Government Ethics under 18 U.S.C. 207(d)(1)) may not, for two years after terminating Commission employment, assist in representing a person by personal presence at an appearance before the Government on a matter in which the former employee had participated personally and substantially while at the Commission.

(4) Former senior Commission employees, as defined in paragraph (a)(3) of this section, are barred for one year from representing parties before the Commission or communicating with intent to influence the Commission, regardless of prior involvement in the particular proceeding.

(b) *Prior consent for appearance.*

(1) Prior to making any appearance, representation or communication described in paragraph (a) of this section, and, in addition to other requirements of this subpart, every former employee must apply for and obtain prior written consent of the Commission for each proceeding or matter in which such appearance, representation, or communication is contemplated. Such consent will be given only if the Commission determines that the appearance, representation or communication is not prohibited by the Act, this section or other provisions of this chapter.

(2) To facilitate the Commission's determination that the intended activity is not prohibited, applications for written consent shall:

(i) Be directed to the Commission, state the former connection of the applicant with the Commission and date of termination of employment, and identify the matter in which the applicant desires to appear; and

(ii) Be accompanied by an affidavit to the effect that the matter for which consent is requested is not a matter in which the applicant participated personally and substantially while at the Commission and, as made applicable by paragraph (a) of this section, that the particular matter as to which consent is requested was not pending under the applicant's official responsibility within one year prior to termination of employment and that the matter was not one in which the former employee had participated personally and substantially while at the Commission. The statements contained in the affidavit shall not be sufficient if disproved by an examination of the files and records of the case.

(3) The applicant shall be promptly advised as to his or her privilege to appear, represent or communicate in the particular matter, and the applica-

tion, affidavit and consent, or refusal to consent, shall be filed by the Commission in its records relative thereto.

(c) *Basic procedures for possible violations.* The following basic guidelines for administrative enforcement restrictions on post employment activities are designed to expedite consultation with the Director of the Office of Government Ethics as required pursuant to section 207(j) of Title 18, United States Code.

(1) *Delegation.* The Chairman may delegate his or her authority under this subpart.

(2) *Initiation of administrative disciplinary hearing.*

(i) On receipt of information regarding a possible violation of 18 U.S.C. 207, and after determining that such information appears substantiated, the Chairman shall expeditiously provide such information, along with any comments or agency regulations, to the Director of the Office of Government Ethics and to the Criminal Division, Department of Justice. The Commission shall coordinate any investigation or administrative action with the Department of Justice to avoid prejudicing criminal proceedings, unless the Department of Justice communicates to the Commission that it does not intend to initiate criminal prosecution.

(ii) Whenever the Commission has determined after appropriate review that there is reasonable cause to believe that a former Commission employee has violated any provision of paragraph (a) of this section or 18 U.S.C. 207(a), (b), or (c), it may initiate an administrative disciplinary proceeding by providing the former Commission employee with notice as defined in paragraph (c)(3) of this section.

(3) *Adequate notice.*

(i) The Commission shall provide a former Commission employee with adequate notice of an intention to institute a proceeding and an opportunity for a hearing.

(ii) Notice to the former Commission employee must include:

(A) A statement of allegations (and the basis thereof) sufficiently detailed to enable the former Commission employee to prepare an adequate defense;

(B) Notification of the right to a hearing; and

(C) An explanation of the method by which a hearing may be requested.

(4) *Presiding official.*

(i) The presiding official at a proceeding under this section shall be an individual to whom the Chairman has delegated authority to make an initial decision (hereinafter referred to as "examiner").

(ii) The examiner must be a Commissioner (other than the Chairman), an administrative law judge, or an attorney employed by the Commission and shall be provided with appropriate administrative and secretarial support by the Commission.

(iii) The presiding official shall be impartial. No individual who has participated in any manner in the decision to initiate a proceeding may serve as an examiner in that proceeding.

(5) *Time, date and place.*

(i) the hearing shall be conducted at a reasonable time, date and place.

(ii) In setting a hearing date, the presiding official shall give due regard to the former Commission employee's need for:

(A) Adequate time to prepare a defense properly, and

(B) An expeditious resolution of allegations that may be damaging to his or her reputation.

(6) *Hearing rights.* A hearing shall include, at a minimum, the following rights:

(i) To represent oneself or to be represented by counsel;

(ii) To introduce and examine witnesses and to submit physical evidence;

(iii) To confront and cross-examine adverse witnesses;

(iv) To receive a transcript or recording of the proceedings, on request.

(7) *Burden of proof.* In any hearing under this subpart, the Commission has the burden of proof and must establish substantial evidence of a violation.

(8) *Initial decision.*

(i) The examiner shall make a determination on matters exclusively of record in a proceeding, and shall set forth in the decision all findings of fact and conclusions of law relevant to the matters at issue.

(ii) Within a reasonable period of the date of an initial decision, as set by the Commission, either party may appeal the decision solely on the record to the Chairman. The Chairman shall base his or her decision solely on the record of the proceedings or those portions thereof cited by the parties to limit the issues.

(iii) If the Chairman modifies or reverses the initial decision, he or she shall specify such findings of fact and conclusions of law as are different from those of the examiner.

(9) *Administrative sanctions.* The Chairman may take appropriate action in the case of any individual who was found in violation of 18 U.S. 207 (a), (b), or (c) or the provisions of paragraph (a) of this section after a final administrative decision or who failed to request a hearing after receiving adequate notice, by:

(i) Prohibiting the individual from making, on behalf of any other person except the United States, any formal or informal appearance before, or, with the intent to influence, any oral or written communication to, the Commission on any matter of business for a period not to exceed five (5) years, which may be accomplished by directing Commission employees to refuse to participate in any such appearance or to accept any such communication; or

(ii) Taking other appropriate disciplinary action.

(10) *Judicial review.* Any person found to have participated in a violation of 18 U.S.C. 207 (a), (b), or (c) or the provisions of paragraph (a) of this section may seek judicial review of the administrative determination.

(11) *Consultation and review.* The procedures for administrative enforcement set forth in paragraphs (a), (b), and (c) of this section have been reviewed by the Director of the Office of Government Ethics.

(d) *Partners or associates.*

(1) In any case in which a former member, officer, or employee of the Commission is prohibited under this section from practicing, appearing, or representing anyone before the Commission in a particular Commission matter, any partner or legal or business associate of such former member, officer, or employee shall be prohibited from (i) utilizing the services of the disqualified former member, officer, or employee in connection with the matter, (ii) discussing the matter in any manner with the disqualified former member, officer, or employee, and (iii) sharing directly or indirectly with the disqualified former member, officer, or employee in any fees or revenues received for services rendered in connection with such matter.

(2) The Commission may require any practitioner or applicant to become a practitioner to file an affidavit to the effect that the practitioner or 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. [Rule 32.]

Exhibit No. 1 to Subpart B [§§ 502.23, 502.26, 502.27]

Notice of Appearance

FEDERAL MARITIME COMMISSION

Notice of Appearance

Docket No. _____: _____

Please enter my appearance in this proceeding as counsel for:

☐ I request to be informed by telephone or telegram of service of the administrative law judge's initial or recommended decision and of the Commission's decision in this proceeding. In the event I am not available when you call, appropriate advice left with my office will suffice.

Washington area: I understand I will be informed by telephone.
Outside Washington area: I authorize ☐ collect telephone call
☐ collect telegram

☐ I do not desire the above notice.

(S) _____
(Name)

_____
(Address)

_____
(Telephone No.)

NOTE.—Must be signed by attorney at law admitted to practice before the Federal Courts or before the courts of any State or Territory of the United States or by a person not an attorney at law who has been admitted to practice before the Commission or by a person appearing on his or her own behalf or on behalf of any corporation, partnership, or association of which he or she is a partner, officer, or regular employee.

SUBPART C—PARTIES

§ 502.41 Parties; how designated.

The term "party", whenever used in the rules in this part, shall include any natural person, corporation, association, firm, partnership, trustee, receiver, agency, public or private organization, or governmental agency. A party who seeks relief or other affirmative action under § 502.62 shall be designated as "complainant." A party against whom relief or other affirmative action is sought in any proceeding commenced under §§ 502.62, 502.66, or 502.67, or a party named in an order of investigation issued by the Commission, shall be designated as "respondent," except that in investigations instituted under section 15 of the Shipping Act, 1916 or section 11(c) of the Shipping Act of 1984, the parties to the agreement shall be designated as "proponents" and the parties protesting the agreement shall be designated as "protestants." A person who has been permitted to intervene under § 502.72 shall be designated as "intervenor." All persons or parties designated in this section shall become parties to the proceeding involved without further pleadings, and no person other than a party or its representative may introduce evidence or examine witnesses at hearings. [Rule 41.]

§ 502.42 Hearing Counsel.

The Director, Bureau of Hearing Counsel, shall be a party to all proceedings governed by the rules in this part, except that in complaint proceedings under § 502.62, the Director may become a party only upon leave to intervene granted pursuant to § 502.72, and in rulemaking proceedings, the Director may become a party by designation, if the Commission determines that the circumstances of the proceeding warrant such participation. The Director or the Director's representative shall be designated as "Hearing Counsel" and shall be served with copies of all papers, pleadings, and documents in every proceeding in which Hearing Counsel is a party. Hearing Counsel shall actively participate in any proceeding to which the Director is a party, to the extent required in the public interest, subject to the separation of functions required by section 5(c) of the Administrative Procedure Act. (See § 502.224.) [Rule 42.]

§ 502.43 Substitution of parties.

In appropriate circumstances, the Commission or presiding officer may order an appropriate substitution of parties. [Rule 43.]

§ 502.44 Necessary and proper parties in certain complaint proceedings.

(a) If a complaint relates to through transportation by continuous carriage or transshipment, all carriers participating in such through transportation shall be joined as respondents.

(b) If the complaint related to more than one carrier or other person subject to the shipping acts, all carriers or other persons against whom a rule or order is sought shall be made respondents.

(c) If complaint is made with respect to an agreement filed under section 15 of the Shipping Act, 1916 or section 5(a) of the Shipping Act of 1984, the parties to the agreement shall be made respondents. [Rule 44.]

SUBPART D—RULEMAKING

§ 502.51 Petition for issuance, amendment, or repeal of rule.

Any interested party may file with the Commission a petition for the issuance, amendment, or repeal of a rule designed to implement, interpret, or prescribe law, policy, organization, procedure, or practice requirements of the Commission. The petition shall set forth the interest of petitioner and the nature of the relief desired, shall include any facts, views, arguments, and data deemed relevant by petitioner, and shall be verified. If such petition is for the amendment or repeal of a rule, it shall be accompanied by proof of service on all persons, if any, specifically named in such rule, and shall conform in other aspects to Subpart H of this part. Replies to such petition shall conform to the requirements of § 502.74. [Rule 51.]

§ 502.52 Notice of proposed rulemaking.

(a) General notice of proposed rulemaking, including the information specified in § 502.143, shall be published in the *Federal Register*, unless all persons subject thereto are named and, either are personally served, or otherwise have actual notice thereof in accordance with law.

(b) Except where notice of hearing is required by statute, this section shall not apply to interpretative rules, general statements of policy, organization rules, procedure, or practice of the Commission, or any situation in which the Commission for good cause finds (and incorporates such findings in such rule) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. [Rule 52.]

§ 502.53 Participation in rulemaking.

(a) Interested persons will be afforded an opportunity to participate in rulemaking through submission of written data, views, or arguments, with or without opportunity to present the same orally in any manner. No replies to the written submissions will be allowed unless, because of the nature of the proceeding, the Commission indicates that replies would be necessary or desirable for the formulation of a just and reasonable rule, except that, where the proposed rules are such as are required by statute to be made on the record after opportunity for a hearing, such hearing shall be conducted pursuant to 5 U.S.C. 556 and 557, and the procedure shall be the same as stated in Subpart J of this part.

(b) In those proceedings in which respondents are named, interested persons who wish to participate shall file a petition to intervene in accordance with the provisions of § 502.72. [Rule 53.]

§ 502.54 Contents of rules.

The Commission will incorporate in any rules adopted a concise general statement of their basis and purpose. [Rule 54.]

§ 502.55 Effective date of rules.

The publication or service of any substantive rule shall be made not less than thirty (30) days prior to its effective date except (a) as otherwise provided by the Commission for good cause found and published in the *Federal Register* or (b) in the case of rules granting or recognizing exemption or relieving restriction; interpretative rules; or statements of policy. [Rule 55.]

SUBPART E—PROCEEDINGS; PLEADINGS; MOTIONS; REPLIES

§ 502.61 Proceedings.

(a) Proceedings are commenced by the filing of a complaint, or by order of the Commission upon petition or upon its own motion, or by reference by the Commission to the formal docket of a petition for a declaratory order.

(b) In proceedings referred to the Office of Administrative Law Judges, the Commission shall specify a date on or before which hearing shall commence, which date shall be no more than six months from the date of publication in the *Federal Register* of the Commission's order instituting the proceedings or notice of complaint filed. Hearing dates may be deferred by the presiding judge only to prevent substantial delay, expense, detriment to the public interest or undue prejudice to a party.

(c) In the order instituting a proceeding or in the notice of filing of complaint and assignment, the Commission shall establish dates by which the initial decision and the final Commission decision will be issued. These dates may be extended by order of the Commission for good cause shown. [Rule 61.]

§ 502.62 Complaints and fee.

(a) The complaint shall contain the name and address of each complainant, the name and address of each complainant's attorney or agent, the name and address of each person against whom complaint is made, a concise statement of the cause of action, and a request for the relief or other affirmative action sought.

(b) Where reparation is sought and the nature of the proceeding so requires, the complaint shall set forth: the ports of origin and destination of the shipments; consignees, or real parties in interest, where shipments are on "order" bill of lading; consignors; date of receipt by carrier or tender of delivery to carrier; names of vessels; bill of lading number (and other identifying reference); description of commodities; weights; measurement; rates; charges made or collected; when, where, by whom and to whom rates and charges were paid; by whom the rates and charges were borne; the amount of damage; and the relief sought. Except under unusual circumstances and for good cause shown, reparation will not be awarded upon a complaint in which it is not specifically asked for, nor upon a

new complaint by or for the same complainant which is based upon a finding in the original proceeding. Wherever a rate, fare, charge, rule, regulation, classification, or practice is involved, appropriate reference to the tariff should be made, if possible.

(c) If the complaint fails to indicate the sections of the acts alleged to have been violated or clearly to state facts which support the allegations, the Commission may, on its own initiative, require the complaint to be amended to supply such further particulars as it deems necessary.

(d) The complaint should designate the place at which hearing is desired.

(e) A form of complaint is set forth in Exhibit No. 1 to this subpart.

(f) The complaint shall be accompanied by remittance of a $50 filing fee.

(g) For special types of cases, see § 502.92 in Subpart F (Special Docket applications for refund or waiver); Subpart K (Shortened Procedure); and Subpart S (Small Claims). [Rule 62.]

§ 502.63 Reparation, statute of limitations.

(a) Complaints seeking reparation pursuant to section 22 of the Shipping Act, 1916 shall be filed within two (2) years after the cause of action accrues.

(b) Complaints seeking reparation pursuant to section 11 of the Shipping Act of 1984 shall be filed within three years after the cause of action accrues.

(c) The Commission will consider as in substantial compliance with a statute of limitations a complaint in which complainant alleges that the matters complained of, if continued in the future, will constitute violations of the shipping acts in the particulars and to the extent indicated and in which complainant prays for reparation accordingly for injuries which may be sustained as a result of such violations. (See §§ 502.251–502.253 and Exhibit No. 1 to Subpart O).

(d) Notification to the Commission that a complaint may or will be filed for the recovery of reparation will not constitute a filing within the applicable statutory period.

(e) A complaint is deemed filed on the date it is received by the Commission. [Rule 63.]

§ 502.64 Answer to complaint.

(a) Respondent shall file with the Commission an answer to the complaint and shall serve it on complainant as provided in Subpart H of this part within twenty (20) days after the date of service of the complaint by the Commission or within thirty (30) days if such respondent resides in Alaska or beyond the Continental United States, unless such periods have been extended under § 502.71 or § 502.102, or reduced under § 502.103, or unless motion is filed to withdraw or dismiss the complaint, in which latter case, answer shall be made within ten (10) days after service of an order denying such motion. Such answer shall give notice of issues controverted in fact or law. Recitals of material and relevant facts in a

complaint, amended complaint, or bill of particulars, unless specifically denied in the answer thereto, shall be deemed admitted as true, but if request is seasonably made, a competent witness shall be made available for cross-examination on such evidence.

(b) In the event that respondent should fail to file and serve the answer within the time provided, the presiding officer may enter such rule or order as may be just, or may in any case require such proof as he or she may deem proper, except that the presiding officer may permit the filing of a delayed answer after the time for filing the answer has expired, for good cause shown.

(c) A form of answer to complaint is set forth in Exhibit No. 2 to this subpart. [Rule 64.]

§ 502.65 Replies to answers not permitted.

Replies to answers will not be permitted. New matters set forth in respondent's answer will be deemed to be controverted. [Rule 65.]

§ 502.66 Order to show cause.

The Commission may institute a proceeding by order to show cause. The order shall be served upon all persons named therein, shall include the information specified in § 502.143, may require the person named therein to answer, and shall require such person to appear at a specified time and place and present evidence upon the matters specified. [Rule 66.]

§ 502.67 Proceedings under section 3(a) of the Intercoastal Shipping Act, 1933.

(a)(1)(i) The term "general rate increase" means any change in rates, fares, or charges which will (A) result in an increase in not less than 50 per centum of the total rate, fare, or charge items in the tariffs per trade of any common carrier by water in intercoastal commerce; and (B) directly result in an increase in gross revenue of such carrier for the particular trade of not less than 3 per centum.

(ii) The term "general rate decrease" means any change in rates, fares, or charges which will (A) result in a decrease in not less than 50 per centum of the total rate, fare, or charge items in tariffs per trade of any common carrier by water in the intercoastal commerce; and (B) directly result in a decrease in gross revenue of such carrier for the particular trade of not less than 3 per centum.

(2) No general rate increase or decrease shall take effect before the close of the sixtieth day after the day it is posted and filed with the Commission. A vessel operating common carrier (VOCC) shall file, under oath, concurrently with any general rate increase or decrease, testimony and exhibits of such composition, scope and format that they will serve as the VOCC's entire direct case in the event the matter is set for formal investigation, together with all underlying workpapers used in the preparation of the testimony and exhibits. The VOCC shall also certify that copies of testimony and exhibits and underlying workpapers have been filed simul-

taneously with the attorney general of every noncontiguous State, Commonwealth, possession or Territory having ports in the relevant trade that are served by the VOCC. The contents of underlying workpapers served on attorneys general pursuant to this paragraph are to be considered confidential and are not to be disclosed to members of the public except to the extent specifically authorized by an order of the Commission or a presiding officer. A copy of the testimony and exhibits shall be made available at every port in the trade at the offices of the VOCC or its agent during usual business hours for inspection and copying by any person.

(3) Workpapers underlying financial and operating data filed in connection with proposed rate changes shall be made available promptly by the carrier to all persons requesting them for inspection and copying upon the submission of the following certification, under oath, to the carrier:

CERTIFICATION

I, (Name and title if applicable) _____, of (Full name of company or entity), having been duly sworn, certify that the underlying workpapers requested from (Name of carrier), will be used solely in connection with protests related to and proceedings resulting from (Name of carrier) _____'s rate (increase) (decrease) scheduled to become effective (Date) _____ and that their contents will not be disclosed to any person who has not signed, under oath, a certification in the form prescribed, which has been filed with the Carrier, unless public disclosure is specifically authorized by an order of the Commission or the presiding officer.

(S) _____.

Date: _____.

Signed and Sworn to before me this _____ day of _____, 19_____.

_____

Notary Public
My Commission expires:

(4) Where a protest contains information obtained in confidence, it will be set out in a separate document, clearly marked on the cover page "Contains Confidential Information." Failure to observe this procedure will subject the protest to rejection.

(5) Failure by the VOCC to meet the service and filing requirements of paragraph (a)(2) of this section may result in rejection of the tariff

matter. Such rejection will take place within three work days after the defect is discovered.

(b)(1) Any protest against a proposed general rate increase or decrease made pursuant to section 3 of the Intercoastal Shipping Act, 1933, may be made by letter and shall be filed with the Director, Bureau of Tariffs, and served upon the tariff publishing officer of the carrier pursuant to Subpart H of this part no later than thirty (30) days prior to the proposed changes, except that, if the due date for protests falls on a Saturday, Sunday or national legal holiday, such protest must be filed no later than the last business day preceding the weekend or holiday. Persons filing protests pursuant to this section shall be made parties to any docketed proceeding involving the matter protested, provided that the issues raised in the protest are pertinent to the issues set forth in the order of investigation. Protests shall include:

(i) Identification of the tariff in question;

(ii) Grounds for opposition to the change;

(iii) Identification of any specific areas of the VOCC's testimony, exhibits, or underlying data that are in dispute and a statement of position on each area in dispute (VOCC general rate increases or decreases only);

(iv) Specific reasons why a hearing is necessary to resolve the issues in dispute;

(v) Any requests for additional carrier data;

(vi) Identification of any witnesses that protestant would produce at a hearing, a summary of their testimony and identification of documents that protestant would offer in evidence; and

(vii) A subscription and verification.

(2) Protests against other proposed changes in tariffs made pursuant to section 3 of the Intercoastal Shipping Act, 1933, shall be filed and served no later than twenty (20) days prior to the proposed effective date of the change. The provision of paragraph (b)(1) of this section relating to the form, place and manner of filing protests against a proposed general rate increase or decrease shall be applicable to protests against other proposed tariff changes. A protest is deemed filed on the date it is received by the Commission.

(c) Replies to protests shall conform to the requirements of § 502.74.

(d)(1) In the event the general rate increase or decrease of a VOCC is made subject to a docketed proceeding, Hearing Counsel, the VOCC and all protestants shall serve, under oath, testimony and exhibits constituting their direct case, together with underlying workpapers on all parties pursuant to Subpart H of this part and lodge copies of testimony and exhibits with the presiding officer no later than seven (7) days after the tariff matter takes effect or, in the case of suspended matter, seven (7) days after the matter would have otherwise gone into effect.

(2) If other proposed tariff changes made pursuant to section 3 of the Intercoastal Shipping Act, 1933 are made subject to a docketed proceeding,

the carrier, Hearing Counsel and all protestants will simultaneously serve pursuant to Subpart H of this part on all parties and lodge with the presiding officer prehearing statements as specified in paragraph (f)(1) of this section no later than seven (7) days after the tariff matter takes effect, or in the case of suspended matter, seven (7) days after the matter would have otherwise gone into effect.

(e)(1) Subsequent to the exchange of prehearing statements by all parties, the presiding officer shall, at his or her discretion, direct all parties to attend a prehearing conference to consider:

(i) Simplification of issues;

(ii) Identification of issues which can be resolved readily on the basis of documents, admissions of fact, or stipulations;

(iii) Identification of any issues which require evidentiary hearing;

(iv) Limitation of witnesses and areas of cross-examination, should an evidentiary hearing be necessary;

(v) Requests for subpoenas; and

(vi) Other matters which may aid in the disposition of the hearing, including but not limited to the exchange of written testimony and exhibits.

(2) After considering the procedural recommendations of the parties, the presiding officer shall limit the issues to the extent possible and establish a procedure for their resolution.

(3) The presiding officer shall, whenever feasible, rule orally upon the record on matters presented before him or her.

(f)(1) It shall be the duty of every party to file and serve a prehearing statement on a date specified by the presiding officer, but in any event no later than the date of the prehearing conference.

(2) A prehearing statement shall state the name of the party or parties on whose behalf it is presented and briefly set forth:

(i) Identification of issues which can be resolved readily on the basis of documents, admissions of fact, or stipulations;

(ii) Identification of any issues which require evidentiary hearing, together with the reasons why these issues cannot be resolved readily on the basis of documents, admissions of facts, stipulations or an alternative procedure;

(iii) Requests for cross-examination of the direct written testimony of specified witnesses, the subjects of such cross-examination and the reasons why alternatives to cross-examination are not feasible;

(iv) Requests for additional, specified witnesses and documents, together with the reasons why the record would be deficient in the absence of this evidence; and

(v) Procedural suggestions that would aid in the timely disposition to the proceeding.

(g) The provisions of this section are designed to enable the presiding officer to complete a hearing within sixty (60) days after the proposed effective date of the tariff changes and submit an initial decision to the Commission within one hundred twenty (120) days pursuant to section

3(b) of the Intercoastal Shipping Act, 1933. The presiding officer may employ any other provision of the Commission's Rules of Practice and Procedure, not inconsistent with this section, in order to meet this objective. Exceptions to the decision of the presiding officer, filed pursuant to § 502.227 shall be served no later than fifteen (15) days after date of service of the initial decision. Replies thereto shall be served no later than ten (10) days after the date of service of exceptions. In the absence of exceptions, the decision of the presiding officer shall be final within 30 days from the date of service, unless within that period, a determination to review is made in accordance with the procedures outlined in § 502.227.

(h) Intervention by persons other than protestants ordinarily shall not be granted. In the event intervention of such persons is granted, the presiding officer of the Commission may attach such conditions or limitations as are deemed necessary to effectuate the purpose of this section. [Rule 67].

§ 502.68 Declaratory orders and fee.

(a)(1) The Commission may, in its discretion, issue a declaratory order to terminate a controversy or to remove uncertainty.

(2) Petitions for the issuance thereof shall: state clearly and concisely the controversy or uncertainty; name the persons and cite the statutory authority involved; include a complete statement of the facts and grounds prompting the petition, together with full disclosure of petitioner's interest; be served upon all parties named therein; and conform to the requirements of Subpart H of this part.

(3) Petitions shall be accompanied by remittance of a $50 filing fee.

(b) Petitions under this section shall be limited to matters involving conduct or activity regulated by the Commission under statutes administered by the Commission. The procedures of this section shall be invoked solely for the purpose 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. Such matters must be adjudicated either by filing of a complaint under section 22 of the Shipping Act, 1916 or section 11 of the Shipping Act of 1984 and § 502.62, or by filing of a petition for investigation under § 502.69.

(c) Petitions under this section shall be accompanied by the complete factual and legal presentation of petitioner as to the desired resolution of the controversy or uncertainty, or a detailed explanation why such can only be developed through discovery or evidentiary hearing.

(d) Replies to the petition shall contain the complete factual and legal presentation of the replying party as to the desired resolution, or a detailed explanation why such can only be developed through discovery or evidentiary hearing. Replies shall conform to the requirements of § 502.74 and shall be served pursuant to Subpart H of this part.

(e) No additional submissions will be permitted unless ordered or requested by the Commission or the presiding officer. If discovery or evidentiary hearing on the petition is deemed necessary by the parties, such must be requested in the petition or replies. Requests shall state in detail the facts to be developed, their relevance to the issues, and why discovery or hearing procedures are necessary to develop such facts.

(f)(1) A notice of filing of any petition which meets the requirements of this section shall be published in the *Federal Register*. The notice will indicate the time for filing of replies to the petition. If the controversy or uncertainty is one of general public interest, and not limited to specifically named persons, opportunity for reply will be given to all interested persons including the Commission's Bureau of Hearing Counsel.

(2) In the case of petitions involving a matter limited to specifically named persons, participation by persons not named therein will be permitted only upon grant of intervention by the Commission pursuant to § 502.72.

(3) Petitions for leave to intervene shall be submitted on or before the reply date and shall be accompanied by intervenor's complete reply including its factual and legal presentation in the matter.

(g) Petitions for declaratory order which conform to the requirements of this section will be referred to a formal docket. Referral to a formal docket is not to be construed as the exercise by the Commission of its discretion to issue an order on the merits of the petition. [Rule 68.]

§ 502.69 Petitions—general and fee.

(a) Except when submitted in connection with a formal proceeding, all claims for relief or other affirmative action by the Commission, except as otherwise provided herein, shall be by written petition, which shall state clearly and concisely the petitioner's grounds of interests in the subject matter, the facts relied upon and the relief sought, shall cite by appropriate reference the statutory provisions or other authority relied upon for relief, shall be served upon all parties named therein, and shall conform otherwise to the requirements of Subpart H of this part. Replies thereto shall conform to the requirements of § 502.74.

(b) Petitions shall be accompanied by remittance of a $50 filing fee. [Rule 69.]

§ 502.70 Amendments or supplements to pleadings.

(a) Amendments or supplements to any pleadings will be permitted or rejected, either in the discretion of the Commission if the case has not been assigned to a presiding officer for hearing, or otherwise, in the discretion of the officer designated to conduct the hearing, except that after a case is assigned for hearing, no amendment shall be allowed which would broaden the issues, without opportunity to reply to such amended pleading and to prepare for the broadened issues. The presiding officer may direct a party to state its case more fully and in more detail by way of amendment.

(b) A response to an amended pleading must be filed and served in conformity with the requirements of Subpart H of this part and § 502.74, unless the Commission or the presiding officer directs otherwise. Amendments or supplements allowed prior to hearing will be served in the same manner as the original pleading.

(c) Whenever by the rules in this part a pleading is required to be verified, the amendment or supplement shall also be verified. [Rule 70.]

§ 502.71 Bill of particulars.

Within fifteen (15) days after date of service of the complaint, respondent may file with the Commission and serve upon complainant pursuant to Subpart H of this part a motion for a bill of particulars. Within ten (10) days after date of service of such motion, complainant shall file with the Commission and serve upon respondent either (a) the bill of particulars or (b) a reply to such motion, made in conformity with the requirements of § 502.74 setting forth the particular matters contained in the motion which are objected to and the reasons for the objections. If the motion is granted in whole or in part, the order granting same shall specify the date by which the particulars must be furnished. A motion may be filed relative to incomplete compliance with such order. In the event of inexcusable default in furnishing particulars, the party in default shall be precluded from making proof upon the issues with respect to which it has defaulted in furnishing particulars. The time for filing an answer to the complaint shall be extended to a date ten (10) days after the date of service of the bill of particulars or of notice of disallowance of the motion thereof. For good case shown, motion for a bill of particulars also may be filed after answer is made and within a reasonable time prior to hearing. [Rule 71.]

§ 502.72 Petition for leave to intervene.

(a) A petition for leave to intervene may be filed in any proceeding and shall be served on existing parties by the petitioner pursuant to Subpart H of this part. An additional fifteen (15) copies of the petition shall be filed with the Secretary for the use of the Commission. Upon request, the Commission will furnish a service list to any member of the public pursuant to Part 503 of this chapter. The petition shall set forth the grounds for the proposed intervention and the interest and position of the petitioner in the proceeding and shall comply with the other applicable provisions of Subpart H of this part, and if affirmative relief is sought, the basis for such relief. Such petition shall also indicate the nature and extent of the participation sought, e.g., the use of discovery, presentation of evidence and examination of witnesses.

(b)(1) Petitions for leave to intervene as a matter of right will only be granted upon a clear and convincing showing that:

(i) The petitioner has a substantial interest relating to the matter which is the subject of the proceeding warranting intervention; and

(ii) The proceeding may, as a practical matter, materially affect the petitioner's interest; and

(iii) The interest is not adequately represented by existing parties to the proceeding.

(2) Petitions for intervention as a matter of Commission discretion may be granted only upon a showing that:

(i) A common issue of law or fact exists between the petitioner's interests and the subject matter of the proceeding; and

(ii) Petitioner's intervention shall not unduly delay or broaden the scope of the proceeding, prejudice the adjudication of the rights of or be duplicative of positions of any existing party; and

(iii) The petitioner's participation may reasonably be expected to assist in the development of a sound record.

(3) The timeliness of the petition will also be considered in determining whether a petition will be granted under paragraphs (b)(1) or (b)(2) of this section. If filed after hearings have been closed, a petition will not ordinarily be granted.

(c) In the interests of: (1) restricting irrelevant, duplicative, or repetitive discovery, evidence or arguments; (2) having common interests represented by a spokesperson; and (3) retaining authority to determine priorities and control the course of the proceeding, the presiding officer, in his or her discretion, may impose reasonable limitations on an intervenor's participation, e.g., the filing of amicus briefs, presentation of evidence on selected factual issues, or oral argument on some or all of the issues.

(d) Absent good cause shown, any intervenor desiring to utilize the procedures provided by Subpart L must commence doing so no later than fifteen (15) days after its petition for leave to intervene has been granted. If the petition is filed later than thirty (30) days after the date of publication in the *Federal Register* of the Commission's Order instituting the proceeding or notice of complaint filed, petitioner will be deemed to have waived its right to utilize such procedures, unless good cause is shown for the failure to file the petition within the 30-day period. The use of Subpart L procedures by an intervenor whose petition was filed beyond such 30-day period will in no event be allowed, if, in the opinion of the presiding officer, such use will result in delaying the proceeding unduly.

(e) If intervention is granted before or at a prehearing conference convened for the purpose of considering matters relating to discovery, the intervenor's discovery matters may also be considered at that time, and may be limited under the provisions of paragraph (c) of this section.

(f) A form of petition for leave to intervene is set forth in Exhibit No. 3 to this subpart. [Rule 72.]

§ 502.73 Motions.

(a) In any docketed proceeding, an application or request for an order or ruling not otherwise specifically provided for in this part shall be by motion. After the assignment of a presiding officer to a proceeding and

before the issuance of his or her recommended or initial decision, all motions shall be addressed to and ruled upon by the presiding officer unless the subject matter of the motion is beyond his or her authority, in which event the matter shall be referred to the Commission. If the proceeding is not before the presiding officer, motions shall be designated as "petitions" and shall be addressed to and passed upon by the Commission.

(b) Motions shall be in writing, except that a motion made at a hearing shall be sufficient if stated orally upon the record, unless the presiding officer directs that it be reduced to writing.

(c) All written motions shall state clearly and concisely the purpose of and the relief sought by the motion, the statutory or principal authority relied upon, and the facts claimed to constitute the grounds requiring the relief requested; and shall conform with the requirements of Subpart H of this part.

(d) Oral argument upon a written motion may be permitted at the discretion of the presiding officer or the Commission, as the case may be.

(e) A repetitious motion will not be entertained. [Rule 73.]

§ 502.74 Replies to pleadings, motions, applications, etc.

(a)(1) A reply to a reply is not permitted.

(2) Except as otherwise provided respecting answers (§ 502.64), shortened procedure (Subpart K of this part), briefs (§ 502.221), exceptions (§ 502.227), and the documents specified in paragraph (b) of this section, any party may file and serve a reply to any written motion, pleading, petition, application, etc., permitted under this part within fifteen (15) days after date of service thereof, unless a shorter period is fixed under § 502.103.

(b) When time permits, replies also may be filed to protests seeking suspension of tariffs (§ 502.67), applications for enlargement of time and postponement of hearing (Subpart G of this part), and motions to take depositions (§ 502.201).

(c) Replies shall be in writing, shall be verified if verification of original pleading is required, shall be so drawn as to fully and completely advise the parties and the Commission as to the nature of the defense, shall admit or deny specifically and in detail each material allegation of the pleading answered, shall state clearly and concisely the facts and matters of law relied upon, and shall conform to the requirements of Subpart H of this part. [Rule 74.]

§ 502.75 Proceedings involving assessment agreements.

(a) In complaint proceedings involving assessment agreements filed under the fifth paragraph of Section 15 of the Shipping Act, 1916 or section 5(d) of the Shipping Act of 1984, the Notice of Filing of Complaint and Assignment will specify a date before which the initial decision will be issued, which date will be not more than eight months from the date the complaint was filed.

(b) Any party to a proceeding conducted under this section who desires to utilize the prehearing discovery procedures provided by Subpart L of this part shall commence doing so at the time it files its initial pleading, i.e., complaint, answer or petition for leave to intervene. Discovery matters accompanying complaints shall be filed with the Secretary of the Commission for service pursuant to § 502.113. Answers or objections to discovery requests shall be subject to the normal provisions set forth in Subpart L.

(c) Exceptions to the decision of the presiding officer, filed pursuant to § 502.227, shall be filed and served no later than fifteen (15) days after date of service of the initial decision. Replies thereto shall be filed and served no later than fifteen (15) days after date of service of exceptions. In the absence of exceptions, the decision of the presiding officer shall be final within thirty (30) days from the date of service, unless within that period, a determination to review is made in accordance with the procedures outlined in § 502.227. [Rule 75.]

Exhibit No. 1 to Subpart E [§ 502.62]

Complaint Form and Information Checklist

BEFORE THE FEDERAL MARITIME COMMISSION

Complaint

_____ v. _____ [Insert without abbreviation exact and complete name of party or parties respondent].

I. The complainant is [State in this paragraph whether complainant is an association, a corporation, firm, or partnership and the names of the individuals composing the same. State also the nature and principal place of business].

II. The respondent is [State in this paragraph whether respondent is an association, a corporation, firm, or partnership and the names of the individuals composing the same. State also the nature and principal place of business].

III. Allegation of jurisdiction. [State in this paragraph a synopsis of the statutory basis for claim(s)].

IV. That [State in this or subsequent paragraphs to be lettered "A", "B", etc., the matter or matters complained of. If rates are involved, name each rate, fare, charge, classification, regulation, or practice, the lawfulness of which is challenged].

V. That by reason of the facts stated in the foregoing paragraphs, complainant has been (and is being) subject to injury as a direct result of the violations by respondent of sections _____ [State in this paragraph the casual connection between the alleged illegal acts of respondent and the claimed injury to complainant, with all necessary statutory sections relief upon].

VI. That complainant has been injured in the following manner: To its damages in the sum of $_____.

VII. Wherefore complainant prays that respondent be required to answer the charges herein; that after due hearing, an order be made commanding said respondent (and each of them): to cease and desist from the aforesaid violations of said act(s); to establish and put in force such practices as the Commission determines to be lawful and reasonable; to pay to said complainant by way of reparations for the unlawful conduct hereinabove described the sum of $_____, with interest and attorney's fees or such sum as the Commission may determine to be proper as an award of reparation; and that such other and further order or orders be made as the Commission determines to be proper in the premises.

Dated at _____, this _____ day of _____, 19_____.

(S) _____
(Complainant's signature)

_____
(Office and post office address)

(S) _____
(Signature or agent or attorney of complainant)

_____
(Post office address)

VERIFICATION [See § 502.112]

State of _____, County of _____, ss:_____, being first duly sworn on oath deposes and says that he (she) is _____ [The complainant, or, if a firm, association, or corporation, state the capacity of the affiant] and is the person who signed the foregoing complaint; that he (she) has read the complaint and that the facts stated therein, upon information received from others, affiant believes to be true.

Subscribed and sworn to before me, a notary public in and for the State of _____, County of _____ this _____ day _____, A.D. 19_____.

(S) _____
(Notary Public)

My Commission expires _____.

INFORMATION TO ASSIST IN FILING FORMAL COMPLAINT

GENERAL

Formal Docket Complaint procedures usually involve an evidentiary hearing on disputed facts. Where no evidentiary hearing on disputed facts is necessary and where all parties agree to the use of different procedures, a complaint may be processed under Subpart K [Shortened Procedure] or Subpart S [Informal Docket for a claim of $10,000 or less]. An application for refund or waiver of collection of freight charges due to tariff error should be filed pursuant to § 502.92 and Exhibit No. 1 to Subpart F. Consider also the feasibility of filing a Petition for Declaratory Order under § 502.68.

Under the Shipping Act of 1984 [foreign commerce], the complaint must be filed within three (3) years from the time the cause of action accrues and may be brought against any person alleged to have violated the 1984 Act to the injury of complainant.

Under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933 [domestic commerce], the complaint must be filed within two (2) years from the time the cause of action accrues and may be brought only against a "person subject to the Act", e.g., a common carrier, terminal operator or freight forwarder.

Because of the limitation periods, a complaint is deemed to be filed only when it is physically received at the Commission. [See § 502.114]

The format of Exhibit No. 1 to Subpart E must be followed and a *verification must be included* where the complainant is not represented by an attorney or other person qualified to practice before the Commission. [See § § 502.21–502.32 and 502.112]. The complaint must also fully describe the alleged violations of the specific section(s) of the shipping statute(s) involved and how complainant is or was directly injured as a result. An original and fifteen copies, plus a further number of copies sufficient for service upon each named respondent must be filed and the Commission will serve the other parties. [See § § 502.113 and 502.118]

In addition to Subpart E, some other important rules are: § 502.2 (mailing address; hours); § 502.7 (documents in foreign language); § 502.23 (Notice of Appearance); § 502.41 (parties; how designated); § 502.44 (necessary and proper parties to certain complaint proceedings); and Subpart H (form, execution and service of documents).

Checklist of Specific Information

The following checklist sets forth items of information which are pertinent in cases submitted to the Commission pursuant to the regulatory provisions of the shipping statutes. The list is not intended to be inclusive, nor does it indicate all of the essential allegations which may be material in specific cases.

1. Identify of complainant; if an individual, complainant's residence; if a partnership, name of partners, business and principal place thereof; if a corporation, name, state of incorporation, and principal place of business. The same information with respect to respondents, interveners, or others who become parties is necessary.

2. Description of commodity involved, with port of origin, destination port, weight, consignor and consignee of shipment(s), date shipped from loading port, and date received at discharge port.

3. Rate charged, with tariff authority for same, and any rule or regulation applicable thereto; the charges collected and from whom.

4. Route of shipment, including any transshipment; bill of lading reference.

5. Date of delivery or tender of delivery of each shipment.

6. Where the rate is challenged and comparisons are made with rates on other commodities, the form, packing, density, susceptibility to damage, tendency to contaminate other freight, value, volume of movement, competitive situation, and all matters relating to the cost of loading, unloading, and otherwise handling of respective commodities.

7. If comparisons are made between the challenged rates and rates on other routes, the allegation showing similarity of service should include at least respective distances, volumes of movement, cost of handling, and competitive conditions.

8. History of rate with reasons for previous increases or decreases of same.

9. When the complaint alleges undue prejudice or preference, the complaint should indicate what manner of undue prejudice or preference is involved, and whether to a particular person, locality, or description of traffic; how the preference or discrimination resulted and the manner in which the respondents are responsible for the same; and how complainant is damaged by the prejudice or preference, in loss of sales or otherwise.

10. Care should be exercised to differentiate between the measure of damages required in cases where prejudice or preference is charged, where the illegality of rates is charged and other situations.

11. Where a filed agreement or conduct under the agreement is challenged, all necessary provisions of the shipping statute involved must be specifically cited, showing in detail how a section was violated and how the conduct or agreement injuries complainant. The complaint should be thorough and clear as to all relief complainant is requesting.

Exhibit No. 2 to Subpart E [§ 502.64]

Answer to Complaint

BEFORE THE FEDERAL MARITIME COMMISSION

Answer

_____ (Complainant) v.
_____ (Respondent)

Docket No. _____

The above-named respondent, for answer to the complaint in this proceeding, states:

I. [State in this and subsequent paragraphs to be numbered II, III, etc., appropriate and responsive admissions, denials, and averments, specifically answering the complaint, paragraph by paragraph.]

Wherefore respondent prays that the complaint in this proceeding be dismissed.

(S) _____
(Name of respondent)

BY: _____

_____
(Title of Officer)

_____
(Office and post office address)

(S) _____
(Signature of attorney or agent)

_____
(Post office address)

Date _____, 19_____.

VERIFICATION

[See form for verification of complaint in Exhibit No. 1 to this Subpart and § 502.112].

CERTIFICATE OF SERVICE
[See § 502.114.]

Exhibit No. 3 to Subpart E [§ 502.72] --

Petition for Leave to Intervene

Before the Federal Maritime Commission

Petition for Leave To Intervene

_____ v. _____

Docket No. _____

Your petitioner, _____, respectfully represents that he (she) has an interest in the matters in controversy in the above-entitled proceeding and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I. That petitioner is [State whether an association, corporation, firm, or partnership, etc., as in Exhibit No. 1 to this subpart, and nature and principal place of business].

II. [Here set out specifically position and interest of petitioner in the above-entitled proceeding and other essential averments in accordance with Rule 72 (46 CFR 502.72).]

Wherefore said _____ requests leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

[If affirmative relief is sought, insert appropriate request here.]

Dated at _____, this ___ day of _____, 19 __.

_____

[Petitioner's signature]

_____

[Office and post office address]

_____

[Signature of agent or attorney of petitioner]

_____

[Post office address]

Verification and Certificate of Service

[See Exhibits Nos. 1 and 2 to this subpart.]

SUBPART F—SETTLEMENT; PREHEARING PROCEDURE

§ 502.91 Opportunity for informal settlement.

(a) 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, without prejudice to the rights of the parties.

(b) No stipulation, offer, or proposal shall be admissible in evidence over the objection of any party in any hearing on the matter. [Rule 91.]

§ 502.92 Special docket applications and fee.

(a)(1) A common carrier by water in foreign commerce which publishes its own tariff or, if the common carrier does not publish its own tariff, the carrier and the conference to which it belongs, or a shipper, may file an application for permission to refund or waive collection of a portion of freight charges where it appears that there is (i) an error in a tariff of a clerical or administrative nature or (ii) an error due to inadvertence in failing to file a new tariff. Such refund or waiver must not result in discrimination among shippers.

(2) The Commission must have received an effective tariff setting forth the rate on which refund or waiver would be based prior to the filing of the application.

(3)(i) The application for refund or waiver must be filed with the Commission within one hundred eighty (180) days from the date of shipment and served upon other persons involved pursuant to Subpart H of this part. An application is filed when it is placed in the mail, delivered to a courier, or, if delivered by another method, when it is received by the Commission. Filings by mail or courier must include a certification as to date of mailing or delivery to the courier.

(ii) The application for refund or waiver must be accompanied by remittance of a $25 filing fee.

(iii) Date of shipment shall mean the date of sailing of the vessel from the port at which the cargo was loaded.

(4) By filing, the applicant(s) agrees that:

(i) If permission is granted by the Commission:

(A) An appropriate notice will be published in the tariff; or

(B) Other steps will be taken as the Commission may require which give notice of the rate on which such refund or waiver would be based; and

(C) Additional refunds or waivers shall be made with respect to other shipments in the manner prescribed by the Commission's order approving the application.

(ii) If the application is denied, other steps will be taken as the Commission may require.

(5)(a) Application for refund or waiver shall be made in accordance with Exhibit 1 to this subpart. Any application which does not furnish

the information required by the prescribed form or otherwise comply with this rule may be returned to the applicant by the Secretary without prejudice to resubmission within the 180-day limitation period.

(b) Common carriers by water in interstate or intercoastal commerce, or conferences of such carriers, may file application for permission to refund a portion of freight charges collected from a shipper or waive collection of a portion of freight charges from a shipper. All such applications shall be filed within the 2-year statutory period referred to in § 502.63, and shall be made in accordance with Exhibit No. 1 to this subpart. Such applications will be considered the equivalent of a complaint and answer thereto admitting the facts complained of. If allowed, an order for payment or waiver will be issued by the Commission.

(c) Applications under paragraphs (a) and (b) of this section shall be submitted in an original and three (3) copies to the Office of the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Each application shall be acknowledged with a reference to the assigned docket number and referred to the Office of Administrative Law Judges. The presiding officer may, in his or her discretion, require the submission of additional information or oral testimony. Formal proceedings as described in other rules of this part need not be conducted. The presiding officer shall issue an initial decision to which the provisions of § 502.227 shall be applicable. [Rule 92.]

§ 502.93 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 Exhibit No. 1 to Subpart D, insofar as said form is applicable; and shall state that a like adjustment has been or will be made by respondent with other persons similarly situated. Satisfied complaints will be dismissed in the discretion of the Commission. [Rule 93.]

§ 502.94 Prehearing conference.

(a)(1) Prior to any hearing, the Commission or presiding officer may direct all interested parties, by written notice, to attend one or more prehearing conferences for the purpose of considering any settlement under § 502.91, formulating the issues in the proceeding and determining other matters to aid in its disposition. In addition to any offers of settlement or proposals of adjustment, there may be considered the following:

(i) Simplification of the issues;

(ii) The necessity or desirability of amendments to the pleadings;

(iii) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(iv) Limitation on the number of witnesses;

(v) The procedure at the hearing;

(vi) The distribution to the parties prior to the hearing of written testimony and exhibits;

(vii) Consolidation of the examination of witnesses by counsel;

(viii) Such other matters as may aid in the disposition of the proceeding.

(2) The presiding officer may require, prior to the hearing, exchange of exhibits and any other material which may expedite the hearing. He or she shall assume the responsibility of accomplishing the purposes of the notice of prehearing conference so far as this may be possible without prejudice to the rights of any party.

(3) The presiding officer shall rule upon all matters presented for decision, orally upon the record when feasible, or by subsequent ruling in writing. If a party determines that a ruling made orally does not cover fully the issue presented, or is unclear, such party may petition for a further ruling thereon within ten (10) days after receipt of the transcript.

(b) In any proceeding under the rules in this part, the presiding officer may call the parties together for an informal conference prior to the taking of testimony, or may recess the hearing for such a conference, with a view to carrying out the purposes of this section. [Rule 94.]

§ 502.95 Prehearing statements.

(a) Unless waiver is granted by the presiding officer, it shall be the duty of all parties to a proceeding to prepare a statement or statements at a time and in the manner to be established by the presiding officer provided that there has been reasonable opportunity for discovery. To the extent possible, joint statements should be prepared.

(b) A prehearing statement shall state the name of the party or parties on whose behalf it is presented and briefly set forth the following matters, unless otherwise ordered by the presiding officer:

(1) Issues involved in the proceeding.

(2) Facts stipulated pursuant to the procedures together with a statement that the party or parties have communicated or conferred in a good faith effort to reach stipulation to the fullest extent possible.

(3) Facts in dispute.

(4) Witnesses and exhibits by which disputed facts will be litigated.

(5) A brief statement of applicable law.

(6) The conclusion to be drawn.

(7) Suggested time and location of hearing and estimated time required for presentation of the party's or parties' case.

(8) Any appropriate comments, suggestions or information which might assist the parties in preparing for the hearing or otherwise aid in the disposition of the proceeding.

(c) The presiding officer may, for good cause shown, permit a party to introduce facts or argue points of law outside the scope of the facts and law outlined in the prehearing statement. Failure to file a prehearing statement, unless waiver has been granted by the presiding officer, may

result in dismissal of a party from the proceeding, dismissal of a complaint, judgment against respondents, or imposition of such other sanctions as may be appropriate under the circumstances.

(d) Following the submission of prehearing statements, the presiding officer may, upon motion or otherwise, convene a prehearing conference for the purpose of further narrowing issues and limiting the scope of the hearing if, in his or her opinion, the prehearing statements indicate lack of dispute of material fact not previously acknowledged by the parties or lack of legitimate need for cross-examination and is authorized to issue appropriate orders consistent with the purposes stated in this section. [Rule 95.]

Exhibit No. 1 to Subpart F [§ 502.92]

APPLICATION FOR REFUND OF OR WAIVER FOR FREIGHT CHARGES DUE TO TARIFF ERROR

Federal Maritime Commission Special Docket No. _____.

Amount of Freight Charges involved in request _____.

Application of [Name of carrier, conference or (if under the 1984 Act) shipper] for the benefit of [Name of person who paid or is responsible for payment of freight charges].

1. SHIPMENT(S). Here fully describe:

(a) Commodity [According to tariff description].

(b) Number of shipments.

(c) Weight or measurement of individual shipment, as well as, all shipments.

(d) Date(s) of shipment(s), i.e., sailing(s) [furnish supporting evidence] and Date(s) of Delivery.

(e) Shipper and Place of Origin.

(f) Consignee, Place of Destination and Routing of Shipment(s).

(g) Name of Carrier and Date shown on Bill of Lading [furnish legible copies of bill(s) of lading].

(h) Names of Participating Ocean Carrier(s).

(i) Name(s) of Vessel(s) involved in carriage.

(j) Amount of Freight Charges actually collected [furnish legible copies of rated bill(s) of lading or freight bill(s), as appropriate] broken down (i) per shipment, (ii) in the aggregate, (iii) by whom paid, (iv) who is responsible for payment if different, and (v) date(s) of collection.

(k) Rate applicable at time of shipment [furnish legible copies of tariff page(s)].

(l) Rate sought to be applied [furnish legible copies of tariff page(s)].

(m) Amount of freight charges at rate sought to be applied, per shipment and in the aggregate.

(n) Amount of freight charges sought to be (refunded) (waived), per shipment and in the aggregate.

2. Furnish docket numbers of other special docket applications or decided or pending formal proceedings involving the same rate situations.

3. Furnish any information or evidence as to whether grant of the application will result in discrimination among ports or carriers.

4. State whether there are shipments of other shippers of the same or similar commodity which (i) moved via the carrier(s) or conference involved in this application during the period of time beginning on the day the bill(s) of lading was issued and ending on the day before the effective date of the conforming tariff, and (ii) moved on the same voyage(s) of the vessel(s) carrying the shipment(s) described in Number 1, above.

5. Fully explain the basis for the application, i.e., the clerical or administrative error or error due to inadvertence, or reasons why freight charges collected are thought to be unlawful (domestic commerce) showing why the application should be granted. Furnish affidavits, if appropriate, and legible copies of all supporting documents. If the error is due to inadvertence, specify the date when the carrier and/or conference intended or agreed to file a new tariff.

[Here set forth Name of Applicant, Signature of Authorized Person, Typed or Printed Name of Person, Title of Person and Date]

State of _____, County of _____ss:

I, _____, on oath declare that I am _____ of the above-named applicant, that I have read this application and know its contents, and that they are true.

Subscribed and sworn to before me, a notary public in and for the State of _____, County of _____, this _____ day of _____, A.D. 19_____.

(SEAL)

(S)_____
Notary Public

My Commission expires _____.

AFFIDAVIT OF CARRIER(S) and/or CONFERENCE

[Here, as applicable, set forth same type of affidavit(s) and notarization(s) as set forth on page 2 of this exhibit for carrier, for any other water carrier participating in the transportation under a joint through rate and/or for a conference, if a conference rate is involved.]

CERTIFICATE OF MAILING

I certify that the date shown below is the date of mailing [or date of delivery to courier] of the original and three (3) copies of this application to the Secretary, Federal Maritime Commission, Washington, D.C., 20573.

Dated at _____, this _____ day of_____, 19_____.

(S)_____

For_____

SUBPART G—TIME

§ 502.101 Computation.

In computing any period of time under the rules in this part, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or national legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or national legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, or national legal holidays shall be excluded from the computation. [Rule 101.]

§ 502.102 Enlargement of time to file documents.

Motions for enlargement of time for the filing of any pleading or other document, or in connection with the procedures of Subpart L of this part, shall set forth the reasons for the motion. Such motions will be granted only under exceptional circumstances duly demonstrated in the request. Such motions shall conform to the requirements of Subpart H of this part, except as to service if they show that the parties have received actual notice of the motion; and in relation to briefs, exceptions, and replies to exceptions, such motions shall conform to the further provisions of §§ 502.222 and 502.227. Upon motion made after the expiration of the specified period, the filing may be permitted where reasonable grounds are found for the failure to file. Replies to such motions shall conform to the requirements of § 502.74. [Rule 102.]

§ 502.103 Reduction of time to file documents.

Except as otherwise provided by law and for good cause, the Commission, with respect to matters pending before it, and the presiding officer, with respect to matters pending before him or her, may reduce any time limit prescribed in the rules in this part. [Rule 103.]

§ 502.104 Postponement of hearing.

Motions for postponement of any hearing date shall set forth the reasons for the motion, and shall conform to the requirements of Subpart H of this part, except as to service if they show that parties have received such actual notice of motion. Such motions will be granted only if found necessary to prevent substantial delay, expense, detriment to the public interest or undue prejudice to a party. Replies to such motions shall conform to the requirements of § 502.74. [Rule 104.]

§ 502.105 Waiver of rules governing enlargements of time and postponements of hearings.

The Commission, the presiding officer, or the Chief Administrative Law Judge may waive the requirements of §§ 502.102 and 502.104, as to replies to pleadings, etc., to motions for enlargement of time or motions to postpone a hearing, and may rule ex parte on such requests. Requests for enlargement of time or motions to postpone or cancel a prehearing conference or hearing

must be received, whether orally or in writing, at least five (5) days before the scheduled date. Except for good cause shown, failure to meet this requirement may result in summary rejection of the request. [Rule 105.]

SUBPART H—FORM, EXECUTION, AND SERVICE OF DOCUMENTS

§ 502.111 Form and appearance of documents filed with Commission.

All papers to be filed under the rules in this part may be reproduced by printing or by any other process, provided the copies are clear and legible, shall be dated, the original signed in ink, show the docket description and title of the proceeding, and show the title, if any, and address of the signer. If typewritten, the impression shall be on only one side of the paper and shall be double spaced except that quotations shall be single spaced and indented. Documents not printed, except correspondence and exhibits, should be on strong, durable paper and shall be not more than 8½ inches wide and 12 inches long, with a left hand margin 1½ inches wide. Printed documents shall be printed in clear type (never smaller than small pica or 11-point type) adequately leaded, and the paper shall be opaque and unglazed. [Rule 111.]

§ 502.112 Subscription and verification of documents.

(a) If a party is represented by an attorney or other person qualified to practice before the Commission under the rules in this part, each pleading, document or other paper of such party filed with the Commission shall be signed by at least one person of record admitted to practice before the Commission in his or her individual name, whose address shall be stated. Except when otherwise specifically provided by rule or statute, such pleading, document or paper need not be verified or accompanied by affidavit. The signature of a person admitted or qualified to practice before the Commission constitutes a certificate by him or her that he or she has read the pleading, document or paper; that he or she is authorized to file it; that to the best of his or her knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. For a willful violation of this section, a person admitted or qualified to practice before the Commission may be subjected to appropriate disciplinary action.

(b) If a party is not represented by a person admitted or qualified to practice before the Commission, each pleading, document or other paper of such party filed with the Commission shall be signed and verified under oath by the party or by a duly authorized officer or agent of the party, whose address and title shall be stated. The form of verification shall be substantially as set forth in Exhibit No. 1 to Subpart E. Where the signature is that of an officer or agent (unless, in the case of a corporate party, it is signed by the president or a vice president and attested by the secretary or an assistant secretary under the seal of the corporation),

there shall be filed with the Commission an original or certified copy of the power of attorney or other document authorizing the person to sign. [Rule 112.]

§ 502.113 Service by the Commission.

Complaints filed pursuant to § 502.62, amendments to complaints, and complainant's memoranda filed in shortened procedure cases will be served by the Commission. In addition to and accompanying the original of every document filed with the Commission for service by the Commission, there shall be a sufficient number of copies for use of the Commission (see § 502.118) and for service on each party to the proceeding. [Rule 113.]

§ 502.114 Service and filing by parties.

(a) Except as otherwise specifically provided by the rules in this part, all pleadings, documents, and papers of every kind (except requests for subpenas) in proceedings before the Commission under the rules in this part (other than documents served by the Commission under § 502.113 and documents submitted at a hearing or prehearing conference) shall, when tendered to the Commission or the presiding officer for filing, show that service has been made upon all parties to the proceeding and upon any other persons required by the rules in this part to be served. Such service shall be made by delivering one copy to each party: by hand delivering in person; by mail, properly addressed with postage prepaid; or by courier.

(b) Except with respect to filing of complaints pursuant to §§ 502.62 and 502.63, protests pursuant to § 502.67 and claims pursuant to § 502.302, the date of filing shall be either the date on which the pleading, document, or paper is physically lodged with the Commission by a party or the date which a party certifies it to have been deposited in the mail or delivered to a courier. [Rule 114.]

§ 502.115 Service on attorney or other representative.

When a party has appeared by attorney or other representative, service upon each attorney or other representative of record will be deemed service upon the party, except that, if two or more attorneys of record are partners or associates of the same firm, only one of them need be served. [Rule 115.]

§ 502.116 Date of service.

The date of service of documents served by the Commission shall be the date shown in the service stamp thereon. The date of service of documents served by parties shall be the day when matter served is deposited in the United States mail, delivered to a courier, or is delivered in person, as the case may be. In computing the time from such dates, the provisions of § 502.101 shall apply. [Rule 116.]

§ 502.117 Certificate of service.

The original of every document filed with the Commission and required to be served upon all parties to a proceeding shall be accompanied by

a certificate of service signed by the party making service, stating that such service has been made upon each party to the proceeding. Certificates of service may be in substantially the following form:

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon [all parties of record or name of person(s)] by [mailing, delivering to courier or delivering in person] a copy to each such person. Dated at, _____ this _____ day of _____ 19 _____.

(S) _____

(For) _____

[Rule 117.]

§ 502.118 Copies of documents for use of the Commission.

(a) Except as otherwise provided in the rules in this part, the original and fifteen (15) copies of every document filed and served in proceedings before the Commission shall be furnished for the Commission's use. If a certificate of service accompanied the original document, a copy of such certificate shall be attached to each such copy of the document.

(b) In matters pending before an administrative law judge the following copy requirements apply.

(1) An original and fifteen copies shall be filed with the Secretary of:

(i) Appeals and replies thereto filed pursuant to § 502.153;

(ii) Memoranda submitted under shortened procedures of Subpart K of this part;

(iii) Briefs submitted pursuant to § 502.211;

(iv) All motions, replies and other filings for which a request is made of the administrative law judge for certification to the Commission or on which it otherwise appears it will be necessary for the Commission to rule.

(2) An original and four copies shall be filed with the Secretary of prehearing statements required by § 502.95, stipulations under § 502.162, and all other motions, petitions, or other written communications seeking a ruling from the presiding administrative law judge.

(3)(i) A single copy shall be filed with the Secretary of requests for discovery, answers, or objections exchanged among the parties under procedures of subpart L of this part. Such materials will not be part of the record for decision unless admitted by the presiding officer or Commission.

(ii) Motions filed pursuant to § 502.201 are governed by the requirements of paragraph (b)(2) of this section and motions involving persons and documents located in a foreign country are governed by the requirements of paragraph (b)(1)(iv) of this section.

(4) One copy of each exhibit shall be furnished to the official reporter, to each of the parties present at the hearing and to the Presiding Officer unless he or she directs otherwise. If submitted other than at a hearing, the "reporter's" copy of an exhibit shall be furnished to the administrative law judge for later inclusion in the record if and when admitted.

(5) Copies of prepared testimony submitted pursuant to §§ 502.67(d) and 502.157 are governed by the requirements for exhibits in paragraph (b)(4) of this section. [Rule 118.]

SUBPART I—SUBPENAS

§ 502.131 Requests; issuance.

Subpenas for the attendance of witnesses or the production of evidence shall be issued upon request of any party, without notice to any other party. Requests for subpenas for the attendance of witnesses may be made orally or in writing; requests for subpenas for the production of evidence shall be in writing. The party requesting the subpena shall tender to the presiding officer an original and at least two copies of such subpena. Where it appears to the presiding officer that the subpena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may in his or her discretion, as a condition precedent to the issuance of the subpena, require the person seeking the subpena to show the general relevance and reasonable scope of the testimony or other evidence sought. [Rule 131.]

§ 502.132 Motions to quash or modify.

(a) Except when issued at a hearing, or in connection with the taking of a deposition, within ten (10) days after service of a subpena for attendance of a witness or a subpena for production of evidence, but in any event at or before the time specified in the subpena for compliance therewith, the person to whom the subpena is directed may, by motion with notice to the party requesting the subpena, petition the presiding officer to quash or modify the subpena.

(b) If served at the hearing, the person to whom the subpena is directed may, by oral application at the hearing, within a reasonable time fixed by the presiding officer, petition the presiding officer to revoke or modify the subpena.

(c) If served in connection with the taking of a deposition pursuant to § 502.203 unless otherwise agreed to by all parties or otherwise ordered by the presiding officer, the party who has requested the subpena shall arrange that it be served at least twenty (20) days prior to the date specified in the subpena for compliance therewith, the person to whom the subpena

is directed may move to quash or modify the subpena within ten (10) days after service of the subpena, and a reply to such motion shall be served within five (5) days thereafter. [Rule 132.]

§ 502.133 Attendance and mileage fees.

Witnesses summoned by subpena to a hearing are entitled to the same fees and mileage that are paid to witnesses in courts of the United States. Fees and mileage shall be paid, upon request, by the party at whose instance the witness appears. [Rule 133.]

§ 502.134 Service of subpenas.

If service of a subpena is made by a United States marshal, or his or her deputy, or an employee of the Commission, such service shall be evidenced by his or her return thereon. If made by any other person, such person shall make affidavit thereto, describing the manner in which service is made, and return such affidavit on or with the original subpena. In case of failure to make service, the reasons for the failure shall be stated on the original subpena. In making service, the original subpena shall be exhibited to the person served, shall be read to him or her if he or she is unable to read, and a copy thereof shall be left with him or her. The original subpena, bearing or accompanied by required return, affidavit, or statement, shall be returned without delay to the Commission, or if so directed on the subpena, to the presiding officer before whom the person named in the subpena is required to appear. [Rule 134.]

§ 502.135 Subpena of Commission staff personnel, documents or things.

(a) A subpena for the attendance of Commission staff personnel or for the production of documentary materials in the possession of the Commission shall be served upon the Secretary. If the subpena is returnable at hearing, a motion to quash may be filed within five (5) days of service and attendance shall not be required until the presiding officer rules on said motion. If the subpena is served in connection with prehearing depositions, the procedure to be followed with respect to motions to quash and replies thereto will correspond to the procedures established with respect to motions and replies in § 502.132(c).

(b) The General Counsel shall designate an attorney to represent any Commission staff personnel subpenaed under this section. The attorney so designated shall not thereafter participate in the Commission's decision-making process concerning any issue in the proceeding.

(c) Rulings of the presiding officer issued under § 502.135(a) shall become final rulings of the Commission unless an appeal is filed within ten (10) days after date of issuance of such rulings or unless the Commission, on its own motion, reverses, modifies, or stays such rulings within twenty (20) days of their issuance. Replies to appeals may be filed within ten (10) days. No ruling of the presiding officer shall be effective until twenty (20) days from date of issuance unless the Commission otherwise directs. [Rule 135.]

§ 502.136 Enforcement.

In the event of failure to comply with any subpena or order issued in connection therewith, the Commission may seek enforcement as provided in § 502.210(b). [Rule 136.]

SUBPART J—HEARINGS; PRESIDING OFFICERS; EVIDENCE

§ 502.141 Hearings not required by statute.

The Commission may call informal public hearings, not required by statute, to be conducted under the rules in this part where applicable, for the purpose of rulemaking or to obtain information necessary or helpful in the determination of its policies or the carrying out of its duties, and may require the attendance of witnesses and the production of evidence to the extent permitted by law. [Rule 141.]

§ 502.142 Hearings required by statute.

In complaint and answer cases, investigations on the Commission's own motion, and in other rulemaking and adjudication proceedings in which a hearing is required by statute, formal hearings shall be conducted pursuant to 5 U.S.C. 554. [Rule 142.]

§ 502.143 Notice of nature of hearing, jurisdiction and issues.

Persons entitled to notice of hearings, except those notified by complaint served under § 502.133, will be duly and timely informed of (a) the nature of the proceeding, (b) the legal authority and jurisdiction under which the proceeding is conducted, and (c) the terms, substance, and issues involved, or the matters of fact and law asserted, as the case may be. Such notice shall be published in the *Federal Register* unless all persons subject thereto are named and either are personally served or otherwise have actual notice thereof in accordance with law. [Rule 143.]

§ 502.144 Notice of time and place of hearing.

Notice of hearing will designate the time and place thereof, the person or persons who will preside, and the kind of decision to be issued. The date or place of a hearing for which notice has been issued may be changed when warranted. Reasonable notice will be given to the parties or their representatives of the time and place of the change thereof, due regard being had for the public interest and the convenience and necessity of the parties or their representatives. Notice may be served by mail or telegraph. [Rule 144.]

§ 502.145 Presiding officer.

(a) *Definition.* "Presiding officer" includes, where applicable, a member of the Commission or an administrative law judge. (See § 502.25.)

(b) *Designation of administrative law judge.* An administrative law judge will be designated by the Chief of the Commission's Office of Administrative Law Judges to preside at hearings required by statute, in rotation so far as practicable, unless the Commission or one or more members

thereof shall preside, and will also preside at hearings not required by statute when designated to do so by the Commission.

(c) *Unavailability.* If the presiding officer assigned to a proceeding becomes unavailable to the Commission, the Commission, or Chief Judge (if such presiding officer was an administrative law judge), shall designate a qualified officer to take his or her place. Any motion predicated upon the substitution of a new presiding officer for one originally designated shall be made within ten (10) days after notice of such substitution. [Rule 145.]

§ 502.146 Commencement of functions of Office of Administrative Law Judges.

In proceedings handled by the Office of Administrative Law judges, its functions shall attach:

(a) Upon the service by the Commission of a complaint filed pursuant to § 502.62; or

(b) Upon reference by the Commission of a petition for a declaratory order pursuant to § 502.68; or

(c) Upon forwarding for assignment by the Office of the Secretary of a special docket application pursuant to § 502.92; or

(d) Upon the initiation of a proceeding and ordering of hearing before an administrative law judge. [Rule 146.]

§ 502.147 Functions and powers.

(a) *Of presiding officer.* The officer designated to hear a case shall have authority to arrange and give notice of hearing; sign and issue subpoenas authorized by law; take or cause depositions to be taken; rule upon proposed amendments or supplements to pleadings; delineate the scope of a proceeding instituted by order of the Commission by amending, modifying, clarifying or interpreting said order, except with regard to that portion of any order involving the Commission's suspension authority set forth in Section 3, Intercoastal Shipping Act, 1933; hold conferences for the settlement or simplification of issues by consent of the parties; regulate the course of the hearing; prescribe the order in which evidence shall be presented; dispose of procedural requests or similar matters; hear and rule upon motions, administer oaths and affirmations; examine witnesses; direct witnesses to testify or produce evidence available to them which will aid in the determination of any question of fact in issue; rule upon offers of proof and receive relevant, material, reliable and probative evidence; act upon petitions to intervene; permit submission of facts, arguments, offers of settlement, and proposals of adjustment; hear oral argument at the close of testimony; fix the time for filing briefs, motions, and other documents to be filed in connection with hearings and the administrative law judge's decision thereon, except as otherwise provided by the rules in this part; act upon petitions for enlargement of time to file such documents, including answers to formal complaints; and dispose of any other matter that normally and properly arises in the course of proceedings.

The presiding officer or the Commission may exclude any person from a hearing for disrespectful, disorderly, or contumacious language or conduct.

(b) All of the functions delegated in Subparts A to Q of this part, inclusive, to the Chief Judge, presiding officer, or administrative law judge include the functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter, pursuant to the provisions of section 105 of Reorganization Plan No. 7 of 1961. [Rule 147.]

§ 502.148 Consolidation of proceedings.

The Commission or the Chief Judge (or designee) may order two or more proceedings which involve substantially the same issues consolidated and heard together. [Rule 148.]

§ 502.149 Disqualification of presiding or participating Officer.

Any presiding or participating officer may at any time withdraw if he or she deems himself or herself disqualified, in which case there will be designated another presiding officer. If a party to a proceeding, or its representative, files a timely and sufficient affidavit of personal bias or disqualification of a presiding or participating officer, the Commission will determine the matter as a part of the record and decision in the case. [Rule 149.]

§ 502.150 Further evidence required by presiding officer during hearing.

At any time during the hearing, the presiding officer may call for further evidence upon any issue, and require such evidence where available to be presented by the party or parties concerned, either at the hearing or adjournment thereof. [Rule 150.]

§ 502.151 Exceptions to rulings of presiding officer unnecessary.

Formal exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is made or sought, makes known the action which it desires the presiding officer to take or its objection to an action taken, and its grounds therefor. [Rule 151.]

§ 502.152 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof. [Rule 152.]

§ 502.153 Appeal from ruling of presiding officer other than orders of dismissal in whole or in part.

(a) Rulings of the presiding officer may not be appealed prior to or during the course of the hearing, or subsequent thereto, if the proceeding

is still before him or her, except where the presiding officer shall find it necessary to allow an appeal to the Commission to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party.

(b) Any part seeking to appeal must file a motion for leave to appeal no later than fifteen (15) days after written service or oral notice of the ruling in question, unless the presiding officer, for good cause shown, enlarges or shortens the time. Any such motion shall contain not only the grounds for leave to appeal but the appeal itself.

(c) Replies to the motion for leave to appeal and the appeal may be filed within fifteen (15) days after date of service thereof, unless the presiding officer, for good cause shown, enlarges or shortens the time. If the motion is granted, the presiding officer shall certify the appeal to the Commission.

(d) Unless otherwise provided, the certification of the appeal shall not operate as a stay of the proceeding before the presiding officer.

(e) The provisions of § 502.10 shall not apply to this section. [Rule 153.]

§ 502.154 Rights of parties as to presentation of evidence.

Every party shall have the right to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. The presiding officer shall, however, have the right and duty to limit the introduction of evidence and the examination and cross-examination of witnesses when in his or her judgment, such evidence or examination is cumulative or is productive of undue delay in the conduct of the hearing. [Rule 154.]

§ 502.155 Burden of proof.

At any hearing in a suspension proceeding under section 3 of the Intercoastal Shipping Act, 1933 (§ 502.67), the burden of proof to show that the suspended rate, fare, charge, classification, regulation, or practice is just and reasonable shall be upon the respondent carrier or carriers. In all other cases, the burden shall be on the proponent of the rule or order. [Rule 155.]

§ 502.156 Evidence admissible.

In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. All other evidence shall be excluded. Unless inconsistent with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules of Evidence, P.L. 93–595, effective July 1, 1975, will also be applicable. [Rule 156.]

§ 502.157 Written evidence.

(a) The use of written statements in lieu of oral testimony shall be resorted to where the presiding officer in his or her discretion rules that

such procedure is appropriate. The statements shall be numbered in paragraphs, and each party in its rebuttal shall be required to list the paragraphs to which it objects, giving an indication of its reasons for objecting. Statistical exhibits shall contain a short commentary explaining the conclusions which the offeror draws from the data. Any portion of such testimony which is argumentative shall be excluded. Where written statements are used, copies of the statement and any rebuttal statement shall be furnished to all parties, as shall copies of exhibits. The presiding officer shall fix respective dates for the exchange of such written rebuttal statements and exhibits in advance of the hearing to enable study by the parties of such testimony. Thereafter, the parties shall endeavor to stipulate as many of the facts set forth in the written testimony as they may be able to agree upon. Oral examination of witnesses shall thereafter be confined to facts which remain in controversy, and a reading of the written statements at the hearing will be dispensed with unless the presiding officer otherwise directs.

(b) Where a formal hearing is held in a rulemaking proceeding, interested persons will be afforded an opportunity to participate through submission of relevant, material, reliable and probative written evidence properly verified, except that such evidence submitted by persons not present at the hearing will not be made a part of the record if objected to by any party on the ground that the person who submits the evidence is not present for cross-examination. [Rule 157.]

§ 502.158 Documents containing matter not material.

Where written matter offered in evidence is embraced in a document containing other matter which is not intended to be offered in evidence, the offering party shall present the original document to all parties at the hearing for their inspection, and shall offer a true copy of the matter which is to be introduced, unless the presiding officer determines that the matter is short enough to be read into the record. Opposing parties shall be afforded an opportunity to introduce in evidence, in like manner, other portions of the original document which are material and relevant. [Rule 158.]

§ 502.159 [Reserved.]

§ 502.160 Records in other proceedings.

When any portion of the record before the Commission in any proceeding other than the one being heard is offered in evidence, a true copy of such portion shall be presented for the record in the form of an exhibit unless the parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference. [Rule 160.]

§ 502.161 Commission's files.

Where any matter contained in a tariff, report, or other document on file with the Commission is offered in evidence, such document need not be produced or marked for identification, but the matter so offered shall be specified in its particularity, giving tariff number and page number

of tariff, report, or document in such manner as to be readily identified, and may be received in evidence by reference, subject to comparison with the original document on file. [Rule 161.]

§ 502.162 Stipulations.

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. It is desirable that facts be thus agreed upon whenever practicable. Written stipulations shall be subscribed and shall be served upon all parties of record unless presented at the hearing or prehearing conference. A stipulation may be proposed even if not subscribed by all parties without prejudice to any nonsubscribing party's right to cross-examine and offer rebuttal evidence. [Rule 162.]

§ 502.163 Receipt of documents after hearing.

Documents or other writings to be submitted for the record after the close of the hearing will not be received in evidence except upon permission of the presiding officer. Such documents or other writings when submitted shall be accompanied by a statement that copies have been served upon all parties, and shall be received, except for good cause shown, not later than ten (10) days after the close of the hearing and not less than ten (10) days prior to the date set for filing briefs. Exhibit numbers will not be assigned until such documents are actually received and incorporated in the record. [Rule 163.]

§ 502.164 Oral argument at hearings.

Oral argument at the close of testimony may be ordered by the presiding officer in his or her discretion. [Rule 164.]

§ 502.165 Official transcript.

(a) The Commission will designate the official reporter for all hearings. The official transcript of testimony taken, together with any exhibits and any briefs or memoranda of law filed therewith, shall be filed with the Commission. Transcripts of testimony will be available in any proceeding under the rules in this part, and will be supplied by the official reporter to the parties and to the public, except when required for good cause to be held confidential, at rates not to exceed the maximum rates fixed by contract between the Commission and the reporter.

(b)(1) Section 11 of the Federal Advisory Committee Act provides that, except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings. As used in this section, "agency proceeding" means any proceeding as defined in 5 U.S.C. 551(12).

(2) The Office of Management and Budget has interpreted this provision as being applicable to proceedings before the Commission and its administrative law judges. (Guidelines, 38 FR 12851, May 16, 1973).

(3) The Commission interprets section 11 and the OMB guidelines as follows:

(i) Future contracts between the Commission and the successfully bidding recording firm will provide that any party to a Commission proceeding or other interested person (hereinafter included within the meaning of "party") shall be able to obtain a copy of the transcript of the proceeding in which it is involved at the actual cost of duplication of the original transcript, which includes a reasonable amount for overhead and profit, except where it requests delivery of copies in a shorter period of time than is required for delivery by the Commission.

(ii) The Commission will bear the full expense of transcribing all of its administrative proceedings where it requests regular delivery service (as set forth in the Contract). In cases where the Commission requests daily delivery of transcript copies (as set forth in the Contract), any party may receive daily delivery service at the actual cost of duplication.

(iii)(A) Where the Commission does not request daily copy service, any party requesting such service must bear the incremental cost of transcription above the regular copy transcription cost borne by the Commission, in addition to the actual cost of duplication, except that where the party applies for and properly shows that the furnishing of daily copy is indispensible to the protection of a vital right or interest in achieving a fair hearing, the presiding officer in the proceeding in which the application is made shall order that daily copy service be provided the applying party at the actual cost of duplication, with the full cost of transcription being borne by the Commission.

(B) In the event a request for daily copy is denied by the presiding officer, the requesting party, in order to obtain daily copy, must pay the cost of transcription over and above that borne by the Commission, i.e., the incremental cost between that paid by the Commission when it requests regular copy and when it requests daily copy.

(C) The decision of the presiding officer in this situation is interpreted as falling within the scope of the functions and powers of the presiding officer, as defined in § 502.147(a). [Rule 165.]

§ 502.166 Corrections of transcript.

Motions made at the hearing to correct the record will be acted upon by the presiding officer. Motions made after the hearing to correct the record shall be filed with the presiding officer within twenty-five (25) days after the last day of hearing or any session thereof, unless otherwise directed by the presiding officer, and shall be served on all parties. Such motions may be in the form of a letter. If no objections are received within ten (10) days after date of service, the transcript will, upon approval of the presiding officer, be changed to reflect such corrections. If objections are received, the motion will be acted upon with due consideration of the stenographic record of the hearing. [Rule 166.]

§ 502.167 Objection to public disclosure of information.

Upon objection to public disclosure of any information sought to be elicited during a hearing, the presiding officer may in his or her discretion order that the witness shall disclose such information only in the presence of those designated and sworn to secrecy by the presiding officer. The transcript of testimony shall be held confidential. Within five (5) days after such testimony is given, the objecting party shall file with the presiding officer a verified written motion to withhold such information from public disclosure, setting forth sufficient identification of same and the basis upon which public disclosure should not be made. Copies of said transcript and motion need be served only upon the parties to whose representatives the information has been disclosed and upon such other parties as the presiding officer may designate. This rule is subject to the proviso that any information given pursuant thereto, may be used by the presiding officer or the Commission if they deem it necessary to a correct decision in the proceeding. [Rule 167.]

§ 502.168 Copies of data or evidence.

Every person compelled to submit data or evidence shall be entitled to retain or, on payment of proper costs, procure a copy of transcript thereof. [Rule 168.]

§ 502.169 Record of decision.

The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision. [Rule 169.]

SUBPART E—SHORTENED PROCEDURE

§ 502.181 Selection of cases for shortened procedure; consent required.

By consent of the parties and with approval of the Commission or presiding officer, a complaint proceeding may be conducted under shortened procedure without oral hearing, except that a hearing may be ordered by the presiding officer at the request of any party or in his or her discretion. [Rule 181.]

§ 502.182 Complaint and memorandum of facts and arguments and filing fee.

A complaint filed with the Commission under this subpart shall have attached a memorandum of the facts, subscribed and verified according to § 502.112, and of arguments separately stated, upon which it relies. The original of each complaint with memorandum shall be accompanied by copies for the Commission's use. The complaint shall be accompanied by remittance of a $50 filing fee. [Rule 182.]

§ 502.183 Respondent's answering memorandum.

Within twenty-five (25) days after date of service of the complaint, unless a shorter period is fixed, each respondent shall, if it consents to

the shortened procedure provided in this subpart, serve upon complainant pursuant to subpart H of this part an answering memorandum of the facts, subscribed and verified according to § 502.112, and of arguments, separately stated, upon which it relies. The original of the answering memorandum shall be accompanied by a certificate of service as provided in § 502.114 and shall be accompanied by copies for the Commission's use. If the respondent does not consent to the proceeding being conducted under the shortened procedure provided in this subpart, the matter will be governed by subpart E of this part and the respondent shall file an answer under § 502.64. [Rule 183.]

§ 502.184 Complainant's memorandum in reply.

Within fifteen (15) days after the date of service of the answering memorandum prescribed in § 502.183, unless a shorter period is fixed, each complainant may file a memorandum in reply, subscribed and verified according to § 502.112, served as provided in § 502.114, and accompanied by copies for the Commission's use. 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. [Rule 184.]

§ 502.185 Service of memoranda upon and by interveners.

Service of all memoranda shall be made upon any interveners. Interveners shall file and serve memoranda in conformity with the provisions relating to the parties on whose behalf they intervene. [Rule 185.]

§ 502.186 Contents of memoranda.

The memorandum should contain concise arguments and fact, the same as would be offered if a formal hearing were held and briefs filed. If reparation is sought, paid freight bills should accompany complainant's original memorandum. [Rule 186.]

§ 502.187 Procedure after filing of memoranda.

An initial, recommended, or tentative decision will be served upon the parties in the same manner as is provided under § 502.225. Thereafter, the procedure will be the same as that in respect to proceedings after formal hearing. [Rule 187.]

SUBPART L—DEPOSITIONS, WRITTEN INTERROGATORIES, AND DISCOVERY

§ 502.201 General provisions governing discovery.

(a) *Applicability.* The procedures described in this subpart are available in all adjudicatory proceedings under section 22 of the Shipping Act, 1916 and the Shipping Act of 1984. Unless otherwise ordered by the presiding officer, the copy requirements of § 502.118(b)(3)(i) shall be observed.

(b) *Schedule of use.*

(1) *Complaint proceedings.* Any party desiring to use the procedures provided in this subpart shall commence doing so at the time it files

its initial pleading, e.g., complaint, answer or petition for leave to intervene. Discovery matters accompanying complaints shall be filed with the Secretary of the Commission for service pursuant to § 502.113.

(2) *Commission instituted proceedings.* All parties desiring to use the procedures provided in this subpart shall commence to do so within 30 days of the service of the Commission's order initiating the proceeding.

(3) *Commencement of discovery.* The requirement to commence discovery under paragraphs (b)(1) and (b)(2) of this section shall be deemed satisfied when a party serves any discovery request under this subpart upon a party or person from whom a response is deemed necessary by the party commencing discovery. A schedule for further discovery pursuant to this subpart shall, be established at the conference of the parties pursuant to paragraph (d) of this section.

(c) *Completion of discovery.* Discovery shall be completed within 120 days of the service of the complaint or the Commission's order initiating the proceeding.

(d) *Duty of the Parties.* In all proceedings in which the procedures of this subpart are used, it shall be the duty of the parties to meet or confer within fifteen (15) days after service of the answer to a complaint or after service of the discovery requests in a Commission-instituted proceeding in order to: establish a schedule for the completion of discovery within the 120-day period prescribed in paragraph (c) of this section; resolve to the fullest extent possible disputes relating to discovery matters; and expedite, limit, or eliminate discovery by use of admissions, stipulations and other techniques. The schedule shall be submitted to the presiding officer not later than five (5) days after the conference. Nothing in this rule should be construed to preclude the parties from meeting or conferring at an earlier date.

(e) *Submission of status reports and requests to alter schedule.* The parties shall submit a status report concerning their progress under the discovery schedule established pursuant to paragraph (d) of this section not later than thirty (30) days after submission of such schedule to the presiding officer and at 30-day intervals thereafter, concluding on the final day of the discovery schedule, unless the presiding officer otherwise directs. Requests to alter such schedule beyond the 120-day period shall set forth clearly and in detail the reasons why the schedule cannot be met. Such requests may be submitted with the status reports unless an event occurs which makes adherence to the schedule appear to be impossible, in which case the requests shall be submitted promptly after occurrence of such event.

(f) *Conferences.* The presiding officer may at any time order the parties or their attorneys to participate in a conference at which the presiding officer may direct the proper use of the procedures of this subpart or make such orders as may be necessary to resolve disputes with respect to discovery and to prevent delay or undue inconvenience. When a reporter

is not present and oral rulings are made at a conference held pursuant to this paragraph or paragraph (g) of this section, the parties shall submit to the presiding officer as soon as possible but within three (3) work days, unless the presiding officer grants additional time, a joint memorandum setting forth their mutual understanding as to each ruling on which they agree and, as to each ruling on which their understandings differ, the individual understandings of each party. Thereafter, the presiding officer shall issue a written order setting forth such rulings.

(g) *Resolution of disputes.* After making every reasonable effort to resolve discovery disputes, a party may request a conference or rulings from the presiding officer on such disputes. Such rulings shall be made orally upon the record when feasible and/or by subsequent ruling in writing. If necessary to prevent undue delay or otherwise facilitate conclusion of the proceeding, the presiding officer may order a hearing to commence before the completion of discovery.

(h) *Scope of examination.* Persons and parties may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(i) *Protective Orders.*

(1) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense including one or more of the following: (i) that the discovery not be had; (ii) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (iii) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (iv) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (v) that discovery may be conducted with no one present except persons designated by the presiding officer; (vi) that a deposition after being sealed be opened only by order of the presiding officer; (vii) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (viii) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

(2) If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order

that any party or person provide or permit discovery. Rulings under this paragraph shall be issued by the presiding officer at a discovery conference called under § 502.201(f) or, if circumstances warrant, under such other procedure as the presiding officer may establish.

(j) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the party's responses to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement responses with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at a hearing, the subject matter on which such person is expected to testify, and the substance of the testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (i) the party knows that the response was incorrect when made, or (ii) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the presiding officer or by agreement of the parties, subject to the time limitations set forth in paragraph (c) of this section or established under paragraph (e) of this section. [Rule 201.]

§ 502.202 Persons before whom depositions may be taken.

(a) *Within the United States.* Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths under the laws of the United States or of the place where the examination is held.

(b) *In foreign countries.* In a foreign country, depositions may be taken (1) on notice, before a person authorized to administer oaths in the place in which the examination is held, either under the law thereof or under the law of the United States, or (2) before a person commissioned by the Commission, and a person so commissioned shall have the power by virtue of his or her commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained

in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under the rules in this subpart. (See 22 CFR 92.49–92.66.)

(c) *Disqualification for interest.* No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(d) *Waiver of objection.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(e) *Stipulations.* If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions. [Rule 202.]

§ 502.203 Depositions upon oral examination.

(a) *Notice of examination.*

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to such person and to every other party to the action, pursuant to subpart H of this part. The notice shall state the time and place for the taking of the deposition sufficient to identify the person or the particular class or group to which the person belongs. The notice shall also contain a statement of the matters concerning which each witness will testify.

(2) The attendance of witnesses may be compelled by subpoena as provided in Subpart I of this part. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(3) All errors and irregularities in the notice of subpoena for taking of a deposition are waived unless written objection is promptly served upon the party giving the notice.

(4) Examination and cross-examination of deponents may proceed as permitted at the hearing under the provisions of § 502.154.

(b) *Record of examination; oath; objections.*

(1) The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the direction and in his or her presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings,

shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. Objections shall be resolved at a discovery conference called under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish.

(2) In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(3) The parties may stipulate or the presiding officer may upon motion order that a deposition be taken by telephone or other reliable device.

(c) *Motion to terminate or limit examination.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the presiding officer may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in paragraph (b) of this section. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the presiding officer. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. Rulings under this paragraph shall be issued by the presiding officer at a discovery conference called under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish.

(d) *Submission to witness; changes; signing.* When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign, together with the reason, if any, given therefor, and the deposition may then be used as fully as though signed, unless upon objection, the presiding officer holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(e) *Certification and filing by officer; copies, notice of filing.*

(1) The officer taking the deposition shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. The officer shall then securely seal the deposition in an envelope endorsed with the title

of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the Secretary of the Commission by hand or registered or certified mail.

(2) Interested parties shall make their own arrangements with the officer taking the deposition for copies of the testimony and the exhibits.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(f) *Effect of errors and irregularities.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under this section and § 502.204 are waived unless a motion to suppress the deposition or some part thereof is made within ten (10) days of filing. [Rule 203.]

§ 502.204 Depositions upon written interrogatories.

(a) *Serving interrogatories; notice.* A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party pursuant to subpart H of this part with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within ten (10) days thereafter, a party so served may serve cross interrogatories upon the party proposing to take the deposition. All errors and irregularities in the notice are waived unless written objection is promptly served upon the party giving the notice.

(b) *Officer to take responses and prepare record.* A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly in the manner provided by paragraphs (b), (d) and (e) of § 502.203 to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him or her.

(c) *Notice of filing.* When the deposition is filed, the party taking it shall promptly give notice thereof to all other parties. [Rule 204.]

§ 502.205 Interrogatories to parties.

(a) *Service, answers.*

(1) Any party may serve, pursuant to Subpart H of this part, upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Any party desiring to serve interrogatories as provided by this section must comply with the applicable provisions of § 502.201 and make service thereof on all parties to the proceeding.

(2) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by

the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, on all parties to the proceeding under the schedule established pursuant to § 502.201. The presiding officer, for good cause, may limit service of answers.

(b) *Objections to interrogatories.* All objections to interrogatories shall be resolved at the conference or meeting provided for under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. Written replies to objections to interrogatories shall be permitted only to the extent that the discovery schedule previously established under § 502.201(d) is not delayed.

(c) *Scope, time, number and use.*

(1) Interrogatories may relate to any matters which can be inquired into under § 502.201(h), and the answers may be used to the same extent as provided in § 502.209 for the use of the deposition of a party.

(2) Interrogatories may be sought after interrogatories have been answered, but the presiding officer, on motion of the deponent or the party interrogated, may make such protective order as justice may require.

(3) The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression.

(4) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the presiding officer may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

(d) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. [Rule 205.]

§ 502.206 Production of documents and things and entry upon land for inspection and other purposes.

(a) *Scope.* Any party may serve, pursuant to Subpart H of this part, on any other party a request (1) to produce and permit the party making the request, or someone acting on its behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photo-

graphs, sound or video recordings, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of § 502.203(a) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property of any designated object or operation thereon, within the scope of § 502.203(a).

(b) *Procedure.* The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Responses shall be served under the schedule established pursuant to § 502.201. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. Objections to requests for production of documents shall be resolved at the conference or meeting required under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. Written replies to objections to requests for production of documents shall be permitted only to the extent that the discovery schedule previously established under § 502.201(d) is not delayed. [Rule 206.]

§ 502.207 Requests for admission.

(a)(1) A party may serve, pursuant to Subpart H of this part, upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of § 502.203(a) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Any party desiring to serve a request as provided by this section must comply with the applicable provisions of § 502.201.

(2)(i) Each matter of which an admission is requested shall be separately set forth.

(ii) The matter is admitted unless, within thirty (30) days after service of the request, or within such shorter or longer time as the presiding officer may allow pursuant to § 502.201, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons

why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder.

(iii) An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that reasonable inquiry has been made and that the information known or readily obtainable is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; a party may, subject to the provisions of § 502.207(c) deny the matter or set forth reasons why it cannot be admitted or denied.

(3) The party who has requested admissions may request rulings on the sufficiency of the answers or objections. Rulings on such requests shall be issued at a conference called under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. Unless the presiding officer determines that an objection is justified, the presiding officer shall order that an answer be served. If the presiding officer determines that an answer does not comply with the requirements of this rule, the presiding officer may order either that the matter is admitted or that an amended answer be served. The presiding officer may, in lieu of these orders, determine that final disposition of the request be made at a prehearing conference or at a designated time prior to hearing.

(b) *Effect of admission.* Any matter admitted under this rule is conclusively established unless the presiding officer on motion permits withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the presiding officer that withdrawal or amendment will be prejudicial in maintaining the party's action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission for any other purpose, nor may it be used against the party in any other proceeding.

(c) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under paragraph (a) of this section, and if the party requesting the admission thereafter proves the genuineness of the document or the truth of the matter, that party may apply to the presiding officer for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. Such application must be made to the presiding officer before issuance of the initial decision in the proceeding. The presiding officer shall make the order unless it is found that (1) the request was held objectionable pursuant to paragraph (a) of this section, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that it might prevail

on the matter, or (4) there was other good reason for the failure to admit. [Rule 207.]

§ 502.208 Use of discovery procedures directed to Commission staff personnel.

(a) Discovery procedures described in §§ 502.202, 502.203, 502.204, 502.205, 502.206, and 502.207, directed to Commission staff personnel shall be permitted and shall be governed by the procedures set forth in those sections except as modified by paragraphs (b) and (c) of this section. All notices to take depositions, written interrogatories, requests for production of documents and other things, requests for admissions, and any motions in connection with the foregoing, shall be served on the Secretary of the Commission.

(b) The General Counsel shall designate an attorney to represent any Commission staff personnel to whom any discovery requests or motions are directed. The attorney so designated shall not thereafter participate in the Commission's decision-making process concerning any issue in the proceeding.

(c) Rulings of the presiding officer issued under paragraph (a) of this section shall become final rulings of the Commission unless an appeal is filed within ten (10) days after date of issuance of such rulings or unless the Commission on its own motion reverses, modifies, or stays such rulings within twenty (20) days of their issuance. Replies to appeals may be filed within ten (10) days. No motion for leave to appeal is necessary in such instances and no ruling of the presiding officer shall be effective until twenty (20) days from date of issuance unless the Commission otherwise directs. [Rule 208.]

§ 502.209 Use of depositions at hearings.

(a) *General.* At the hearing, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or duly authorized agent of a public or private corporation, partnership, or association which is a party, may be used by any other party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer finds: (i) that the witness is dead; or (ii) that the witness is out of the United States unless it appears that the absence of the witness was procured by the party offering the depositions; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance

of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, any other party may require introduction of all of it which is relevant to the part introduced, and any party may introduce any other parts.

(5) Substitution of parties does not affect the right to use depositions previously taken; and, when a proceeding in any hearing has been dismissed and another proceeding involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former proceeding may be used in the latter as if originally taken therefor.

(b) *Objections to admissibility.*

(1) Except as otherwise provided in this paragraph, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(2) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at the time.

(3) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(4) Objections to the form of written interrogatories submitted under § 502.204 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross interrogatories.

(c) *Effect of taking or using depositions.* A party shall not be deemed to make a person its own witness for any purpose by taking such person's deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by any other party of a deposition as described in paragraph (a)(3) of this section. At the hearing, any party may rebut any relevant evidence contained in a deposition whether introduced by it or by any other party. [Rule 209.]

§ 502.210 Refusal to comply with orders to answer or produce documents; sanctions; enforcement.

(a) *Sanctions for failure to comply with order.* If a party or an officer or duly authorized agent of a party refuses to obey an order requiring such party to answer designated questions or to produce any document or other thing for inspection, copying or photographing or to permit it to be done, the presiding officer may make such orders in regard to the refusal as are just, and among others, the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence or an order that with respect to matters regarding which the order was made or any other designated fact, inferences will be drawn adverse to the person or party refusing to obey such order;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereto, or rendering a judgment by default against the disobedient party.

(b) *Enforcement of orders and subpenas.* In the event of refusal to obey an order or failure to comply with a subpena, the Attorney General at the request of the Commission, or any party injured thereby may seek enforcement by a United States district court having jurisdiction over the parties. Any action with respect to enforcement of subpenas or orders relating to depositions, written interrogatories, or other discovery matters shall be taken within twenty (20) days of the date of refusal to obey or failure to comply. A private party shall advise the Commission five (5) days (excluding Saturdays, Sundays and legal holidays) before applying to the court of its intent to seek enforcement of such subpenas and discovery orders.

(c) *Persons and documents located in a foreign country.* Orders of the presiding officer directed to persons or documents located in a foreign country shall become final orders of the Commission unless an appeal to the Commission is filed within ten (10) days after date of issuance of such orders or unless the Commission on its own motion reverses, modifies, or stays such rulings within twenty (20) days of their issuance. Replies to appeals may be filed within ten (10) days. No motion for leave to appeal is necessary in such instances and no orders of the presiding officer shall be effective until twenty (20) days from date of issuance unless the Commission otherwise directs. [Rule 210.]

SUBPARTS M—BRIEFS; REQUESTS FOR FINDINGS; DECISIONS; EXCEPTIONS

§ 502.221 Briefs; requests for findings.

(a) The presiding officer shall fix the time and manner of filing briefs and any enlargement of time. The period of time allowed shall be the same for all parties unless the presiding officer, for good cause shown, directs otherwise.

(b) Briefs shall be served upon all parties pursuant to Subpart H of this part.

(c) In investigations instituted on the Commission's own motion, the presiding officer may require Hearing Counsel to file a request for findings of fact and conclusions within a reasonable time prior to the filing of briefs. Service of the request shall be in accordance with the provisions of Subpart H of this part.

(d) Unless otherwise ordered by the presiding officer, opening or initial briefs shall contain the following matters in separately captioned sections: (1) introductory section describing the nature and background of the case, (2) proposed findings of fact in serially numbered paragraphs with reference to exhibit numbers and pages of the transcript, (3) argument based upon principles of law with appropriate citations of the authorities relied upon, and (4) conclusions.

(e) All briefs shall contain a subject index or table of contents with page references and a list of authorities cited.

(f) The presiding officer may limit the number of pages to be contained in a brief. [Rule 221.]

§ 502.222 Requests for enlargement of time for filing briefs.

Requests for enlargement of time within which to file briefs shall conform to the requirements of § 502.102. Except for good cause shown, such requests shall be filed and served pursuant to Subpart H of this part not later than five (5) days before the expiration of the time fixed for the filing of the briefs. [Rule 222.]

§ 502.223 Decisions—administrative law judges.

To the administrative law judges is delegated the authority to make and serve initial or recommended decisions. [Rules 223.]

§ 502.224 Separation of functions.

The separation of functions as required by 5 U.S.C. 554(d) shall be observed in proceedings under Subparts A to Q inclusive, of this part. [Rule 224.]

§ 502.225 Decisions—contents and service.

All initial, recommended, and final decisions will include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and the appropriate rule, order, sanction, relief, or denial thereof. A copy of each decision when issued shall be served on the parties to the proceeding. In proceedings involving overcharge claims, the presiding officer may, where appropriate, require that the carrier publish notice in its tariff of

the substance of the decision. This provision shall also apply to decisions issued pursuant to Subpart T of this part. [Rule 225.]

§ 502.226 Decision based on official notice; public documents.

(a) Official notice may be taken of such matters as might be judicially noticed by the courts, or of technical or scientific facts within the general knowledge of the Commission as an expert body, provided, that where a decision or part thereof rests on the official notice of a material fact not appearing in the evidence in the record, the fact of official notice shall be so stated in the decision, and any party, upon timely request, shall be afforded an opportunity to show the contrary.

(b) Whenever there is offered in evidence (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a state or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered in evidence as a public document by specifying the document or relevant part thereof. [Rule 226.]

§ 502.227 Exceptions to decisions or orders of dismissal of administrative law judges; replies thereto; and review of decisions or orders of dismissal by Commission.

(a)(1) Within twenty-two (22) days after date of service of the initial decision, unless a shorter period is fixed under § 502.103, any party may file a memorandum excepting to any conclusions, findings, or statements contained in such decision, and a brief in support of such memorandum. Such exceptions and brief shall constitute one document, shall indicate with particularity alleged errors, shall indicate transcript page and exhibit number when referring to the record, and shall be served on all parties pursuant to Subpart H of this part.

(2) Any adverse party may file and serve a reply to such exceptions within twenty-two (22) days after the date of service thereof, which shall contain appropriate transcript and exhibit references.

(3) Whenever the officer who presided at the reception of the evidence, or other qualified officer, makes an initial decision, such decision shall become the decision of the Commission thirty (30) days after date of service thereof (and the Secretary shall so notify the parties), unless within such 30-day period, or greater time as enlarged by the Commission for good cause shown, request for review is made in exceptions filed or a determination to review is made by the Commission on its own initiative.

(4) Upon the filing of exceptions to, or review of, an initial decision, such decision shall become inoperative until the Commission determines the matter.

(5) Where exceptions are filed to, or the Commission reviews, an initial decision, the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision. Whenever the Commission shall determine to review an initial decision on its own initiative, notice of such intention shall be served upon the parties.

(6) The time periods for filing exceptions and replies to exceptions, prescribed by this section, shall not apply to proceedings conducted under §§ 502.67 and 502.75.

(b)(1) If an administrative law judge has granted a motion for dismissal of the proceeding in whole or in part, any party desiring to appeal must file such appeal no later than twenty-two (22) days after service of the ruling on the motion in question.

(2) Any adverse party may file and serve a reply to an appeal under this paragraph within fifteen (15) days after the date the appeal is served.

(3) The denial of a petition to intervene or withdrawal of a grant of intervention shall be deemed to be a dismissal within the meaning of this paragraph.

(c) Whenever an administrative law judge orders dismissal of a proceeding in whole or in part, such order, in the absence of appeal, shall become the order of the Commission thirty (30) days after date of service of such order (and the Secretary shall so notify the parties), unless within such 30-day period the Commission decides to review such order on its own motion, in which case notice of such intention shall be served upon the parties.

(d) The Commission shall not, on its own initiative, review any initial decision or order of dismissal unless such review is requested by an individual Commissioner. Any such request must be transmitted to the Secretary within thirty (30) days after date of service of the decision or order. Such request shall be sufficient to bring the matter before the Commission for review. [Rule 227.]

§ 502.228 Request for enlargement of time for filing exceptions and replies thereto.

Requests for enlargement of time within which to file exceptions, and briefs in support thereof, or replies to exceptions shall conform to the applicable provisions of § 502.102. Requests for extensions of these periods will be granted only under exceptional circumstances duly demonstrated in the request. Except for good cause shown, such requests shall be filed and served not later than five (5) days before the expiration of the time fixed for the filing of such documents. Any enlargement of time granted will automatically extend by the same period the date for the filing of notice of review by the Commission. [Rule 228.]

§ 502.229 Certification of record by presiding or other officer.

The presiding or other officer shall certify and transmit the entire record to the Commission when (a) exceptions are filed or the time therefor

has expired, (b) notice is given by the Commission that the initial decision will be reviewed on its own initiative, or (c) the Commission requires the case to be certified to it for initial decision. [Rule 229.]

§ 502.230 Reopening by presiding officer or Commission.

(a) *Motion to reopen.* At any time after the conclusion of a hearing in a proceeding, but before issuance by the presiding officer of a recommended or initial decision, any party to the proceeding may file with the presiding officer a motion to reopen the proceeding for the purpose of receiving additional evidence. A motion to reopen shall be served in conformity with the requirements of Subpart H and shall set forth the grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

(b) *Reply.* Within ten (10) days following service of a motion to reopen, any party may reply to such motion.

(c) *Reopening by presiding officer.* At any time prior to filing his or her decision, the presiding officer upon his or her own motion may reopen a proceeding for the reception of further evidence.

(d) *Reopening by the Commission.* Where a decision has been issued by the presiding officer or where a decision by the presiding officer has been omitted, but before issuance of a Commission decision, the Commission may, after petition and reply in conformity with paragraphs (a) and (b) of this section, or upon its own motion, reopen a proceeding for the purpose of taking further evidence.

(e) *Remand by the Commission.* Nothing contained in this rule shall preclude the Commission from remanding a proceeding to the presiding officer for the taking of additional evidence or determining points of law. [Rule 230.]

SUBPART N—ORAL ARGUMENT; SUBMISSION FOR FINAL DECISION

§ 502.241 Oral Argument.

(a) If oral argument before the Commission is desired on exceptions to an initial or recommended decision, or on a motion, petition, or application, a request therefor shall be made in writing. Any party may make such request irrespective of its filing exceptions under § 502.227. If a brief on exceptions is filed, the request for oral argument shall be incorporated in such brief. Requests for oral argument on any motion, petition, or application shall be made in the motion, petition or application, or in the reply thereto.

(b) Applications for oral argument will be granted or denied in the discretion of the Commission, and, if granted; the notice of oral argument will set forth the order of presentation. Upon request, the Commission will notify any party of the amount of time which will be allowed it.

(c) Those who appear before the Commission for oral argument shall confine their argument to points of controlling importance raised on exceptions or replies thereto. Where the facts of a case are adequately and accurately dealt with in the initial or recommended decision, parties should, as far as possible, address themselves in argument to the conclusions.

(d) Effort should be made by parties taking the same position to agree in advance of the argument upon those persons who are to present their side of the case, and the names of such persons and the amount of time requested should be received by the Commission not later than ten (10) days before the date set for the argument. The fewer the number of persons making the argument the more effectively can the parties' interests be presented in the time allotted. [Rule 241.]

§ 502.242 Submission to Commission for final decision.

A proceeding will be deemed submitted to the Commission for final decision as follows: (a) If oral argument is had, the date of completion thereof, or if memoranda on points of law are permitted to be filed after argument, the last date of such filing; (b) if oral argument is not had, the last date when exceptions or replies thereto are filed, or if exceptions are not filed, the expiration date for such exceptions; (c) in the case of an initial decision, the date of notice of the Commission's intention to review the decision, if such notice is given. [Rule 242.]

§ 502.243 Participation of absent Commissioner.

Any Commissioner who is not present at oral argument and who is otherwise authorized to participate in a decision shall participate in making that decision after reading the transcript of oral argument unless he or she files in writing an election not to participate. [Rule 243.]

SUBPART O—REPARATION

§ 502.251 Proof on award of reparation.

If many shipments or points of origin or destination are involved in a proceeding in which reparation is sought (See § 502.63), the Commission will determine in its decision the issues as to violations, injury to complainant, and right to reparation. If complainant is found entitled to reparation, the parties thereafter will be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation due before the order of the Commission awarding reparation is entered. In such cases, freight bills and other exhibits bearing on the details of all shipments, and the amount of reparation on each, need not be produced at the original hearing unless called for or needed to develop other pertinent facts. [Rule 251.]

§ 502.252 Reparation statements.

When the Commission finds that reparation is due, but that the amount cannot be ascertained upon the record before it, the complainant shall immediately prepare a statement in accordance with the approved reparation

statement in Exhibit No. 1 to this subpart, showing details of the shipments on which reparation is claimed. This statement shall not include any shipments not covered by the findings of the Commission. Complainant shall forward the statement, together with the paid freight bills on the shipments, or true copies thereof, to the respondent or other person who collected the charges for checking and certification as to accuracy. Statements so prepared and certified shall be filed with the Commission for consideration in determining the amount of reparation due. Disputes concerning the accuracy of amounts may be assigned for conference by the Commission, or in its discretion referred for further hearing. [Rule 252.]

§ 502.253 Interest and attorney's fees in reparation proceedings.

(a) Except as to applications for refund or waiver of freight charges under § 502.92 and claims which are settled by agreement of the parties, and absent fraud or misconduct of a party, interest will be granted on awards of reparation in cases involving the misrating of cargo and arising under section 10(b) of the Shipping Act of 1984 and section 2 of the Intercoastal Shipping Act, 1933. Interest awarded in reparation proceedings will accrue from the date of injury to the date specified in the Commission order awarding reparations. Normally, the date specified within which payment must be made will be fifteen 15 days subsequent to the date of service of the Commission Order. The rate of interest will be derived from the average monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that the injury occurred and concluding with the latest available monthly Treasury bill rate at the date of the Commission Order awarding reparations. Compounding will be daily from the date of injury to the date specified in the Commission Order awarding reparations. The monthly rates on six-month U.S. Treasury bills for the reparation period will be summed and divided by the number of months for which interest rates are available in the reparation period to determine the average interest rate applicable during the period.

(b) The Commission shall also award reasonable attorney's fees in reparation proceedings. [Rule 253.]

EXHIBIT NO. 1 TO SUBPART O

[§ 502.252]

REPARATION STATEMENT TO BE FILED PURSUANT TO RULE 252

Claim of _____ under the decision of the Federal Maritime Commission in Docket No. _____.

Date of B/L	Date of delivery or tender of delivery	Date charges paid	Vessel	Voyage No.	Port of origin	Destination port	Route	Commodity	Weight or measurement	As charged		Should be		Reparation	Charges paid by*
										Rate	Amount	Rate	Amount		

*Here insert name of person paying charges in the first instance, and state whether as consignor, consignee, or in what other capacity.

Total amount of reparation $ _____.

The undersigned hereby certifies that this statement has been checked against the records of this company and found correct.

Date _____

_____ Steamship Company, Collecting Carrier Respondent,

By _____, *Auditor*

By _____, *Claimant*

_____, *Attorney*

(address and date)

SUBPART P—RECONSIDERATION OF PROCEEDINGS

§ 502.261 Petitions for reconsideration and stay.

(a) Within thirty (30) days after issuance of a final decision or order by the Commission, any party may file a petition for reconsideration. Such petition shall be served in conformity with the requirements of Subpart H of this part. A petition will be subject to summary rejection 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. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received. A petition shall be verified if verification of the original pleading is required and shall not operate as a stay of any rule or order of the Commission.

(b) A petition for stay of a Commission order which directs the discontinuance of statutory violations will not be received.

(c) The provisions of this section are not applicable to decisions issued pursuant to Subpart S of this part. [Rule 261.]

§ 502.262 Reply.

Any party may file a reply to a petition for reconsideration within fifteen (15) days after the date of service of the petition in accordance with § 502.74. The reply shall be served in conformity with Subpart H. [Rule 262.]

SUBPART Q—SCHEDULES AND FORMS

§ 502.271 Schedule of information for presentation in regulatory cases.

The following approved forms and illustrative wording for use in Commission proceedings appear in this part as follows:

(a) *Notice of Appearance.* Exhibit No. 1 to Subpart B [following § 502.32].

(b) *Certification.* Certification of non-disclosure by persons requesting underlying data from carriers filing general rate increase or decrease [502.67(a)(3)].

(c) *Complaint.* Exhibit No. 1 to Subpart E [following § 502.75].

(d) *Verification.* See complaint form in Exhibit No. 1 to Subpart E [following § 502.75].

(e) *Answer to Complaint.* Exhibit No. 2 to Subpart E [following § 502.75].

(f) *Petition for Leave to Intervene.* Exhibit No. 3 to Subpart E [following § 502.75].

(g) *Special Docket Application.* Exhibit No. 1 to Subpart F [following § 502.95].

(h) *Certificate of Service.* § 502.117 [Subpart H]. See also § 502.320 for small claims.

(i) *Reparation Statement.* Where the Commission finds reparation is due but that the amount cannot be ascertained: Exhibit No. 1 to Subpart O [following § 502.253].

(j) *Small Claim Form for Informal Adjudication.* Exhibit No. 1 to Subpart S [following § 502.305].

(k) *Respondent's Consent Form for Informal Adjudication.* Exhibit No. 2 to Subpart S [following § 502.305]. [Rule 271.]

SUBPART R—NONADJUDICATORY INVESTIGATIONS

§ 502.281 Investigational policy.

The Commission has extensive regulatory duties under the various acts it is charged with administering. The conduct of investigations is essential to the proper exercise of the Commission's regulatory duties. It is the purpose of this subpart to establish procedures for the conduct of such investigations which will insure protection of the public interest in the proper and effective administration of the law. The Commission encourages voluntary cooperation in its investigations where such can be effected without delay or without prejudice to the public interest. The Commission may, in any matter under investigation, invoke any or all of the compulsory processes authorized by law. [Rule 281.]

§ 502.282 Initiation of investigations.

Commission inquiries and nonadjudicatory investigations are originated by the Commission upon its own motion when in its discretion the Commission determines that information is required for the purposes of rulemaking or is necessary or helpful in the determination of its policies or the carrying out of its duties, including whether to institute formal proceedings directed toward determining whether any of the laws which the Commission administers have been violated. [Rule 282.]

§ 502.283 Order of investigation.

When the Commission has determined that an investigation is necessary, an Order of Investigation shall be issued. [Rule 283.]

§ 502.284 By whom conducted.

Investigations are conducted by Commission representatives designated and duly authorized for the purpose. (See § 502.25.) Such representatives are authorized to exercise the duties of their office in accordance with the laws of the United States and the regulations of the Commission, including the resort to all compulsory processes authorized by law, and the administration of oaths and affirmances in any matters under investigation by the Commission. [Rule 284.]

§ 502.285 Investigational hearings.

(a) Investigational hearings, as distinguished from hearings in adjudicatory proceedings, may be conducted in the course of any investigation undertaken by the Commission, including inquiries initiated for the purpose of determining whether or not a person is complying with an order of the Commission.

(b) Investigational hearings may be held before the Commission, one or more of its members, or a duly designated representative, for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation. Such hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of investigation. [Rule 285.]

§ 502.286 Compulsory process.

The Commission, or its designated representative may issue orders or subpenas directing the person named therein to appear before a designated representative at a designated time and place to testify or to produce documentary evidence relating to any matter under investigation, or both. Such orders and subpenas shall be served in the manner provided in § 502.134. [Rule 286.]

§ 502.287 Depositions.

The Commission, or its duly authorized representative, may order testimony to be taken by deposition in any investigation at any stage of such investigation. Such depositions may be taken before any person designated by the Commission having the power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition or under his or her direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and be deposed and to produce evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence as provided in § 502.131. [Rule 287.]

§ 502.288 Reports.

The Commission may issue an order requiring a person to file a report or answers in writing to specific questions relating to any matter under investigation. [Rule 288.]

§ 502.289 Noncompliance with investigational process.

In case of failure to comply with Commission investigational processes, appropriate action may be initiated by the Commission, including actions for enforcement by the Commission or the Attorney General and forfeiture of penalties or criminal actions by the Attorney General. [Rule 289.]

§ 502.290 Rights of witness.

Any person required to testify or to submit documentary evidence shall be entitled to retain or, on payment of lawfully prescribed cost, procure a copy of any document produced by such person and of his or her own testimony as stenographically reported or, in the depositions, as reduced to writing by or under the direction of the person taking the deposition.

Any party compelled to testify or to produce documentary evidence may be accompanied and advised by counsel, but counsel may not, as a matter or right, otherwise participate in the investigation. [Rule 290.]

§ 502.291 Nonpublic proceedings.

Unless otherwise ordered by the Commission, all investigatory proceedings shall be nonpublic. [Rule 291.]

SUBPART S—INFORMAL PROCEDURE FOR ADJUDICATION OF SMALL CLAIMS

§ 502.301 Statement of Policy.

(a) Section 11(a) of the Shipping Act of 1984 permits any person to file a complaint with the Commission claiming a violation occurring in connection with the foreign commerce of the United States and to seek reparation for any injury caused by that violation.

(b) Section 22 of the Shipping Act, 1916, permits any person to file a complaint against any common carrier by water in interstate and offshore domestic commerce or against any other person subject to the Shipping Act, 1916 or the Intercoastal Shipping Act, 1933, claiming a violation of those statutes and to seek reparation for that violation.

(c) With the consent of both parties, claims filed under this subpart in the amount of $10,000 or less will be referred to the Commission's Informal Dockets Activity for adjudication and decision by its Settlement Officers without the necessity of formal proceedings under the rules of this part.

(d) Determination of claims under this subpart shall be administratively final and conclusive. [Rule 301.]

§ 502.302 Limitations of Actions.

(a) Claims alleging violations of the Shipping Act of 1984 must be filed within three years from the time the cause of action accrues.

(b) Claims alleging violations of the Shipping Act, 1916 or Intercoastal Shipping Act, 1933, must be filed within two years from the time the cause of action arises.

(c) A claim is deemed filed on the date it is received by the Commission. [Rule 302.]

§ 502.303 [Reserved.]

§ 502.304 Procedure and filing fee.

(a) A sworn claim under this subpart shall be filed in the form prescribed in Exhibit No. 1 to this subpart. Three (3) copies of the claim must be filed, together with the same number of copies of such supporting documents as may be deemed necessary to establish the claim. Copies of tariff pages need not be filed; reference to such tariffs or to pertinent parts thereof will be sufficient. Supporting documents may consist of affidavits, correspondence, bills of lading, paid freight bills, export declarations, dock or wharf receipts, or of such other documents as, in the judgment

of the claimant, tend to establish the claim. The Settlement Officer may, if deemed necessary, request additional documents or information from claimants. Claimant may attach a memorandum, brief or other document containing discussion, argument, or legal authority in support of its claim. If a claim filed under this subpart involves any shipment which has been the subject of a previous claim filed with the Commission, formally or informally, full reference to such previous claim must be given.

(b) Claims under this subpart shall be addressed to the Office of the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Such claims shall be accompanied by remittance of a $25 filing fee.

(c) Each claim under this subpart will be acknowledged with a reference to the Informal Docket Number assigned. The number shall consist of a numeral(s) followed by capital "I" in parentheses. All further correspondence pertaining to such claims must refer to the assigned Informal Docket Number. If the documents filed fail to establish a claim for which relief may be granted, the parties affected will be so notified in writing. The claimant may thereafter, but only if the period of limitation has not run, resubmit its claim with such additional proof as may be necessary to establish the claim. In the event a complaint has been amended because it failed to state a claim upon which relief may be granted, it will be considered as a new complaint.

(d) A copy of each claim filed under this subpart, with attachments, shall be served by the Settlement Officer on the respondent involved.

(e) Within twenty-five (25) days from the date of service of the claim, the respondent shall serve upon the claimant and file with the Commission its response to the claim, together with an indication, in the form prescribed in Exhibit No. 2 to this subpart, as to whether the informal procedure provided in this subpart is consented to. Failure of the respondent to indicate refusal or consent in its response will be conclusively deemed to indicate such consent. The response shall consist of documents, arguments, legal authorities, or precedents, or any other matters considered by the respondent to be a defense to the claim. The Settlement Officer may request the respondent to furnish such further documents or information as deemed necessary, or he or she may require the claimant to reply to the defenses raised by the respondent.

(f) If the respondent refuses to consent to the claim being informally adjudicated pursuant to this subpart, the claim will be considered a complaint under § 502.311 and will be adjudicated under Subpart T of this part.

(g) Both parties shall promptly be served with the Settlement Officer's decision which shall state the basis upon which the decision was made. Where appropriate, the Settlement Officer may require that the respondent publish notice in its tariff of the substance of the decision. This decision shall be final, unless, within thirty (30) days from the date of service of the decision, the Commission exercises its discretionary right to review

the decision. The Commission shall not, on its own initiative, review any decision or order of dismissal unless such review is requested by an individual Commissioner. Any such request must be transmitted to the Secretary within thirty (30) days after date of service of the decision or order. Such request shall be sufficient to bring the matter before the Commission for review.

(h) Within thirty (30) days after service of a final decision by a Settlement Officer, any party may file a petition for reconsideration. Such petition shall be directed to the Settlement Officer and shall act as a stay of the review period prescribed in paragraph (g) of this section. A petition will be subject to summary rejection 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; (3) addresses a material matter in the Settlement Officer's decision upon which the petitioner has not previously had the opportunity to comment. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received. Upon issuance of a decision or order on reconsideration by the Settlement Officer, the review period prescribed in paragraph (g) of this section will recommence. [Rule 304.]

§ 502.305 Applicability of other rules of this part.

Except as specifically provided in this subpart, the Rules in Subparts A through Q, inclusive, of this part do not apply to situations covered by this subpart. [Rule 305.]

EXHIBIT NO. 1 to SUBPART S

[§ 502.304(a)]

Small Claim Form For Informal Adjudication And Information Checklist

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

_____

INFORMAL DOCKET NO. _____

_____

_____ (Claimant) vs. _____ (Respondent)

I. The claimant is [state in this paragraph whether claimant is an association, corporation, firm or partnership, and if a firm or partnership, the names of the individuals composing the same. State the nature and principal place of business.]

II. The respondent named above is [state in this paragraph whether respondent is an association, corporation, firm or partnership, and if a firm or partnership, the names of the individuals composing the same. State the nature and principal place of business.]

III. That [state in this and subsequent paragraphs to be lettered A, B, etc., the matters that gave rise to the claim. Name specifically each rate, charge, classification, regulation or practice which is challenged. Refer to tariffs, tariff items or rules, or agreement numbers, if known. If claim is based on the fact that a firm is a common carrier, state where it is engaged in transportation by water and which statute(s) it is subject to under the jurisdiction of the Federal Maritime Commission].

IV. If claim is for overcharges, state commodity, weight and cube, origin, destination, bill of lading description, bill of lading number and date, rate and/or charges assessed, date of delivery, date of payment, by whom paid, rate or charge claimed to be correct and amount claimed as overcharges. [Specify tariff item for rate or charge claimed to be proper].

V. State section of statute claimed to have been violated. (Not required if claim is for overcharges).

VI. State how claimant was injured and amount of damages requested.

VII. The undersigned authorizes the Settlement Officer to determine the above-stated claim pursuant to the informal procedure outlined in Subpart S (46 CFR 502.301–592.305) of the Commission's informal procedure for adjudication of small claims subject to discretionary Commission review.

Attach memorandum or brief in support of claim. Also attach bill of lading, copies of correspondence or other documents in support of claim.

_____
(Date)

(S)_____
(Claimant's signature)

_____
(Claimant's address)

(S)_____
(Signature of agent or attorney)

_____
(Agent's or attorney's address)

VERIFICATION

State of _____, County of _____, ss: _____, being first duly sworn on oath deposes and says that he or she is _____
The claimant [or if a firm, association, or corporation, state the capacity of the affiant] and is the person who signed the foregoing claim, that he or she has read the foregoing and that the facts set forth without qualification are true and that the facts stated therein upon information received from others, affiant believes to be true.

Subscribed and sworn to before me, a notary public in and for the State of _____, County of _____, this _____ day of _____ 19_____.

(SEAL)

(S) _____
(Notary Public)

My Commission expires, _____

INFORMATION TO ASSIST IN FILING INFORMAL COMPLAINTS

Informal Docket procedures are limited to claims of $10,000 or less and are appropriate only in instances when an evidentiary hearing on disputed facts is not necessary. Where, however, a respondent elects not to consent to the informal procedures [See Exhibit No. 2 to Subpart S], the claim will be adjudicated by an administrative law judge under Subpart T of Part 502.

Under the Shipping Act of 1984 [for foreign commerce], the claim must be filed within three (3) years from the time the cause of action accrues and may be brought against any person alleged to have violated the 1984 Act to the injury of claimant.

Under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933 [domestic commerce], the claim must be filed within two (2) years from the time the cause of action accrues and may only be brought against a "person subject to the Act", e.g., a common carrier, terminal operator or freight forwarder.

A violation of a specific section of a particular shipping statute must be alleged.

The format of Exhibit No. 1 must be followed and a *verification must be included* where the claimant is not represented by an attorney or other person qualified to practice before the Commission. [See §§ 502.21–502.32 and § 502.112.] An original and two (2) copies of the claim *and all attachments*, including a brief in support of the claim, must be submitted.

EXHIBIT NO. 2 TO SUBPART S

[§ 502.304(e)]
Respondent's Consent Form for Informal Adjudication

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

INFORMAL DOCKET NO. _____

RESPONDENT'S AFFIDAVIT

I authorize the Settlement Officer to determine the above-numbered claim in accordance with Subpart S (46 CFR 502) of the Commission's informal procedure for adjudication of small claims subject to discretionary Commission Review.

_____
(Date)

(S)_____

_____
(Capacity)

VERIFICATION

State of _____, County of _____, ss: _____, being first duly sworn on oath deposes and says that he or she is _____, (Title or Position) and is the person who signed the foregoing and agrees without qualification to its truth.

_____

Subscribed and sworn to before me, a notary public in and for the State of _____, County of _____, this _____ day of _____, 19_____.

(SEAL)

(S)_____

(Notary Public)

My Commission expires _____.

CERTIFICATE OF SERVICE
[SEE § 502.320]

SUBPART T—FORMAL PROCEDURE FOR ADJUDICATION OF SMALL CLAIMS

§ 502.311 Applicability.

In the event the respondent elects not to consent to determination of the claim under Subpart S of this part, it shall be adjudicated by the administrative law judges of the Commission under procedures set forth in this subpart, if timely filed under § 502.302. The previously assigned Docket Number shall be used except that it shall now be followed by capital "F" instead of "I" in parenthesis (See § 502.304(c)). The complaint shall consist of the documents submitted by the claimant under Subpart S of this part. [Rule 311.]

§ 502.312 Answer to complaint.

The respondent shall file with the Commission an answer within twenty-five (25) days of service of the complaint and shall serve a copy of said answer upon complainant. The answer shall admit or deny each matter set forth in the complaint. Matters not specifically denied will be deemed admitted. Where matters are urged in defense, the answer shall be accomplished by appropriate affidavits, other documents, and memoranda. [Rule 312.]

§ 502.313 Reply to complainant.

Complainant may, within twenty (20) days of service of the answer filed by respondent, file with the Commission and serve upon the respondent a reply memorandum accompanied by appropriate affidavits and supporting documents. [Rule 313.]

§ 502.314 Additional information.

The administrative law judge may require submission of additional affidavits, documents, or memoranda from complainant or respondent. [Rule 314.]

§ 503.315 Request for oral hearing.

In the usual course of disposition of complaints filed under this subpart, no oral hearing will be held, but, the administrative law judge, in his or her discretion, may order such hearing. A request for oral hearing may be incorporated in the answer or in complainant's reply to the answer. Requests for oral hearing will not be entertained unless they set forth in detail the reasons why the filing of affidavits or other documents will not permit the fair and expeditious disposition of the claim, and the precise nature of the facts sought to be proved at such oral hearing. The administrative law judge shall rule upon a request for oral hearing within ten (10) days of its receipt. In the event an oral hearing is ordered, it will be held in accordance with the rules applicable to other formal proceedings, as set forth in Subparts A through Q of this part. [Rule 315.]

§ 503.316 Intervention.

Intervention will ordinarily not be permitted. [Rule 316.]

§ 502.317 Oral argument.

No oral argument will be held, unless otherwise directed by the administrative law judge. [Rule 317.]

§ 502.318 Decision.

The decision of the administrative law judge shall be final, unless, within twenty-two (22) days from the date of service of the decision, either party requests review of the decision by the Commission, asserting as grounds therefore that a material finding of fact or a necessary legal conclusion is erroneous or that prejudicial error has occurred, or unless, within thirty (30) days from the date of service of the decision, the Commission exercises its discretionary right to review the decision. The Commission shall not, on its own initiative, review any decision or order of dismissal unless such review is requested by an individual Commissioner. Any such request must be transmitted to the Secretary within thirty (30) days after date of service of the decision or order. Such request shall be sufficient to bring the matter before the Commission for review. [Rule 318.]

§ 502.319 Date of service and computation of time.

The date of service of documents served by the Commission shall be that which is shown in the service stamp thereon. The date of service of documents served by parties shall be the date when the matter served is mailed or delivered in person, as the case may be. When the period of time prescribed or allowed is ten (10) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded from the computation. [Rule 319.]

§ 502.320 Service.

All claims, resubmitted claims, petitions to intervene and rulings thereon, notices or oral hearings, notices of oral arguments (if necessary), decisions of the administrative law judge, notices of review, and Commission decisions shall be served by the administrative law judge or the Commission. All other pleadings, documents and filings shall, when tendered to the Commission, evidence service upon all parties to the proceeding. Such certificate shall be in substantially the following form:

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by [mailing, delivering to courier, or delivering in person], a copy to each such person in sufficient time to reach such person on the date the document is due to be filed with the Commission.

Dated at _____ this _____ day of _____, 19_____.

(S) _____

(For) _____

[Rule 320.]

§ 502.321 Applicability of other rules of this part.

Except as specifically provided in this subpart, rules in Subparts A through Q, inclusive, of this part do not apply to situations covered by this subpart. [Rule 321.]

SUBPART U—CONCILIATION SERVICE

§ 502.401 Definitions.

For purposes of this subpart:

(a) "*Disputes*" means disagreements between two or more parties arising from the transportation of goods or the performance of services in connection with such transportation in the domestic offshore commerce or the foreign commerce of the United States; a difference of opinion regarding the interpretation of any tariff, rate, rule, or regulation; a disagreement regarding the performance of any service in connection with such transportation; a disagreement with respect to an alleged violation of the shipping statutes; and other disagreement or opposing opinion regarding any matter connected with transportation of cargoes in the waterborne commerce of the United States. This definition is limited to those disputes which fall within the jurisdiction of the Federal Maritime Commission.

(b) "*Shipping statutes*" means the Shipping Act of 1984, 46 U.S.C. app. 1701–1720; Shipping Act, 1916, 46 U.S.C. app. 801 et seq.; Merchant Marine Act 1936, 46 U.S.C. app. 1101 et seq.; Merchant Marine Act, 1920, 46 U.S.C. app. 861 et seq., the Intercoastal Shipping Act, 1933, 46 U.S.C. app. 843 et seq.; and amendments of and Acts relating to the foregoing, to the extent of the Federal Maritime Commission's jurisdiction under such Acts.

(c) "*Advisory opinions*" means non-binding conclusions reached by a conciliator on the basis of oral presentation and/or documentary authority.

(d) "*Domestic offshore commerce*" means waterborne common carriage between:

(1) The Continental United States and Alaska or Hawaii;

(2) Alaska and Hawaii;

(3) The United States or the District of Columbia and any territory, commonwealth, possession or district (excluding the District of Columbia);

(4) Any territory, commonwealth, possession or district (excluding the District of Columbia) and any other such territory, commonwealth, possession or district; and

(5) Places in the same district, territory; commonwealth or possession (excluding the District of Columbia); and which are not solely engaged in transportation subject to the jurisdiction of the Interstate Commerce Commission under 49 U.S.C. Chapter 105.

(e) "*Foreign commerce*" means waterborne common carriage between the United States or any of its territories, commonwealths, districts or possessions, and foreign country. [Rule 401.]

§ 502.402 Policy.

It is the policy of the Federal Maritime Commission:

(a) To offer its good offices and expertise to parties to disputes involving matters within its jurisdiction, so as to permit resolution of such disputes with dispatch and without the necessity of costly and time-consuming formal proceedings;

(b) To facilitate and promote the resolution of problems and disputes by encouraging affected parties to resolve differences through their own resources;

(c) To create a forum in which grievances, interpretations, problems, and questions involving the waterborne commerce of the United States may be aired, discussed and, hopefully, resolved to the mutual advantage of all concerned parties. [Rule 402.]

§ 502.403 Persons eligible for service.

Request for conciliation service may be made by any shipper, shippers' association, merchant, carrier, conference of carriers, freight forwarder, marine terminal operator, Government agency, or any other person affected by or involved in the transportation of goods by common carrier in the waterborne domestic offshore or foreign commerce of the United States. [Rule 403.]

§ 502.404 Procedure and fee.

(a) The request for conciliation should be addressed to the Federal Maritime Commission Conciliation Service, Washington, D.C. 20573, and should contain the details of the dispute, names and addresses of all involved parties, the contentions of each party or parties, and copies of any documents that are relevant to the disposition of the issues. If the request is made by any one party to the dispute, the party requesting conciliation should mail or deliver to the other party or parties to the dispute a copy of the letter of request, with attachments, if any. The request shall be accompanied by remittance of a $25 service fee.

(b) Each matter will be assigned a number prefixed by the letters FMCCS and assigned to a conciliator for disposition and the involved parties will be informed of the case number and the name of the conciliator.

(c) While it is preferable that all parties involved in a dispute request a service jointly, a request by a single party for the service will be acted upon, provided all parties agree that the dispute should be conciliated. In the event that the request is made by only one party, the conciliator will contact the other party or parties to the dispute and be advised as to whether such parties agree to participate in the conciliation. If the other party or parties to the dispute do not agree to the Conciliation Service,

no further action will be taken by the conciliator and the conciliation ceases.

(d) The parties will be free to determine the best procedures to be used with the qualification that the conciliator may disapprove procedures that would in his or her opinion be either too time-consuming or involve inordinate expense to the Federal Maritime Commission. The parties may agree to (1) fix a time and place for the oral presentation of each party's contention; and (2) request affidavits, documents, or other materials that could help resolve the dispute. The conciliator will be in a strictly advisory capacity. There will be no written record of the conciliation discussions.

(e) Participation in the conciliation of a dispute is purely voluntary at all stages and the parties involved may withdraw at any time without prejudice. [Rule 404.]

§ 502.405 Assignment of conciliator.

The Secretary of the Commission, giving due regard to the type and complexity of the problem presented and the degree of expertise required, will assign a conciliator to each dispute. [Rule 405.]

§ 502.406 Advisory opinion.

(a) The conciliator will write an advisory opinion that must meet the approval of all parties. If the advisory opinion, or revision thereof requested by one or more of the parties, is not unanimously agreed upon, then the conciliation will cease, without prejudice to any of the parties involved. If unanimity is not reached, the conciliator will note in a report to the Commission, which shall be served on all parties, that the parties failed to reach agreement. Only if unanimity is reached will the informal advisory opinion, although not binding, be sent to all interested parties and be made available to the public.

(b) There will be no appeal from, or review of, such opinions and any party may pursue any further course of action under any other rule or statute that it deems advisable. [Rule 406.]

SUBPART V—PAPERWORK REDUCTION ACT

§ 502.991 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this part comply with the Act, which requires that agencies display a current control number assigned by the Director of OMB for each agency information collection requirement:

Section	Current OMB Control No.
502.27 (Form FMC.12)	3072–0001

FEDERAL MARITIME COMMISSION

[46 CFR PART 503]
PUBLIC INFORMATION

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AUTHORITY: 5 U.S.C. 552, 552a, 552b, 553; E.O. 12356, 47 FR 14874, 15557, 3 CFR 1982 Comp., p. 167.

SUBPART A—GENERAL

§ 503.1 Statement of policy.

(a) The Chairman of the Federal Maritime Commission is responsible for the effective administration of the provisions of Pub. L. 89–487, as amended. The Chairman shall carry out this responsibility through the program and the officials as hereinafter provided in this part.

(b) In addition, the Chairman, pursuant to his responsibility, hereby directs that every effort be expended to facilitate the maximum expedited service to the public with respect to the obtaining of information and records. Accordingly, members of the public may make requests for information, records, decisions or submittals in accordance with the provisions of § 503.31.

SUBPART B—PUBLICATION IN THE "FEDERAL REGISTER"

§ 503.11 Materials to be published.

(a) The Commission shall separately state and concurrently publish the following materials in the *Federal Register* for the guidance of the public:

(1) Descriptions of its central and field organization and the established places at which the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions.

(2) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirement of all formal and informal procedures available.

(3) Rules of procedure, descriptions of forms available, or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations.

(4) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.

(5) Every amendment, revision, or repeal of the foregoing.

(b) The Commission's publication with respect to paragraph (a)(1) of this section has been and shall continue to be by publication in the *Federal Register* of the Rules and Regulations, Commission Order No. 1 (Amended), and amendment and supplements thereto.

(c) The Commission's publications with respect to paragraphs (a)(2), (a)(3), and (a)(4) of this section, including amendments, revisions, and repeals, have been and shall continue to be by publication in the *Federal*

Register as part of the Code of Federal Regulations, Title 46, Chapter IV.

§ 503.12 Effect of nonpublication.

Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the *Federal Register* and not so published.

§ 503.13 Incorporation by reference.

For purposes of this subpart, matter which is reasonably available to the class of persons affected hereby shall be deemed published in the *Federal Register* when incorporated by reference therein with the approval of the Director of the Office of the *Federal Register.*

SUBPART C—COMMISSION OPINIONS AND ORDERS

§ 503.21 Public records.

(a) The Commission shall, in accordance with this part, make the following materials available for public inspection and copying:

(1) Final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases.

(2) Those statements of policy and interpretations which have been adopted by the Commission.

(3) Administrative staff manuals and instructions to staff that affect any member of the public.

(b) To prevent unwarranted invasion of personal privacy, the Commission may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction, and shall, in each case, explain in writing the justification for the deletion.

§ 503.22 Current index.

The Commission shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated, and which is required by Subpart B of this part to be made available or published. The index shall be available at the Office of the Secretary, Washington, D.C. 20573. Publication of such indices has been determined by the Commission to be unnecessary and impracticable. The indices shall, nonetheless, be provided to any member of the public at a cost not in excess of the direct cost of duplication of any such index upon request therefor made in accordance with Subpart D of this part.

§ 503.23 Effect of noncompliance.

No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public will be relied upon, used, or cited, as precedent by the Commission against any private party unless it has been indexed and either made available or published as pro-

vided by this subpart, or unless that private party shall have actual and timely notice of the terms thereof.

§ 503.24 Documents available at the Communications Center.

The following documents have been promulgated by the Commission and are available for inspection and copying at the Commission's Communications Center, 1100 L Street, N.W., Washington, D.C. 20573:

(a) Rules and regulations of the Commission including general substantive rules.

(b) Rules of Practice and Procedure.

(c) Annual reports of the Commission.

(d) Shipping Act, 1916, Shipping Act of 1984, and related acts.

§ 503.25 Documents available at the Office of the Secretary.

The following documents are available for inspection and copying at the Federal Maritime Commission, Office of the Secretary, Washington, D.C. 20573:

(a) Proposed rules.

(b) Final rules.

(c) Reports of decisions (including concurring and dissenting opinions), orders and notices in all formal proceedings and pertinent correspondence.

(d) Press releases, biographies, etc.

(e) Pamphlets.

(f) Official docket files (transcripts, exhibits, briefs, etc.) in all formal proceedings.[1]

(g) Approved minutes showing final votes.

(h) Correspondence to or from the Commission or Administrative Law Judges concerning docketed proceedings.

SUBPART D—PROCEDURE GOVERNING AVAILABILITY OF COMMISSION RECORDS

§ 503.31 Identification of records.

A member of the public who requests permission to inspect, copy or be provided with any records described in §§ 503.11, 503.21, 503.24 and 503.25 shall:

(a) Reasonably describe the record or records sought; and

(b) Submit such request in writing to the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Any such request shall be clearly marked on the exterior with the letters FOIA.

§ 503.32 Records generally available.

The following records are available for inspection and copying upon request in writing addressed to the Office of the Secretary:

[1] Copies of transcripts may be purchased from the reporting company contracted for by the Commission. Contact the Office of the Secretary for the name and address of this company.

(a) Agreements filed and in effect pursuant to section 15 of the Shipping Act, 1916 and sections 5 and 6 of the Shipping Act of 1984.

(b) Agreements filed under section 15 of the Shipping Act, 1916 and section 5 of the Shipping Act of 1984 which have been noticed in the *Federal Register*.

(c) Tariffs filed under the provisions of the Shipping Act, 1916, the Intercoastal Shipping Act, 1933, and the Shipping Act of 1984.

(d) Terminal tariffs filed pursuant to Part 515 of this chapter.

(e) List of certifications of financial responsibility pertaining to Public Law 89–777.

(f) List of licensed ocean freight forwarders.

§ 503.33 Other records available upon written request.

Any written request to the Office of the Secretary, Federal Maritime Commission, Washington, D.C. 20573, for records listed in paragraphs (a) through (e), inclusive, of this section, shall identify the record as provided in § 503.31. The Secretary shall evaluate each request in conjunction with the official having responsibility for the subject matter area, and the General Counsel, and the Secretary shall determine whether or not to grant the request in accordance with the provisions of § 503.34. There follows the categories of records subject to this provision:

(a) Correspondence:

(1) General correspondence.

(2) Correspondence regarding interpretation or applicability of a statute or rule.

(3) Correspondence regarding methods of compliance with rules and regulations.

(4) Correspondence and reports on legislation if made public by the Office Management and Budget and the appropriate Congressional Committee.

(b) Staff reports served on a party at interest.

(c) Filings:

(1) Reports on self-policing.

(2) Notice of admission and denial of conference membership.

(3) Procedures and reports regarding shippers' requests and complaints.

(4) Applications for license as ocean freight forwarder with the exceptions of those portions protected from public disclosure under the Freedom of Information Act.

(d) Staff records:

(1) Advisory opinions to the public.

(2) Nonconfidential records.

(e) Court records in which the Commission is a party.

(1) Briefs filed in court.

(2) Court decisions.

§ 503.34 Procedures on requests for documents.

(a) Determination of compliance with requests for documents.

(1) Upon request by any member of the public for documents, made in accordance with the rules of this part, the Commission's Secretary or his or her delegate in his or her absence, shall determine whether or not such request shall be granted.

(2) Except as provided in paragraph (c) of this section, such determination shall be made by the Secretary within ten (10) days (excluding Saturdays, Sundays and legal public holidays) after receipt of such request.

(3) The Secretary shall immediately notify the party making such request of the determination made, the reasons therefor, and, in the case of a denial of such request, shall notify the party of its right to appeal that determination to the Chairman.

(b) Appeals from adverse determination (denial of request).

(1) Any party whose request for documents or other information pursuant to this part has been denied in whole or in part by the Secretary may appeal such determination. Any such appeal shall be addressed to: Chairman, Federal Maritime Commission, Washington, D.C. 20573, and shall be submitted within a reasonable time following receipt by the party of notification of the initial denial by the Secretary in the case of a total denial of the request, or within a reasonable time following request, or within a reasonable time following receipt of any of the records requested in the case of a partial denial. In no case shall an appeal be filed later than ten (10) working days following receipt of notification of denial or receipt of a part of the records requested.

(2) Upon appeal from any denial or partial denial of a request for documents by the Secretary, the Chairman of the Federal Maritime Commission, or the Chairman's specific delegate in his or her absence, shall make a determination with respect to that appeal within twenty (20) days (excepting Saturdays, Sundays and legal public holidays) after receipt of such appeal, except as provided in paragraph (c) of this section. If, on appeal, the denial is upheld, either in whole or in part, the Chairman shall so notify the party submitting the appeal and shall notify such person of the provisions of paragraph 4 of subsection (a) of the FOIA (Pub. L. 93–502, 88 Stat. 1561–1562, November 21, 1974) regarding judicial review of such determination upholding the denial. Notification shall also include the statement that the determination is that of the Chairman of the Federal Maritime Commission and the name of the Chairman.

(c) *Exception to time limitation.* In unusual circumstances, as specified in this paragraph, the time limits prescribed with respect to initial actions or actions on appeal may be extended by written notice from the Secretary of the Commission to the person making such request, setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten (10) working days. As used in this paragraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(d) *Effect of failure by Commission to meet the time limitation.* Failure by the Commission either to deny or grant any request for documents within the time limits prescribed by FOIA (5 U.S.C. 552 as amended) and these regulations shall be deemed to be an exhaustion of the administrative remedies available to the person making the request.

§ 503.35 Exceptions to availability of records.

(a) Except as provided in paragraph (b) of this section, the following records shall not be available:

(1) Records specifically authorized under criteria established by Executive Order to be kept secret in the interest of national defense or foreign policy and which are in fact properly classified pursuant to such Executive Order. Records to which this provision applies shall be deemed by the Commission to have been properly classified. This exception may apply to records in the custody of the Commission which have been transmitted to the Commission by another agency which has designated the record as nonpublic under Executive Order.

(2) Records related solely to the internal personnel rules and practices of the Commission. Such records relate to those matters which are for the guidance of Commission personnel with respect to their employment with the Federal Maritime Commission.

(3) Records specifically exempted from disclosure by statute.

(4) Information given in confidence. This includes information obtained by or given to the Commission which constitutes trade secrets, confidential commercial or financial information, privileged information, or other information which was given to the Commission in confidence or would not customarily be released by the person from whom it was obtained.

(5) Interagency or intraagency memoranda or letters which would not be available by law to a private party in litigation with the Commission. Such communications include interagency memoranda, drafts, staff memoranda transmitted to the Commission, written communications between the Commission, the Secretary, and the General Counsel, regarding the preparation of Commission orders and decisions, other documents received or generated in the process of issuing an order, decision, or regulation, and reports and other work papers of staff attorneys, accountants, and investigators.

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy. This exemption includes all personnel and medical records and all private, personal, financial, or business information contained in other files which, if disclosed to the public, would invade the privacy of any person, including members of the family of the person to whom the information pertains.

(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by any agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel. Any record, portions of which are exempt under the provisions of this section, will be provided to any person requesting such record after the exempt portions thereof have been deleted, provided such nonexempt portions are reasonably segregable.

(b) Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this part, nor shall this part be authority to withhold information from Congress.

§ 503.36 Commission report of actions.

On or before March 1 of each calendar year, the Federal Maritime Commission shall submit a report of its activities with regard to public information requests during the preceding calendar year to the Speaker of the House of Representatives and to the President of the Senate. This report shall include:

(a) The number of determinations made by the Federal Maritime Commission not to comply with requests for records made to the agency under the provisions of this part and the reasons for each such determination.

(b) The number of appeals made by persons under such provisions, the result of such appeals, and the reasons for the action upon each appeal that results in a denial of information.

(c) The name and title or position of each person responsible for the denial of records requested under the provisions of this part and the number of instances of participation for each.

(d) The results of each proceeding conducted pursuant to subsection (a)(4)(F) of FOIA, as amended November 21, 1974, including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken.

(e) A copy of every rule made by the Commission implementing the provisions of the FOIA, as amended November 21, 1974.

(f) A copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section.

(g) Such other information as indicates efforts to administer fully the provisions of the FOIA, as amended.

SUBPART E-FEES

§ 503.41 Policy and services available.

Pursuant to policies established by the Congress, the Government's costs for special services furnished to individuals or firms who request such service are to be recovered by the payment of fees (Act of August 31, 1951—5 U.S.C. 140).

(a) Upon request, the following services are available upon the payment of the fees hereinafter prescribed:

(1) Copying records/documents.

(2) Certification of copies of documents.

(3) Records search.

(b) Fees shall also be assessed for the following services provided by the Commission:

(1) Subscriptions to Commission publications.

(2) Placing one's name, as an interested party, on the mailing list of a docketed proceeding.

(3) Processing nonattorney applications to practice before the Commission.

§ 503.42 Payment of fees and charges.

The fees charged for special services may be paid through the mail by check, draft, or postal money order, payable to the Federal Maritime Commission, except for charges for transcripts of hearings. Transcripts of hearings, testimony, and oral argument are furnished by a nongovernmental contractor, and may be purchased directly from the reporting firm.

§ 503.43 Fees for services.

The basic fees set forth below provide for documents to be mailed with postage prepaid. If copy is to be transmitted by registered, certified, air, or special delivery mail, postage therefor will be added to the basic fee. Also, if special handling or packaging is required, costs thereof will be added to the basic fee.

(a) Photo-copying of records and documents performed by requesting party will be available at the rate of five cents per page (one side), limited to size 8½″ × 14¼″ or smaller.

(b) The certification and validation (with Federal Maritime Commission seal) of documents filed with or issued by the Commission will be available at $5 for each such, certification.

(c) To the extent that time can be made available, records and information search and/or copying will be performed by Commission personnel for

reimbursement at the following rates. Any such charges are in addition to a five cent per page charge for copies provided.

(1) By clerical personnel at a rate of $7 per person per hour.

(2) By professional personnel at an actual hourly cost basis to be established prior to search.

(3) Minimum charge for record and information search, $7.

(4) Minimum charge for copying services performed by Commission personnel, $2.50.

(d) Annual subscriptions to Commission publications for which there are regular mailing lists are available at the charges indicated below for calendar year terms. Subscriptions for periods of less than a full calendar year will be prorated on a quarterly basis. No provision is made for refund upon cancellation of subscription by a purchaser.

(1) Orders, notices, rulings, and decisions (initial and final) issued by Administrative Law Judges and by the Commission in all formal docketed proceedings before the Federal Maritime Commission are available at an annual subscription rate of $195.

(2) Final decisions (only) issued by the Commission in all formal docketed proceedings before the Commission are available at an annual subscription rate of $120.

(3) General rules and regulations of the Commission are available at the following rates: (i) initial set including all current regulations for a fee of $16.50, and (ii) an annual subscription rate of $8.25 for all amendments to existing regulations and any new regulations issued.

(4) *Exceptions.* No charge will be made by the Commission for notices, decisions, orders, etc., required by law to be served on a party to any proceeding or matter before the Commission. No charge will be made for single copies of the above Commission publications individually requested in person or by mail. In addition, a subscription to Commission mailing lists will be entered without charge when one of the following conditions is present:

(i) The furnishing of the service without charge is an appropriate courtesy to a foreign country or international organization.

(ii) The recipient is another governmental agency, Federal, State, or local, concerned with the domestic or foreign commerce by water of the United States or, having a legitimate interest in the proceedings and activities of the Commission.

(iii) The recipient is a college or university.

(iv) The recipient does not fall within paragraphs (d)(4)(i), (d)(4)(ii), or (d)(4)(iii) of this section but is determined by the Commission to be appropriate in the interest of its programs.

(e) To have one's name and address placed on the mailing list of a specific docket as an interested party to receive all issuances pertaining to that docket: $3 per proceeding.

(f) The FMC guide on the shipping of automobiles, entitled "Automobile Manufacturers' Measurements," is available from the U.S. Government Printing Office, on a subscription basis.

(g) Loose-leaf reprint of the Commission's complete, current Rules of Practice and Procedure, Part 502 of this chapter, for an initial fee of $4.25. Future amendments to the reprint are available at an annual subscription rate of $4.

(h) Applications for admission to practice before the Commission for persons not attorneys at law must be accompanied by a fee of $13 pursuant to § 502.27 of this chapter.

(i) Upon a determination by the Commission that waiver or reduction of the fees prescribed in this section is in the public interest because the information furnished has been determined to be of primary benefit to the general public, such information shall be furnished without charge or at a reduced charge at the discretion of the Commission.

(j) Additional issuances, publications and services of the Commission may be made available for fees to be determined by the Secretary which fees shall not exceed the cost to the Commission for providing them.

SUBPART F—INFORMATION SECURITY PROGRAM

§ 503.51 Definitions.

(a) "*Original Classification*" means an initial determination that information requires protection against unauthorized disclosure in the interest of national security, together with a classification designation signifying the level of protection required.

(b) "*Derivative Classification*" means a determination that information is in substance the same as information currently classified, and the application of the same classification markings.

(c) "*Declassification date or event*" means a date or event upon which classified information is automatically declassified.

(d) "*Downgrading date or event*" means a date or event upon which classified information is automatically downgraded in accordance with appropriate downgrading instructions on the classified materials.

(e) "*National security*" means the national defense or foreign relations of the United States.

(f) "*Foreign government information*" means either information provided to the United States by a foreign government or governments, an international organization of governments, or any element thereof with the expectation, expressed or implied, that the information, the source of the information, or both, are to be held in confidence; or information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments, an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence.

§ 503.52 Senior agency official.

The Chairman of the Commission shall designate a senior agency official to be the Security Officer for the Commission who shall be responsible for directing and administering the Commission's information security program, which includes an active oversight and security education program to ensure effective implementation of Executive Order 12356.

§ 503.53 Oversight Committee.

An Oversight Committee is established, under the chairmanship of the Security Officer with the following responsibilities;

(a) Establish a Commission security education program to familiarize all personnel who have or may have access to classified information with the provisions of Executive Order 12356, and Information Security Oversight Office Directive No. 1. The program shall include initial, refresher, and termination briefings;

(b) Establish controls to ensure that classified information is used, processed, stored, reproduced, and transmitted only under conditions that will provide adequate protection and prevent access by unauthorized persons;

(c) Act on all suggestions and complaints concerning the Commission's information security program;

(d) Recommend appropriate administrative action to correct abuse or violations of any provision of Executive Order 12356; and

(e) Consider and decide other questions concerning classification and declassification that may be brought before it.

§ 503.54 Original classification.

(a) No Commission Member or employee has the authority to classify any Commission originated information.

(b) If a Commission Member or employee develops information that appears to require classification, or receives any foreign government information as defined in § 503.51(f), the Member or employee shall immediately notify the Security Officer and appropriately protect the information.

(c) If the Security Officer believes the information warrants classification, it shall be sent to the appropriate agency with original classification authority over the subject matter, or to the Information Security Oversight Office, for review and a classification determination.

(d) If there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified pending a determination by an original classification authority. If there is reasonable doubt about the appropriate level of classification, it shall be safeguarded at the higher level of classification pending a determination by an original classification authority.

§ 503.55 Derivative classification.

(a) Any document that includes paraphrases, restatements, or summaries of, or incorporates in new form, information that is already classified, shall be assigned the same level of classification as the sources, unless

consultation with originators or instructions contained in authorized classification guides indicate that no classification, or a lower classification than originally assigned, should be used.

(b) Persons who apply derivative classification markings shall:

(1) Observe and respect original classification decisions, and

(2) Carry forward to any newly created documents any assigned authorized markings. The declassification date or event that provides the longest period of classification shall be used for documents classified on the basis of multiple sources.

(c) A derivative document that derives its classification from the approved use of the classification guide of another agency shall bear the declassification date required by the provisions of that classification guide.

(d) Documents classified derivatively on the basis of source documents or classification guides shall bear all applicable marking prescribed in Sections 2001.5(a) through 2001.5(e), Information Security Oversight Office Directive No. 1.

(1) *Classification authority.* The authority for classification shall be shown as follows:

(i) "*Classified by (description of source documents or classification guide)*", or

(ii) "*Classified by Multiple Sources*", if a document is classified on the basis of more than one source document or classification guide.

(iii) In these cases, the derivative classifier shall maintain the identification of each source with the file or record copy of the derivatively classified document. A document derivatively classified on the basis of a source document that is marked "Classified by Multiple Sources" shall cite the source document in its "Classified by" line rather than the term "Multiple sources."

(2) *Declassification and downgrading instructions.* Date or events for automatic declassification or downgrading, or the notation "Originating Agency's Determination Required" to indicate that the document is not to be declassified automatically, shall be carried forward from the source document, or as directed by a classification guide, and shown on "declassify on" line as follows:

"Declassify on: (date, description of event); or
"Originating Agency's Determination required (OADR)."

§ 503.56 General declassification policy.

(a) The Commission exercises declassification and downgrading authority in accordance with Section 3.1 of Executive Order 12356, only over that information originally classified by the Commission under previous Executive Orders. Declassification and downgrading authority may be exercised by the Commission Chairman and the Commission Security Officer, and such others as the Chairman may designate. Commission personnel may not declassify information originally classified by other agencies.

(b) The Commission does not now have original classification authority nor does it have in its possession any documents that it originally classified when it had such authority. The Commission has authorized the Archivist of the United States to automatically declassify information originally classified by the Commission and under its exclusive and final declassification jurisdiction at the end of 20 years from the date of original classification.

§ 503.57 Mandatory review for declassification.

(a) Information originally classified by the Commission shall be subject to a review for declassification by the Commission, if:

(1) A request is made by a United States citizen or permanent resident alien, a federal agency, or a state or local government; and

(2) A request describes the documents or material containing the information with sufficient specificity to enable the Commission to locate it with a reasonable amount of effort. Requests with insufficient description of the material will be returned to the requester for further information.

(b) Requests for mandatory declassification reviews of documents originally classified by the Commission shall be in writing, and shall be sent to the Security Officer, Federal Maritime Commission, Washington, D.C. 20573.

(c) If the request requires the provision of services by the Commission, fair and equitable fees may be charged under Title 5 of the Independent Offices Appropriation Act, 65 Stat. 290, 31 U.S.C. 483a.

(d) Requests for mandatory declassification reviews shall be acknowledged by the Commission within 15 days of the date of receipt of such requests.

(e) If the document was originally classified by the Commission, the Commission Security Officer shall forward the request to the Chairman of the Commission for a determination of whether the document should be declassified.

(f) If the document was derivatively classified by the Commission or originally classified by another agency, the request, the document, and a recommendation for action shall be forwarded to the agency with the original classification authority. The Commission may, after consultation with the originating agency, inform the requester of the referral.

(g) If a document is declassified in its entirety, it may be released to the requester, unless withholding is otherwise warranted under applicable law. If a document or any part of it is not declassified, the Security Officer shall furnish the declassified portions to the requester unless withholding is otherwise warranted under applicable law, along with a brief statement concerning the reasons for the denial of the remainder, and the right to appeal that decision to the Commission within 60 days.

(h) If a declassification determination cannot be made within 45 days, the requester shall be advised that additional time is needed to process the request. Final determination shall be made within one year from the date of receipt unless there are unusual circumstances.

(i) In response to a request for information under the Freedom of Information Act, the Privacy Act of 1974, or the mandatory review provisions of Executive Order 12356, the Commission shall refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under Executive Order 12356.

§ 503.58 Appeals of denials of mandatory declassification review requests.

(a) Within 60 days after the receipt of denial of a request for mandatory declassification review, the requester may submit an appeal in writing to the Commission through the Secretary, Federal Maritime Commission, Washington, D.C. 20573. The appeal shall:

(1) Identify the document in the same manner in which it was identified in the original request;

(2) Indicate the dates of the request and denial, and the expressed basis for the denial; and

(3) State briefly why the document should be declassified.

(b) The Commission shall rule on the appeal within 30 days of receiving it. If additional time is required to make a determination, the Commission shall notify the requester of the additional time needed and provide the requester with the reason for the extension. The Commission shall notify the requester in writing of the final determination and the reasons for any denial.

(c) A determination by the Commission under paragraph (b) of this section is final and no further administrative appeal will be permitted. However, the requester may be informed that suggestions and complaints concerning the information security program prescribed by Executive Order 12356 may be submitted to the Director, Information Security Oversight Officer, GSA(AT), Washington, D.C. 20540.

§ 503.59 Safeguarding classified information.

(a) All classified information shall be afforded a level of protection against unauthorized disclosure commensurate with its level of classification.

(b) Whenever classified material is removed from a storage facility, such material shall not be left unattended and shall be protected by attaching an appropriate classified document cover sheet to each classified document.

(c) Classified information being transmitted from one Commission office to another shall be protected with a classified document cover sheet and hand delivered by an appropriately cleared person to another appropriately cleared person.

(d) Classified information shall be made available to a person only when the possessor of the classified information has determined that the person seeking the classified information has a valid security clearance at least commensurate with the level of classification of the information and has established that access is essential to the accomplishment of authorized and lawful Government purposes.

(e) The requirement in paragraph (d) of this section, that access to classified information may be granted only as is essential to the accomplishment of authorized and lawful Government purposes, may be waived as provided in paragraph (f) of this section for persons who:

(1) Are engaged in historical research projects, or

(2) Previously have occupied policy-making positions to which they were appointed by the President.

(f) Waivers under paragraph (e) of this section may be granted when the Commission Security Officer:

(1) Determines in writing that access is consistent with the interest of national security;

(2) Takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is properly safeguarded; and

(3) Limits the access granted to former presidential appointees to items that the person originated, reviewed, signed, or received while serving as a presidential appointee.

(g) Persons seeking access to classified information in accordance with paragraphs (e) and (f) of this section must agree in writing:

(1) To be subject to a national security check;

(2) To protect the classified information in accordance with the provisions of Executive Order 12356; and

(3) Not to publish or otherwise reveal to unauthorized persons any classified information.

(h) Except as provided by directives issued by the President through the National Security Council, classified information that originated in another agency may not be disseminated outside the Commission.

(i) Only appropriately cleared personnel may receive, transmit, and maintain current access and accountability records for classified material.

(j) Each office which has custody of classified material shall maintain:

(1) A classified document register or log containing a listing of all classified holdings, and

(2) A classified document destruction register or log containing the title and date of all classified documents that have been destroyed.

(k) An inventory of all documents classified higher than confidential shall be made at least annually and whenever there is a change in classified document custodians. The Commission Security Officer shall be notified, in writing, of the results of each inventory.

(l) Reproduced copies of classified documents are subject to the same accountability and controls as the original documents.

(m) Combinations to dial-type locks shall be changed only by persons having an appropriate security clearance, and shall be changed whenever such equipment is placed in use; whenever a person knowing the combination no longer requires access to the combination; whenever a combination has been subject to possible compromise; whenever the equipment is taken

out of service; and at least once each year. Records of combinations shall be classified no lower than the highest level of classified information to be stored in the security equipment concerned. One copy of the record of each combination shall be provided to the Commission Security Officer.

(n) Individuals charged with the custody of classified information shall conduct the necessary inspections within their areas to insure adherence to procedural safeguards prescribed to protect classified information. The Commission Security Officer shall conduct periodic inspections to determine if the procedural safeguards prescribed in this subpart are in effect at all times.

(o) Whenever classified material is to be transmitted outside the Commission, the custodian of the classified material shall contact the Commission Security Officer for preparation and receipting instructions. If the material is to be hand carried, the Security Officer shall ensure that the person who will carry the material has the appropriate security clearance, is knowledgeable of safeguarding requirements, and is briefed, if appropriate, concerning restrictions with respect to carrying classified material on commercial carriers.

(p) Any person having access to and possession of classified information is responsible for protecting it from persons not authorized access to it, to include securing it in approved equipment or facilities, whenever it is not under the direct supervision of authorized persons.

(q) Employees of the Commission shall be subject to appropriate sanctions, which may include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation, if they:

(1) Knowingly, willfully, or negligently disclose to unauthorized persons information properly classified under Executive Order 12356 or predecessor orders;

(2) Knowingly and willfully classify or continue the classification of information in violation of Executive Order 12356 or any implementing directive; or

(3) Knowingly and willfully violate any other provision of Executive Order 12356 or implementing directive.

(r) Any person who discovers or believes that a classified document is lost or compromised shall immediately report the circumstances to his or her supervisor and the Commission Security Officer, who shall conduct an immediate inquiry into the matter.

(s) Questions with respect to the Commission Information Security Program, particularly those concerning the classification, declassification, downgrading, and safeguarding of classified information, shall be directed to the Commission Security Officer.

SUPBART G—ACCESS TO ANY RECORD OF IDENTIFIABLE PERSONAL INFORMATION

§ 503.60 Definitions.

For the Purpose of this subpart:

(a) "*Agency*" means each authority of the government of the United States as defined in 5 U.S.C. 551(1) and shall include any executive department, military department, government corporation, government controlled corporation or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency.

(b) "*Commission*" means the Federal Maritime Commission.

(c) "*Individual*" means a citizen of the United States or an alien lawfully admitted for permanent residence to whom a record pertains.

(d) "*Maintain*"includes maintain, collect, use, or disseminate.

(e) "*Person*" means any person not an individual and shall include, but is not limited to, corporations, associations, partnerships, trustees, receivers, personal representatives, and public or private organizations.

(f) "*Record*" means any item, collection, or grouping of information about an individual that is maintained by the Federal Maritime Commission, including but not limited to a person's education, financial transactions, medical history, and criminal or employment history, and that contains the person's name, or the identifying number, symbol or other identifying particular assigned to the individual, such as a finger or voice print, or a photograph.

(g) "*Routine use*" means [with respect to the disclosure of a record], the use of such records for a purpose which is compatible with the purpose for which it was collected.

(h) "*Statistical record*" means a record in a system of records, maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, but shall not include matter pertaining to the Census as defined in 13 U.S.C. 8.

(i) "*System of records*" means a group of any records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual.

§ 503.61 Conditions of disclosure.

(a) Subject to the conditions of paragraphs (b) and (c) of this section, the Commission shall not disclose any record which is contained in a system of records, by any means of communication, to any person or other agency who is not an individual to whom the record pertains.

(b) Upon written request or with prior written consent of the individual to whom the record pertains, the Commission may disclose any such record to any person or other agency.

(c) In the absence of a written consent from the individual to whom the record pertains, the Commission may disclose any such record, provided such disclosure is:

(1) To those officers and employees of the Commission who have a need for the record in the performance of their duties;

(2) Required under the Freedom of Information Act (5 U.S.C. 552);

(3) For a routine use;

(4) To the Bureau of Census for purposes of planning or carrying out a census or survey or related activity under the provisions of Title 13 of the United States Code;

(5) To a recipient who has provided the Commission with adequate advance written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) To the National Archives of the United States, as a record which has sufficient historical or other value to warrant its continued preservation by the United States government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity authorized by law, provided the head of the agency or instrumentality has made a prior written request to the Secretary of the Commission specifying the particular record and the law enforcement activity for which it is sought;

(8) To either House of Congress, and to the extent of a matter within its jurisdiction, any committee, subcommittee, or joint committee of Congress;

(9) To the Comptroller General, or any authorized representative, thereof, in the course of the performance of the duties of the GAO; or

(10) Under an order of a court of competent jurisdiction.

§ 503.62 Accounting of disclosures.

(a) The Secretary shall make an accounting of each disclosure of any record contained in a system of records in accordance with 5 U.S.C. 552a(c)(1) and 552a(c)(2).

(b) Except for a disclosure made under § 503.61(c)(7), the Secretary shall make the accounting described in paragraph (a) of this section available to any individual upon written request made in accordance with § 503.63(b) or § 503.63(c).

(c) The Secretary shall make reasonable efforts to notify the individual when any record which pertains to such individual is disclosed to any person under compulsory legal process, when such process becomes a matter of public record.

§ 503.63 Request for Information.

(a) Upon request, in person or by mail, made in accordance with the provisions of paragraph (b) or (c) of this section, any individual shall be informed whether or not any Commission system of records contains a record pertaining to him or her.

(b) Any individual requesting such information in person shall personally appear at the Office of the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573 and shall:

(1) Provide information sufficient, in the opinion of the Secretary, to identify the record, e.g., the individual's own name, date of birth, place of birth, etc.;

(2) Provide identification acceptable to the Secretary to verify the individual's identity, e.g., driver's license, employee identification card or medicare card;

(3) Complete and sign the appropriate form provided by the Secretary.

(c) Any individual requesting such information by mail shall address such request to the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573 and shall include in such request the following:

(1) Information sufficient in the opinion of the Secretary to identify the record, e.g., the individual's own name, date of birth, place of birth, etc.;

(2) A signed notarized statement to verify his or her identity.

§ 503.64 Commission procedure on request for information.

Upon request for information made in accordance with § 503.63, the Secretary or his or her delegate shall, within 10 days (excluding Saturdays, Sundays, and legal public holidays), furnish in writing to the requesting party notice of the existence or nonexistence of any records described in such request.

§ 503.65 Request for access to records.

(a) *General.* Upon request by any individual made in accordance with the procedures set forth in paragraph (b) of this section, such individual shall be granted access to any record pertaining to him or her which is contained in a Commission system of records. However, nothing in this section shall allow an individual access to any information compiled by the Commission in reasonable anticipation of a civil or criminal action or proceeding.

(b) *Procedures for requests for access to records.* Any individual may request access to a record pertaining to him or her in person or by mail in accordance with paragraphs (b)(1) and (b)(2) of this section:

(1) Any individual making such request in person shall do so at the Office of the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573 and shall:

(i) Provide identification acceptable to the Secretary to verify the individual's identity, e.g., driver's license, employee identification card, or medicare card; and

(ii) Complete and sign the appropriate form provided by the Secretary.

(2) Any individual making a request for access to records by mail shall address such request to the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573, and shall include therein a signed notarized statement to verify his or her identity.

(3) Any individual requesting access to records under this section in person may be accompanied by a person of his or her own choosing, while reviewing the record requested. If an individual elects to be so accompanied, he or she shall notify the Secretary of such election in the request and shall provide a written statement authorizing disclosure of the record in the presence of the accompanying person. Failure to so notify the Secretary in a request for access shall be deemed to be a decision by the individual not to be accompanied.

(c) *Commission determination of requests for access.*

(1) Upon request made in accordance with this section, the Secretary or his or her delegate shall:

(i) Determine whether or not such request shall be granted.

(ii) Make such determination and provide notification within 10 days (excluding Saturdays, Sundays, and legal public holidays) after receipt of such request, and, if such request is granted shall;

(iii) Notify the individual that fees for reproducing copies will be made in accordance with § 503.69.

(2) If access to a record is denied because such information has been compiled by the Commission in reasonable anticipation of a civil or criminal action or proceeding, or for any other reason, the Secretary shall notify the individual of such determination and his or her right to judicial appeal under 5 U.S.C. 552a(g).

(d) *Manner of providing access.*

(1) If access is granted, the individual making such request shall notify the Secretary whether the records requested are to be copied and mailed to the individual.

(2) If records are to be made available for personal inspection, the individual shall arrange with the Secretary a mutually agreeable time and place for inspection of the record.

(3) Fees for reproducing and mailing copies of records will be made in accordance with § 503.69.

§ 503.66 Amendment of a record.

(a) *General.* Any individual may request amendment of a record pertaining to him or her according to the procedure in paragraph (b) of this section.

(b) *Procedures for requesting amendment of a record.* After inspection of a record pertaining to him or her, an individual may file with the

Secretary a request, in person or by mail, for amendment of a record. Such request shall specify the particular portions of the record to be amended, the desired amendments and the reasons therefor.

(c) *Commission procedures on request for amendment of a record.*

(1) Not later than ten (10) days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of a request made in accordance with this section to amend a record in whole or in part, the Secretary or his or her delegate shall:

(i) Make any correction of any portion of the record which the individual believes is not accurate, relevant, timely or complete and thereafter inform the individual of such correction; or

(ii) Inform the individual, by certified mail, return receipt requested, of refusal to amend the record, setting out the reasons therefore, and notify the individual of his or her right to appeal that determination to the Chairman of the Commission under § 503.67.

(2) The Secretary shall inform any person or other agency to whom a record has been disclosed of any correction or notation of dispute made by the Secretary with respect to such records, in accordance with 5 U.S.C. 552a(c)(4) referring to amendment of a record, if an accounting of such disclosure has been made.

§ 503.67 Appeals from denial of request for amendment of a record.

(a) *General.* An individual whose request for amendment of a record pertaining to him or her is denied, may further request a review of such determination in accordance with paragraph (b) of this section.

(b) *Procedure for appeal.* Not later than thirty (30) days (excluding Saturdays, Sundays, and legal public holidays) following receipt of notification of refusal to amend, an individual may file an appeal to amend the record. Such appeal shall:

(1) Be addressed to the Chairman, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573; and

(2) Specify the reasons for which the refusal to amend is challenged.

(c) *Commission procedure on appeal.*

(1) Upon appeal from a denial to amend a record, the Chairman of the Commission or the officer designated by the Chairman to act in his or her absence, shall make a determination whether or not to amend the record and shall notify the individual of that determination by certified mail, return receipt requested, not later than thirty (30) days (excluding Saturdays, Sundays and legal public holidays) after receipt of such appeal, unless extended pursuant to paragraph (d) of this section.

(2) The Chairman shall also notify the individual of the provisions of 5 U.S.C. 552a(g)(1)(A) regarding judicial review of the Chairman's determination.

(3) If, on appeal, the refusal to amend the record is upheld, the Commission shall permit the individual to file a statement setting forth the reasons for disagreement with the Commission's determination.

(d) The Chairman, or his or her delegate in his or her absence, may extend up to thirty (30) days the time period prescribed in paragraph (c)(1) of this section within which to make a determination on appeal from refusal to amend a record for the reasons that a fair and equitable review cannot be completed within the prescribed time period.

§ 503.68 Exemptions.

The Chairman of the Commission reserves the right to promulgate rules in accordance with the requirements of 5 U.S.C. 553(b)(1), (2) and (3), 553(c) and 553(e) (Administrative Procedure Act-Rulemaking), to exempt any system of records maintained by the Commission in accordance with the provisions of 5 U.S.C. 552a(k).

§ 503.69 Fees.

(a) *General.* The following Commission services are available, with respect to requests made under the provisions of this subpart, for which fees will be charged as provided in paragraphs (b) and (c) of this section:

(1) Copying records/documents.

(2) Certification of copies of documents.

(b) *Fees for services.* The fees set forth below provide for documents to be mailed with ordinary first-class postage prepaid. If a copy is to be transmitted by registered, certified, air, or special delivery mail, postage therefor will be added to the basic fee. Also, if special handling or packaging is required, costs thereof will be added to the basic fee.

(1) The copying of records and documents will be available at the rate of 30 cents per page (one side), limited to size 8¼″ × 14″ or smaller.

(2) The certification and validation (with Federal Maritime Commission seal) of documents filed with or issued by the Commission will be available at $5 for each certification.

(c) *Payment of fees and charges.* The fees charged for special services may be paid by check, draft, or postal money order, payable to the Federal Maritime Commission.

SUBPART H—PUBLIC OBSERVATION OF FEDERAL MARITIME COMMISSION MEETINGS AND PUBLIC ACCESS TO INFORMATION PERTAINING TO COMMISSION MEETINGS

§ 503.70 Policy.

It is the policy of the Federal Maritime Commission, under the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b, September 13, 1976) to entitle the public to the fullest practicable information regarding the decisional processes of the Commission. The provisions of this Subpart set forth the procedural requirements designed to provide the public with such information while continuing to protect the rights of individuals and to maintain the capabilities of the Commission in carrying out its responsibilities under the shipping statutes administered by this Commission.

§ 503.71 Definitions.

The following definitions apply for purposes of this subpart:

(a) "*Agency*" means the Federal Maritime Commission;

(b) "*Information pertaining to a meeting*" means, but is not limited to the following: the record of any agency vote taken under the provisions of this subpart, and the record of the vote of each member; a full written explanation of any agency action to close any portion of any meeting under this Subpart; lists of persons expected to attend any meeting of the agency and their affiliation; public announcement by the agency under this subpart of the time, place, and subject matter of any meeting or portion of any meeting; announcement of whether any meeting or portion of any meeting shall be open to public observation or be closed; any announcement of any change regarding any meeting or portion of any meeting; and the name and telephone number of the Secretary of the agency who shall be designated by the agency to respond to requests for information concerning any meeting or portion of any meeting;

(c) "*Meeting*" means the deliberations of at least three of the members of the agency which determine or result in the joint conduct of disposition of official agency business, but does not include: (1) individual member's consideration of official agency business circulated to the members in writing for disposition on notation: (2) deliberations by the agency in determining whether or not to close a portion or portions of a meeting or series of meetings as provided in §§ 503.74 and 503.75; (3) deliberations by the agency in determining whether or not to withhold from disclosure information pertaining to a portion or portions of a meeting or series of meetings as provided in § 503.80; or (4) deliberations pertaining to any change in any meeting or to changes in the public announcement of such a meeting as provided in § 503.83;

(d) "*Member*" means each individual Commissioner of the agency;

(e) "*Person*" means any individual, partnership, corporation, association, or public or private organization, other than an agency as defined in 5 U.S.C. 551(1);

(f) "*Series of meetings*" means more than one meeting involving the same particular matters and scheduled to be held no more than thirty (30) days after the initial meeting in such series.

§ 503.72 General rule—meetings.

(a) Except as otherwise provided in §§ 503.73, 503.74, 503.75 and 503.76, every meeting and every portion of a series of meetings of the agency shall be open to public observation.

(b) The opening of a portion or portions of a meeting or a portion or portions of a series of meetings to public observation shall not be construed to include any participation by the public in any manner in the meeting. Such an attempted participation or participation shall be cause for removal of any person so engaged at the discretion of the presiding member of the agency.

§ 503.73 Exceptions—meetings.

Except in a case where the agency finds that the public interest requires otherwise, the provisions of § 503.72(a) shall not apply to any portion or portions of an agency meeting or portion or portions of a series of meetings where the agency determined under the provisions of § 503.74 or § 503.75 that such portion or portions or such meeting or series of meetings is likely to:

(a) Disclose matters that are (1) specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and (2) in fact properly classified pursuant to such Executive Order;

(b) Relate solely to the internal personnel rules and practices of any agency;

(c) Disclose matters specifically exempted from disclosure by any statute other than 5 U.S.C. 552 (FOIA), provided that such statute (1) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or (2) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(d) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Involve accusing any person of a crime, or formally censuring any person;

(f) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(g) Disclose investigatory records compiled for law enforcement purposes, or information which, if written, would be contained in such records, but only to the extent that the production of such records or information would (1) interfere with enforcement proceedings, (2) deprive a person of a right to a fair trial or an impartial adjudication, (3) constitute an unwarranted invasion of personal privacy, (4) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (5) disclose investigative techniques and procedures, or (6) endanger the life or physical safety of law enforcement personnel;

(h) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(i) Disclose information, the premature disclosure of which would be likely to significantly frustrate, implementation of a proposed agency action unless the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(j) Specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

§ 503.74 Procedures for closing a portion or portions of a meeting or a portion or portions of a series of meetings on agency initiated requests.

(a) Any member of the agency or the General Counsel of the agency may request that any portion or portions of a series of meetings be closed to public observation for any of the reasons provided in § 503.73 by submitting such request in writing to the Secretary of the agency in sufficient time to allow the Secretary to schedule a timely vote on the request pursuant to paragraph (b) of this section.

(b) Upon receipt of any request made under paragraph (a) of this section, the Secretary of the agency shall schedule a time at which the members of the agency shall vote upon the request, which vote shall take place not later than eight (8) days prior to the scheduled meeting of the agency.

(c) At the time the Secretary schedules a time for an agency vote as described in paragraph (b) of this section, he or she shall forward the request to the General Counsel of the agency who shall act upon such request as provided in § 503.77.

(d) At the time scheduled by the Secretary as provided in paragraph (b) of this section, the members of the agency, upon consideration of the request submitted under paragraph (a) of this section and consideration of the certified opinion of the General Counsel of the agency provided to the members under § 503.77, shall vote upon that request. That vote shall determine whether or not any portion or portions of a meeting may be closed to public observation for any of the reasons provided in § 503.73, and whether or not the public interest requires that the portion or portions of the meeting or meetings remain open, notwithstanding the applicability of any of the reasons provided in § 503.73 permitting the closing of any meeting to public observation.

(e) In the case of a vote on a request under this section to close to public observation a portion or portions of a meeting, no such portion or portions of any meeting may be closed unless, by a vote on the issues described in paragraph (d) of this section, a majority of the entire membership of the agency shall vote to close such portion or portions of a meeting by recorded vote.

(f) In the case of a vote on a request under this section to close to public observation a portion or portions of a series of meetings as defined in § 503.71, no such portion or portions of a series of meetings may be closed unless, by a vote on the issues described in paragraph (d) of this section, a majority of the entire membership of the agency shall vote

to close such portion or portions of a series of meetings. A determination to close to public observation a portion or portions of a series of meetings may be accomplished by a single vote on each of the issues described in paragraph (d) of this section, provided that the vote of each member of the agency shall be recorded and the vote shall be cast by each member and not by proxy vote.

§ 503.75 Procedures for closing a portion of a meeting on request initiated by an interested person.

(a) Any person as defined in § 503.71, whose interests may be directly affected by a portion of a meeting of the agency, may request that the agency close that portion of a meeting for the reason that matters in deliberation at that portion of the meeting are such that public disclosure of that portion of a meeting is likely to:

(1) Involve accusing any person of a crime, or formally censuring any person;

(2) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy; or

(3) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:

(i) Interfere with enforcement proceedings;

(ii) Deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Constitute an unwarranted invasion of personal privacy;

(iv) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(v) Disclose investigative techniques and procedures; or

(vi) Endanger the life or physical safety of law enforcement personnel.

(b) Any person described in paragraph (a) of this section who submits a request that a portion of a meeting be closed shall submit an original and 15 copies of that request to the Secretary, Federal Maritime Commission, Washington, DC 20573, and shall state with particularity that portion of a meeting sought to be closed and the reasons therefor as described in paragraph (a) of this section.

(c) Upon receipt of any request made under paragraphs (a) and (b) of this section, the Secretary of the agency shall:

(1) Furnish a copy of the request to each member of the agency; and

(2) Furnish a copy of the request to the General Counsel of the agency.

(d) Upon receipt of a request made under paragraphs (a) and (b) of this section, any member of the agency may request agency action upon the request to close a portion of a meeting by notifying the Secretary of the agency of that request for agency action.

(e) Upon receipt of a request for agency action under paragraph (d) of this section, the Secretary of the agency shall schedule a time for an agency vote upon the request of the person whose interests may be directly affected by a portion of a meeting, which vote shall take place prior to the scheduled meeting of the agency.

(f) At the time the Secretary receives a request for agency action and schedules a time for an agency vote as described in paragraph (e) of this section, the request of the person whose interests may be directly affected by a portion of a meeting shall be forwarded to the General Counsel of the agency who shall act upon such request as provided in § 503.77.

(g) At the time scheduled by the Secretary, as provided in paragraph (e) of this section, the members of the agency, upon consideration of the request of the person whose interests may be directly affected by a portion of a meeting submitted under paragraphs (a) and (b) of this section, and consideration of the certified opinion of the General Counsel of the agency provided to the members under § 503.77, shall vote upon that request. That vote shall determine whether or not any portion or portions of a meeting or portions or portions of a series of meetings may be closed to public observation for any of the reasons provided in paragraph (a) of this section, and whether or not the public interest requires that the portion or portions of the meeting or meetings remain open, notwithstanding the applicability of any of the reasons provided in paragraph (a) of this section permitting the closing of any portion of any meeting to public observation.

(h) In the case of a vote on a request under this section to close to public observation a portion of a meeting, no such portion of a meeting may be closed unless, by a vote on the issues described in paragraph (g) of this section, a majority of the entire membership of the agency shall vote to close such portion of a meeting by a recorded vote.

§ 503.76 Effect of vote to close a portion or portions of a meeting or series of meetings.

(a) Where the agency votes as provided in § 503.74 or § 503.75, to close to public observation a portion or portions of a meeting or a portion or portions of a series of meetings, the portion or portions of a meeting or the portion or portions of a series of meetings shall be closed.

(b) Except as otherwise provided in §§ 503.80, 503.81 and 503.82, not later than the day following the day on which a vote is taken under § 503.74 or § 503.75, by which it is determined to close a portion or portions of a meeting or a portion or portions of a series of meetings to public observation, the Secretary shall make available to the public:

(1) A written copy of the recorded vote reflecting the vote of each member of the agency;

(2) A full written explanation of the agency action closing that portion or those portions to public observation; and

(3) A list of the names and affiliations of all persons expected to attend the portion or portions of the meeting or the portion or portions of a series of meetings.

(c) Except as otherwise provided in §§ 503.80, 503.81 and 503.82, not later than the day following the day on which a vote is taken under § 503.74, or § 503.75, by which it is determined that the portion or portions of a meeting or the portion or portions of a series of meetings shall remain open to public observation, the Secretary shall make available to the public a written copy of the recorded vote reflecting the vote of each member of the agency.

§ 503.77 Responsibilities of the General Counsel of the agency upon a request to close any portion of any meeting.

(a) Upon any request that the agency close a portion or portions of any meeting or any portion or portions of any series of meetings under the provisions of §§ 503.74 and 503.75, the General Counsel of the agency shall certify in writing to the agency, prior to an agency vote on that request, whether or not in his or her opinion the closing of any such portion or portions of a meeting or portion or portions of a series of meetings is proper under the provisions of this subpart and the terms of the Government in the Sunshine Act (5 U.S.C. 552b). If, in the opinion of the General Counsel, the closing of a portion or portions of a meeting or portion or portions of a series of meetings is proper under the provisions of this subpart and the terms of the Government in the Sunshine Act (5 U.S.C. 552b), his or her certification of that opinion shall cite each applicable, particular, exemptive provision of that Act and provision of this subpart.

(b) A copy of the certification of the General Counsel as described in paragraph (a) of this section, together with a statement of the officer presiding over the portion or portions of any meeting or the portion or portions of a series of meetings setting forth the time and place of the relevant meeting or meetings, and the persons present, shall be maintained by the Secretary for public inspection.

§ 503.78 General rule—information pertaining to meeting.

(a) As defined in § 503.71, all information pertaining to a portion or portions of a meeting or portion or portions of a series of meetings of the agency shall be disclosed to the public unless excepted from such disclosure under §§ 503.79, 503.80 and 503.81.

(b) All inquiries as to the status of pending matters which were considered by the Commission in closed session should be directed to the Secretary of the Commission. Commission personnel who attend closed meetings of the Commission are prohibited from disclosing anything that occurs during those meetings. An employee's failure to respect the confidentiality of closed meetings constitutes a violation of the Commission's General Standards of Conduct. The Commission can, of course, determine to make public the events or decisions occurring in a closed meeting, such informa-

tion to be disseminated by the Office of the Secretary. An inquiry to the Office of the Secretary as to whether any information has been made public is not, therefore, improper. However, a request of or attempt to persuade a Commission employee to divulge the contents of a closed meeting constitutes a lack of proper professional conduct inappropriate to a person practicing before this agency, and requires that the employee file a report of such event so that a determination can be made whether disciplinary action should be initiated pursuant to § 502.30 of this chapter.

§ 503.79 Exceptions—information pertaining to meeting.

Except in a case where the agency finds that the public interest requires otherwise, information pertaining to a portion or portions of a meeting or portion or portions of a series of meetings need not be disclosed by the agency if the agency determines, under the provisions of §§ 503.80 and 503.81 that disclosure of that information is likely to disclose matters which are:

(a) Specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and (2) in fact properly classified pursuant to such Executive Order;

(b) Related solely to the internal personnel rules and practices of an agency;

(c) Specifically exempted from disclosure by any statute other than 5 U.S.C. 552 (FOIA), provided that such statute (1) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (2) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(d) Trade secrets and commercial or financial information, obtained from a person and privileged or confidential;

(e) Involved with accusing any person of a crime, or formally censuring any person;

(f) Of a personal nature, where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(g) Investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such record or information would (1) interfere with enforcement proceedings, (2) deprive a person of a right to a fair trial or an impartial adjudication, (3) constitute an unwarranted invasion of personal privacy, (4) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (5) disclose investigative techniques and procedures, or (6) endanger the life or physical safety of law enforcement personnel;

(h) Contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(i) Information, the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action, unless the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(j) Specifically concerned with the agency's issuance of a subpena, the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

§ 503.80 Procedures for withholding information pertaining to meeting.

(a) Any member of the agency, or the General Counsel of the agency may request that information pertaining to a portion or portions of a meeting or to a portion or portions of a series of meetings be withheld from public disclosure for any of the reasons set forth in § 503.79 by submitting such request in writing to the Secretary not later than two (2) weeks prior to the commencement of the first meeting in a series of meetings.

(b) Upon receipt of any request made under paragraph (a) of this section, the Secretary shall schedule a time at which the members of the agency shall vote upon the request, which vote shall take place not later than eight (8) days prior to the scheduled meeting of the agency.

(c) At the time scheduled by the Secretary in paragraph (b) of this section, the Members of the agency, upon consideration of the request submitted under paragraph (a) of this section, shall vote upon that request. That vote shall determine whether or not information pertaining to a meeting may be withheld from public disclosure for any of the reasons provided in § 503.79, and whether or not the public interest requires that the information be disclosed notwithstanding the applicability of the reasons provided in § 503.79 permitting the withholding from public disclosure of the information pertaining to a meeting.

(d) In the case of a vote on a request under this, section to withhold from public disclosure information pertaining to a portion or portions of a meeting, no such information shall be withheld from public disclosure unless, by a vote on the issues described in paragraph (c) of this section, a majority of the entire membership of the agency shall vote to withhold such information by recorded vote.

(e) In the case of a vote on a request under this section to withhhold information pertaining to a portion or portions of a series of meetings, no such information shall be withheld unless, by a vote on the issues described in paragraph (c) of this section, a majority of the entire member-

ship of the agency shall vote to withhold such information. A determination to withhold information pertaining to a portion or portions of a series of meetings from public disclosure may be accomplished by a single vote on the issues described in paragraph (c) of this section, provided that the vote of each member of the agency shall be recorded and the vote shall be cast by each member and not by proxy vote.

§ 503.81 Effect of vote to withhold information pertaining to meeting.

(a) Where the agency votes as provided in § 503.80 to withhold from public disclosure information pertaining to a portion or portions of a meeting or portion or portions of a series of meetings, such information shall be excepted from the requirements of §§ 503.78, 503,82 and 503.83.

(b) Where the agency votes as provided in § 503.80 to permit public disclosure of information pertaining to a portion or portions of a meeting or portion or portions of a series of meetings, such information shall be disclosed to the public as required by §§ 503.78, 503.82 and 503.83.

(c) Not later than the day following the date on which a vote is taken under § 503.80, by which the information pertaining to a meeting is determined to be disclosed, the Secretary shall make available to the public a written copy of such vote reflecting the vote of each member of the agency on the question.

§ 503.82 Public announcement of agency meeting.

(a) Except as provided in §§ 503.80 and 503.81 regarding a determination to withhold from public disclosure any information pertaining to a portion or portions of a meeting or portion or portions of a series of meetings, or as otherwise provided in paragraph (c) of this section, the Secretary of the agency shall make public announcement of each meeting of the agency.

(b) Except as otherwise provided in this section, public announcement of each meeting of the agency shall be accomplished not later than one week prior to commencement of a meeting or the commencement of the first meeting in a series of meeting, and shall disclose:

(1) The time of the meeting;

(2) The place of the meeting;

(3) The subject matter of each portion of each meeting or series of meetings;

(4) Whether any portion or portions of any meeting or any portion or portions of any series of meetings is open or closed to public observation; and

(5) The name and telephone number of the Secretary of the agency who shall respond to requests for information about a meeting.

(c) The announcement described in paragraphs (a) and (b) of this section may be accomplished less than one week prior to the commencement of any meeting or series of meetings, provided the agency determines by recorded vote that the agency business requires that any such meeting or series of meetings be held at an earlier date. In the event of such

a determination by the agency, public announcement as described in paragraph (b) of this section shall be accomplished at the earliest practicable time.

(d) Immediately following any public announcement accomplished under the provisions of this section, the Secretary of the agency shall submit a notice for publication in the *Federal Register* disclosing:

(1) The time of the meeting;

(2) The place of the meeting;

(3) The subject matter of each portion of each meeting or series of meetings;

(4) Whether any portion or portions of any meeting or any portion or portions of any series of meetings is open or closed to public observation; and

(5) The name and telephone number of the Secretary of the agency who shall respond to requests for information about a meeting.

§ 503.83 Public announcement of changes in meeting.

(a) Except as provided in §§ 503.80 and 503.81, under the provisions of paragraphs (b) and (c) of this section, the time or place of a meeting or series of meetings may be changed by the agency following accomplishment of the announcement and notice required by § 503.82, provided the Secretary of the agency shall publicly announce such change at the earliest practicable time.

(b) The subject matter of a portion or portions of a meeting or a portion or portions of a series of meetings, the time and place of such meeting, and the determination that the portion or portions of a series of meetings shall be open or closed to public observation may be changed following accomplishment of the announcement required by § 503.82, provided:

(1) The agency, by recorded vote of the majority of the entire membership of the agency, determines that agency business so requires and that no earlier announcement of the change was possible; and

(2) The Secretary of the agency publicly announces, at the earliest practicable time, the change made and the vote of each member upon such change.

(c) Immediately following any public announcement of any change accomplished under the provisions of this section, the Secretary of the agency shall submit a notice for publication in the *Federal Register* disclosing:

(1) The time of the meeting;

(2) The place of the meeting;

(3) The subject matter of each portion of each meeting or series of meetings;

(4) Whether any portion or portions of any meeting or any portion or portions of any series of meetings is open or closed to public observation; and

(5) Any change in paragraphs (c)(1), (c)(2), (c)(3), or (c)(4) of this section; and

(6) The name and telephone number of the Secretary of the agency who shall respond to requests for information about any meeting.

§ 503.84 [Reserved.]

§ 503.85 Agency recordkeeping requirements.

(a) In the case of any portion or portions of a meeting or portion or portions of a series of meetings determined by the agency to be closed to public observation under the provisions of this subpart, the following records shall be maintained by the Secretary of the agency:

(1) The certification of the General Counsel of the agency required by § 503.77;

(2) A statement from the officer presiding over the portion or portions of the meeting or portion or portions of a series of meetings setting forth the time and place of the portion or portions of the meeting or portion or portions of the series of meetings, the persons present at those times; and

(3) Except as provided in paragraph (b) of this section, a complete transcript or electronic recording fully recording the proceedings at each portion of each meeting closed to public observation.

(b) In case the agency determines to close to public observation any portion or portions of any meeting or portion or portions of any series of meetings because public observation of such portion or portions of any meeting is likely to specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing, the agency may maintain a set of minutes in lieu of the transcript or recording described in paragraph (a)(3) of this section. Such minutes shall contain:

(1) A full and clear description of all matters discussed in the closed portion of any meeting;

(2) A full and accurate summary of any action taken on any matter discussed in the closed portion of any meeting and the reasons therefor;

(3) A description of each of the views expressed on any matter upon which action was taken as described in paragraph (b)(2) of this section;

(4) The record of any rollcall vote which shall show the vote of each member on the question; and

(5) An identification of all documents considered in connection with any action taken on a matter described in paragraph (b)(1) of this section.

(c) All records maintained by the agency as described in this section shall be held by the agency for a period of not less than two (2) years following any meeting or not less than one (1) year following the conclusion of any agency proceeding with respect to which that meeting or portion of a meeting was held.

§ 503.86 Public access to records.

(a) All transcripts, electronic recordings or minutes required to be maintained by the agency under the provisions of §§ 503.85(a)(3) and 503.85(b) shall be promptly made available to the public by the Secretary of the agency, except for any item of discussion or testimony of any witnesses which the agency determines to contain information which may be withheld from public disclosure because its disclosure is likely to disclose matters which are:

(1)(i) specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and (ii) in fact properly classified pursuant to such Executive Order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by any statute other than 5 U.S.C. 552 (FOIA), provided that such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Involved with accusing any person of a crime, or formally censuring any person;

(6) Of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Investigatory records compiled for law enforcement purposes, or information which, if written, would be contained in such records, but only to the extent that the production of such records or information would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures or (vi) endanger the life or physical safely of law enforcement personnel;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) Information, the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action, unless the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) Specifically concerned with the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

(b) Requests for access to the records described in this section shall be made in accordance with procedures described in §§ 503.31 through 503.36.

(c) Records disclosed to the public under this section shall be furnished at the expense of the party requesting such access at the actual cost of duplication of transcription.

§ 503.87 Effect of provisions of this subpart on other subparts.

(a) Nothing in this subpart shall limit or expand the ability of any person to seek access to agency records under Subpart D (§§ 503.31 to 503.36) of this part except that the exceptions of § 503.86 shall govern requests to copy or inspect any portion of any transcript, electronic recordings or minutes required to be kept under this subpart.

(b) Nothing in this subpart shall permit the withholding from any individual to whom a record pertains any record required by this subpart to be maintained by the agency which record is otherwise available to such an individual under the provisions of Subpart G of this part.

NOTE: This part does not contain any collection of information requests or requirements within the meaning of the Paperwork Reduction Act of 1980, Pub. L. 96–511.

FEDERAL MARITIME COMMISSION

[46 CFR PART 504]

PROCEDURES FOR ENVIRONMENTAL POLICY ANALYSIS

Sec.
504.1 Purpose and scope.
504.2 Definitions.
504.3 General information.
504.4 Categorical exclusions.
504.5 Environmental assessments.
504.6 Finding of no significant impact.
504.7 Environmental impact statements.
504.8 Record of decision.
504.9 Information required by the Commission.
504.10 Time constraints on final administrative actions.
504.91 OBM control numbers assigned pursuant to the Paperwork Reduction Act.

AUTHORITY: 5 U.S.C. 552, 553; Secs. 21 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 820 and 841a); secs. 13 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1712 and 1716); sec. 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(b)) and sec. 382(b) of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6362).

§ 504.1 Purpose and scope.

(a) This part implements the National Environmental Policy Act of 1969 (NEPA) and Executive Order 12114 and incorporates and complies with the Regulations of the Council on Environmental Quality (CEQ) (40 CFR 1500 *et seq.*).

(b) This part applies to all actions of the Federal Maritime Commission (Commission). To the extent possible, the Commission shall integrate the requirements of NEPA with its obligations under section 382(b) of the Energy Policy and Conservation Act of 1975, 42 U.S.C. 6362.

(c) Information obtained under this part is used by the Commission to assess potential environmental impacts of proposed Federal Maritime Commission actions. Compliance is voluntary but may be made mandatory by Commission order to produce the information pursuant to section 21 of the Shipping Act, 1916 or section 15 of the Shipping Act of 1984. Penalty for non-compliance with a section 21 order is $100 a day for each day of default; penalty for falsification of such a report is a fine of up to $1,000 or imprisonment up to one year, or both. Penalty for violation of a Commission order under section 15 of the Shipping Act of 1984 may not exceed $5,000 for each violation, unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $25,000 for each violation. (Each day of a continuing violation constitutes a separate offense).

§ 504.2 Definitions.

(a) "*Shipping Act, 1916*"—[46 U.S.C. app. 801–846] means the Shipping Act, 1916 as amended, 46 U.S.C. app. 801 *et seq.*

(b) "*Common carrier*" means any common carrier by water as defined in section 3 of the Shipping Act of 1984 or in the Shipping Act, 1916, including a conference of such carriers.

(c) "*Environmental Impact*" means any alteration of existing environmental conditions or creation of a new set of environmental conditions, adverse or beneficial, caused or induced by the action under consideration.

(d) "*Potential Action*" means the range of possible Commission actions that may result from a Commission proceeding in which the Commission has not yet formulated a proposal.

(e) "*Proposed Action*" means that stage of activity where the Commission has determined to take a particular course of action and the effects of that course of action can be meaningfully evaluated.

(f) "*Environmental Assessment*" means a concise document that serves to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact" (40 CFR 1508.9).

(g) "*Recyclable*" means any secondary material that can be used as a raw material in an industrial process in which it is transformed into a new product replacing the use of a depletable natural resource.

(h) "*Shipping Act of 1984*" means the Shipping Act of 1984, (46 U.S.C. app. 1701–1720).

(i) "*Marine Terminal Operator*" means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier.

§ 504.3 General Information.

(a) All comments submitted pursuant to this part shall be addressed to the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573.

(b) A list of Commission actions for which a finding of no significant impact has been made or for which an environmental impact statement is being prepared will be maintained by the Commission in the Office of the Secretary and will be available for public inspection.

(c) Information or status reports on environmental statements and other elements of the NEPA process can be obtained from the Office of Environmental Analysis, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573 (telephone [202] 523–5835).

§ 504.4 Categorical exclusions.

(a) No environmental analyses need be undertaken or environmental documents prepared in connection with actions which do not individually or cumulatively have a significant effect on the quality of the human environment because they are purely ministerial actions or because they do not increase or decrease air, water or noise pollution or the use of fossil

fuels, recyclables, or energy. The following Commission actions, and rulemakings related thereto, are therefore excluded:

(1) Issuance, modification, denial and revocation of Ocean Freight Forwarder licenses.

(2) Certification of financial responsibility of passenger vessels pursuant to 46 CFR Part 540.

(3) [Reserved.]

(4) Promulgation of procedural rules pursuant to 46 CFR Part 502.

(5) Acceptance or rejection of tariff filings in foreign and domestic commerce.

(6) Consideration of special permission applications filed pursuant to 46 CFR Parts 550 or 580.

(7) Receipt of terminal tariffs pursuant to 46 CFR Part 515.

(8) Suspension of and/or decision to investigate tariff schedules pursuant to section 3 of the Intercoastal Shipping Act, 1933.

(9) Consideration of amendments to agreements filed pursuant to section 15 of the Shipping Act, 1916 or section 5 of the Shipping Act of 1984, which do not increase the authority set forth in the effective agreement.

(10) Consideration of agreements between common carriers which solely affect intraconferene or inter-rate agreement relationships or pertain to administrative matters of conferences or rate agreements.

(11) Consideration of agreements between common carriers to discuss, propose or plan future action, the implementation of which requires filing a further agreement.

(12) Consideration of exclusive or non-exclusive equipment interchange or husbanding agreements.

(13) Receipt of non-exclusive transshipment agreements.

(14) Action relating to collective bargaining agreements.

(15) Action pursuant to section 9 of the Shipping Act of 1984 concerning the justness and reasonableness of controlled carriers' rates, charges, classifications, rules or regulations.

(16) Receipt of self-policing reports or shipper requests and complaints.

(17) Consideration of financial reports prepared by common carriers in the domestic offshore trades.

(18) Consideration of actions solely affecting the environment of a foreign country.

(19) Action taken on special docket applications pursuant to 46 CFR 502.92.

(20) Consideration of matters related solely to the issue of Commission jurisdiction.

(21) Investigations conducted pursuant to 46 CFR Part 555.

(22) Investigatory adjudicatory proceedings, the purpose of which is to ascertain past violations of the Shipping Act, 1916 or the Shipping Act of 1984.

(23) [Reserved.]

(24) Action regarding access to public information pursuant to 46 CFR Part 503.

(25) Action regarding receipt and retention of minutes of conference meetings.

(26) Administrative procurements (general supplies).

(27) Contracts for personal services.

(28) Personnel actions.

(29) Requests for appropriations.

(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.

(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 and cargo inspection services.

(b) If interested persons allege that a categorically-excluded action will have a significant environmental effect (e.g., increased or decreased air, water or noise pollution; use of recyclables; use of fossil fuels or energy), they shall, by written submission to the Commission's Office of Environmental Analysis (OEA), explain in detail their reasons. The OEA shall review these submissions and determine, not later than ten (10) days after receipt, whether to prepare an environmental assessment. If the OEA determines not to prepare an environmental assessment, such persons may petition the Commission for review of the OEA's decision within ten (10) days of receipt of notice of such determination.

(c) If the OEA determines that the individual or cumulative effect of a particular action otherwise categorically excluded offers a reasonable potential of having a significant environmental impact, it shall prepare an environmental assessment pursuant to § 504.5.

§ 504.5 Environmental assessments.

(a) Every Commission action not specifically excluded under § 504.4 shall be subject to an environmental assessment.

(b) The OEA may publish in the *Federal Register* a notice of intent to prepare an environmental assessment briefly describing the nature of the potential or proposed action and inviting written comments to aid in the preparation of the environmental assessment and early identification

of the significant environmental issues. Such comments must be received by the Commission no later than ten (10) days from the date of publication of the notice in the *Federal Register.*

§ 504.6 Finding of no significant impact.

(a) If upon completion of an environmental assessment, the OEA determines that a potential or proposed action will not have a significant impact on the quality of the human environment of the United States or of the global commons, a finding of no significant impact shall be prepared and notice of its availability published in the *Federal Register.* This document shall include the environmental assessment or a summary of it, and shall briefly present the reasons why the potential or proposed action, not otherwise excluded under § 504.4 will not have a significant effect on the human environment and why, therefore, an environmental impact statement (EIS) will not be prepared.

(b) Petitions for review of a finding of no significant impact must be received by the Commission within ten (10) days from the date of publication of the notice of its availability in the *Federal Register.* The Commission shall review the petitions and either deny them or order the OEA to prepare an EIS pursuant to § 504.7. The Commission shall, within ten (10) days of receipt of the petition, serve copies of its order upon all parties who filed comments concerning the potential or proposed action or who filed petitions for review.

§ 504.7 Environmental impact statements.

(a) *General.*

(1) An environmental impact statement (EIS) shall be prepared by the OEA when the environmental assessment indicates that a potential or proposed action may have a significant impact upon the environment of the United States or the global commons.

(2) The EIS process will commence:

(i) For adjudicatory proceedings, when the Commission issues an order of investigation or a complaint is filed;

(ii) For rulemaking or legislative proposals, upon issuance of the proposal by the Commission; and

(iii) For other actions, the time the action is noticed in the *Federal Register.*

(3) The major decision points in the EIS process are:

(i) the issuance of an initial decision in those cases assigned to be heard by an Administrative Law Judge (ALJ); and

(ii) the issuance of the Commission's final decision or report on the action.

(4) The EIS shall consider potentially significant impacts upon the quality of the human environment of the United States and, in appropriate cases, upon the environment of the global commons outside the jurisdiction of any nation.

(b) *Draft environmental impact statements.*

(1) The OEA will initially prepare a draft environmental impact statement (DEIS) in accordance with 40 CFR Part 1502.

(2) The DEIS shall be distributed to every party to a Commission proceeding for which it was prepared. There will be no fee charged to such parties. One copy per person will also be provided to interested persons at their request. The fee charged such persons shall be that provided in § 503.43 of this chapter.

(3) Comments on the DEIS must be received by the Commission within ten (10) days of the date the Environmental Protection Agency (EPA) publishes in the *Federal Register* notice that the DEIS was filed with it. Sixteen copies shall be submitted as provided in § 504.3(a). Comments shall be as specific as possible and may address the adequacy of the DEIS or the merits of the alternatives discussed in it. All comments received will be made available to the public. Extensions of time for commenting on the DEIS may be granted by the Commission for up to ten (10) days if good cause is shown.

(c) *Final environmental impact statements.*

(1) After receipt of comments on the DEIS, the OEA will prepare a final environmental impact statement (FEIS) pursuant to 40 CFR Part 1502, which shall include a discussion of the possible alternative actions to a potential or proposed action. The FEIS will be distributed in the same manner as specified in paragraph (b)(2) of this section.

(2) The FEIS shall be prepared prior to the Commission's final decision and shall be filed with the Secretary, Federal Maritime Commission. Upon filing, it shall become part of the administrative record.

(3) For any Commission action which has been assigned to an ALJ for evidentiary hearing:

(i) The FEIS shall be submitted prior to the close of the record, and

(ii) The ALJ shall consider the environmental impacts and alternatives contained in the FEIS in preparing the initial decision.

(4)(i) For all proposed Commission actions, any party may, by petition to the Commission within ten (10) days following EPA's notice in the *Federal Register*, assert that the FEIS contains a substantial and material error of fact which can only be properly resolved by conducting an evidentiary hearing, and expressly request that such a hearing be held. Other parties may submit replies to the petition within ten (10) days of its receipt.

(ii) The Commission may delineate the issue(s) and refer them to an ALJ for expedited resolution or may elect to refer the petition to an ALJ for consideration.

(iii) The ALJ shall make findings of fact on the issue(s) and shall certify such findings to the Commission as a supplement to the FEIS. To the extent that such findings differ from the FEIS, it shall be modified by the supplement.

(iv) Discovery may be granted by the ALJ on a showing of good cause and, if granted, shall proceed on an expedited basis.

§ 504.8 Record of decision.

The Commission shall consider each alternative described in the FEIS in its decisionmaking and review process. At the time of its final report or order, the Commission shall prepare a record of decision pursuant to 40 CFR 1505.2.

§ 504.9 Information required by the Commission.

(a) Upon request of OEA, a person filing a complaint, protest, petition or agreement requesting Commission action shall submit to OEA, no later than ten (10) days from the date of the request, a statement setting forth, in detail, the impact of the requested Commission action on the quality of the human environment, if such requested action will:

(1) Alter cargo routing patterns between ports or change modes of transportation;

(2) Change rates or services for recyclables;

(3) Change the type, capacity or number of vessels employed in a specific trade; or

(4) Alter terminal or port facilities.

(b) The statement submitted shall, to the fullest extent possible, include:

(1) The probable impact of the requested Commission action on the environment (*e.g.*, the use of energy or natural resources, the effect on air, noise, or water pollution), compared to the environmental impact created by existing uses in the area affected by it;

(2) Any adverse environmental effects which cannot be avoided if the Commission were to take or adopt the requested action; and

(3) Any alternatives to the requested Commission action.

(c) If environmental impacts, either adverse or beneficial, are alleged, they should be sufficiently identified and quantified to permit meaningful review. Individuals may contact the OEA for informal assistance in preparing this statement. The OEA shall independently evaluate the information submitted and shall be responsible for assuring its accuracy if used by it in the preparation of an environmental assessment or EIS.

(d) In all cases, the OEA may request every common carrier by water, or marine terminal operator, or any officer, agent or employee thereof, as well as all parties to proceedings before the Commission, to submit, within ten (10) days of such request, all material information necessary to comply with NEPA and this part. Information not produced in response to an informal request may be obtained by the Commission pursuant to section 21 of the Shipping Act, 1916, or section 15 of the Shipping Act of 1984.

§ 504.10 Time constraints on final administrative actions.

No decision on a proposed action shall be made or recorded by the Commission until the later of the following dates unless reduced pursuant

to 40 CFR 1506.10(d), or unless required by a statutorily-prescribed deadline on the Commission action:

(a) Forty (40) days after EPA's publication of the notice described in § 504.7(b) for a DEIS; or

(b) Ten (10) days after publication of EPA's notice for an FEIS.

§ 504.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control number assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
504.4 through 504.7	3072–0035
504.9	3072–0035

FEDERAL MARITIME COMMISSION

[46 CFR PART 505]

COMPROMISE, ASSESSMENT, SETTLEMENT AND COLLECTION OF CIVIL PENALTIES

Sec.
505.1 Purpose and scope.
505.2 Definitions.
505.3 Assessment of civil penalties: procedure; criteria for determining amount; limitations; relation to compromise.
505.4 Compromise of penalties: relation to assessment proceedings.
505.5 Payment of penalty: method, default.

Appendix A—Example of Compromise Agreement to be used under 46 CFR § 505.4.

Appendix B—Example of Promissory Note to be used under 46 CFR § 505.5.

AUTHORITY: 5 U.S.C. 552, 553; secs. 32 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 831 and 841a); secs. 10, 11, 13, and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709, 1710, 1712, and 1716.)

§ 505.1 Purpose and scope.

The purpose of this part is to implement the statutory provisions of section 32 of the Shipping Act, 1916, and section 13 of the Shipping Act of 1984, by establishing rules and regulations governing the compromise, assessment, settlement and collection of civil penalties arising under certain designated provisions of the Shipping Act, 1916, the Intercoastal Shipping Act, 1933, the Shipping Act of 1984, and/or any order, rule or regulation (except for procedural rules and regulations contained in part 502 of this chapter) issued or made by the Commission in the exercise of its powers, duties and functions under those statutes.

§ 505.2 Definitions.

For the purposes of this part:

(a) "*Assessment*" means the imposition of a civil penalty by order of the Commission after a formal docketed proceeding.

(b) "*Commission*" means the Federal Maritime Commission.

(c) "*Compromise*" means the process whereby a civil penalty for a violation is agreed upon by the respondent and the Commission outside of a formal, docketed proceeding.

(d) "*Person*" includes individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country.

(e) "*Respondent*" means any person charged with a violation.

(f) "*Settlement*" means the process whereby a civil penalty or other disposition of the case for a violation is agreed to in a formal, docketed proceeding instituted by order of the Commission.

(g) "*Violation*" includes any violation of sections 14 through 21 (except section 16 First and Third) of the Shipping Act, 1916; section 2 of the Intercoastal Shipping Act, 1933; any provision of the Shipping Act of 1984; and/or any order, rule or regulation (except for procedural rules and regulations contained in part 502 of this chapter) issued or made by the Commission in the exercise of its powers, duties and functions under the Shipping Act, 1916, the Intercoastal Shipping Act, 1933, or the Shipping Act of 1984.

(h) Words in the plural form shall include the singular and vice versa; and words importing the masculine gender shall include the feminine and vice versa. The terms "includes" and "including" do not exclude matters not listed but which are in the same general class. The word "and" includes "or", except where specifically stated or where the context requires otherwise.

§ 505.3 Assessment of civil penalties: procedure; criteria for determining amount; limitations; relation to compromise.

(a) *Procedure for assessment of penalty.* The Commission may assess a civil penalty only after notice and opportunity for a hearing under section 22 of the Shipping Act, 1916, or sections 11 and 13 of the Shipping Act of 1984. The proceeding, including settlement negotiations, shall be governed by the Commission's Rules of Practice and Procedure in Part 502 of this Chapter. All settlements must be approved by the Presiding Officer. The full text of any settlement must be included in the final order of the Commission.

(b) *Criteria for determining amount of penalty.* In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

(c) *Limitations: relation to compromise.* When the Commission, in its discretion, determines that policy, justice or other circumstances warrant, a civil penalty assessment proceeding may be instituted at any time for any violation which occurred within five years prior to the issuance of the order of investigation. A proceeding may also be instituted at any time after the initiation of informal compromise procedures, except where a compromise agreement for the same violations under the compromise procedures has become effective under § 505.4(e).

§ 505.4 Compromise of penalties: relation to assessment proceedings.

(a) *Scope.* Except in pending assessment proceedings provided for in § 505.3, the Commission, when it has reason to believe a violation has occurred, may invoke the informal compromise procedures of this section.

(b) *Notice.* When the Commission considers it appropriate to afford an opportunity for the compromise of a civil penalty, it will, except where circumstances render it unnecessary, send a registered or certified demand letter to the respondent describing specific violation(s) on which the claim is based, including the particular facts, dates and other elements necessary for the respondent to identify the specific conduct constituting the alleged violation; the amount of the penalty demanded; and the names of Commission personnel with whom the demand may be discussed, if the person desires to compromise the penalty. The demand shall also include the deadlines for the institution and completion of compromise negotiations and the consequences of failure to compromise.

(c) *Request for compromise.* Any person receiving a demand provided for in paragraph (b) of this section may, within the time specified, deny the violation, or submit matters explaining, mitigating or showing extenuating circumstances, as well as make voluntary disclosures of information and documents.

(d) *Criteria for compromise.* In addition to the factors set forth in § 505.3(b), in compromising a penalty claim, the Commission may consider litigative probabilities, the cost of collecting the claim and enforcement policy.

(e) *Disposition of claims in compromise procedures.*

(1) When the penalty is compromised, such compromise will be made conditional upon the full payment of the compromised amount upon such terms and conditions as may be allowed.

(2) When a penalty is compromised and the respondent agrees to settle for that amount, a compromise agreement shall be executed. (One example of such a compromise agreement is set forth as Appendix A to this part.) This agreement, after reciting the nature of the claim, will include a statement evidencing the respondent's agreement to the compromise of the Commission's penalty claim for the amount set forth in the agreement and will also embody an approval and acceptance provision which is to be signed by the appropriate Commission official. Upon compromise of the penalty in the agreed amount, a copy of the executed agreement shall be furnished to the respondent.

(3) Upon completion of the compromise, the Commission may issue a public notice thereof, the terms and language of which are not subject to negotiation.

(f) *Relation to assessment proceedings.* Except by order of the Commission, no compromise procedure shall be initiated or continued after institution of a Commission assessment proceeding directed to the same violations. Any offer of compromise submitted by the respondent pursuant to this

section shall be deemed to have been furnished by the respondent without prejudice and shall not be used against the respondent in any proceeding.

(g) *Delegation of compromise authority.* The compromise authority set forth in this part is delegated to the Director, Bureau of Hearing Counsel.

§ 505.5 Payment of penalty: method; default.

(a) *Method.* Payment of penalties by the respondent shall be made by:

(1) A bank cashier's check or other instrument acceptable to the Commission;

(2) Regular installments, with interest where appropriate, by check or other instrument acceptable to the Commission after the execution of a promissory note containing a confess-judgment agreement (Appendix B); or,

(3) A combination of the above alternatives.

(b) All checks or other instruments submitted in payment of claims shall be made payable to the Federal Maritime Commission.

(c) *Default in payment.* Where a respondent fails or refuses to pay a penalty properly assessed under § 505.3, or compromised and agreed to under § 505.4, appropriate collection efforts will be made by the Commission, including, but not limited to referral to the Department of Justice for collection. Where such a defaulting respondent is a licensed freight forwarder, such a default may also be grounds for revocation or suspension of the respondent's license, after notice and opportunity for hearing, unless such notice and hearing have been waived by the respondent in writing.

NOTE: This part does not contain any collection of information requests or requirements within the meaning of the Paperwork Reduction Act of 1980, Pub. L. 96–511.

APPENDIX A—EXAMPLE OF COMPROMISE AGREEMENT TO BE USED UNDER 46 CFR § 505.4

COMPROMISE AGREEMENT

FMC FILE NO. _____

This Agreement is entered into between:

(1) The Federal Maritime Commission and,

(2) _____ hereinafter referred to as respondent.

WHEREAS, the Commission is considering the institution of an assessment proceeding against respondent for the recovery of civil penalties provided under the _____ Act _____, for _____ alleged violation(s) of Section(s) _____.

WHEREAS, this course of action is the result of practices believed by the Commission to have been engaged in by respondent to wit;

_____

_____

WHEREAS, Section _____ of the _____ Act _____ authorizes the Commission to collect and compromise civil penalties arising from the alleged violation(s) set forth and described above; and,

WHEREAS, the respondent has terminated the practices which are the basis of the alleged violation(s) set forth herein, and has instituted and indicated its willingness to maintain measures designed to eliminate, discourage and prevent these practices by respondent or its officers, employees and agents.

NOW THEREFORE, in consideration of the premises herein, and in compromise of all civil penalties arising from the violation(s) set forth and described herein that may have occurred between (date) and (date), the undersigned respondent herewith tenders to the Federal Maritime Commission a bank cashier's check in the sum of $_____, upon the following terms of settlement:

1. Upon acceptance of this agreement of settlement in writing by the Director of the Bureau of Hearing Counsel of the Federal Maritime Commission, this instrument shall forever bar the commencement or institution of any assessment proceeding or other claims for recovery of civil penalties from respondent arising from the alleged violations set forth and described herein, that have been disclosed by respondent to the Commission and that occurred between (date) and (date).

2. The undersigned voluntarily signs this instrument and states that no promises or representations have been made to the respondent other than the agreements and consideration herein expressed.

3. It is expressly understood and agreed that this agreement is not to be construed as an admission of guilt by undersigned respondent to the alleged violations set forth above.

4. Insofar as this agreement may be inconsistent with Commission procedures for compromise and settlement of violations, the parties hereby waive application of such procedures.

By: _____

Title: _____

Date: _____

Approval and Acceptance

The above Terms and Conditions and Amount of Consideration are hereby Approved and Accepted;

By the Federal Maritime Commission:

_____

(Hearing Counsel)

_____

Director, Bureau of Hearing Counsel

Date_____

APPENDIX B—EXAMPLE OF PROMISSORY NOTE TO BE USED UNDER 46 CFR § 505.5

PROMISSORY NOTE CONTAINING AGREEMENT FOR JUDGMENT FMC FILE NO. _____

For value received, _____ promises to pay to the Federal Maritime Commission (the Commission) the principal sum of $_____($_____) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

$_____ (_____) within _____ months of execution of the settlement agreement by the Director of the Bureau of Hearing Counsel;

$_____ ($_____) within _____ months of execution of the agreement;

[Further payments if necessary]

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 of this execution of this Promissory Note by the Director of the Bureau of Hearing Counsel, and be computed at the rate of [_____ percent (_____) per annum.]

If any payment of principal or interest shall remain unpaid for a period of ten (10) 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, (Respondent) does hereby authorize and empower any U.S. attorney, any of its assistants or any attorney of any court of record, Federal or State, to appear for him or her, and to enter and confess judgment against (Respondent) 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 (Respondent) in any suit on this Promissory Note; to waive any venue requirement in such suit; to release all errors which may intervene in entering such judgment or in issuing any execution thereon; and to consent to immediate execution on said judgment.

(Respondent) 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 Respondent 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.

By: _____

Title: _____

Date: _____

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 580 (FORMERLY PART 536)]

DOCKET NOS. 84–21, 84–23, AND 84–24

SERVICE CONTRACTS; LOYALTY CONTRACTS; AND PUBLISHING AND FILING OF TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

November 9, 1984

ACTION: Final Rule.

SUMMARY: This Final Rule implements those provisions of the Shipping Act of 1984 which relate to the areas of (1) service contracts, (2) loyalty contracts, and (3) general tariff filing requirements. It amends and supersedes three previously published Interim Rules in these subject areas and consolidates them into one Final Rule.

DATES: Effective December 15, 1984.

SUPPLEMENTARY INFORMATION: The Shipping Act of 1984, Public Law 98–237, 98 Stat. 67, 46 U.S.C. app. 1701–1720 (the Act or 1984 Act), was enacted on March 20, 1984 and became effective 90 days later, on June 18, 1984. It significantly alters the statutory scheme which previously governed the oceanborne foreign commerce of the United States—the Shipping Act, 1916 (46 U.S.C. app. 801 *et seq.*) (the 1916 Act). As a result of these changes, the Commission determined that it would be necessary to promulgate rules to implement several provisions of the Act, including, *inter alia,* those relating to (1) service contracts and time/volume rates, (2) loyalty contracts and (3) general tariff filing requirements.

The Commission initially issued three Interim Rules covering these subjects, pursuant to the authority given it by section 17 of the Act—Docket No. 84–21 (26 F.M.C. 640) (service contracts and time/volume rates); Docket No. 84–23 (26 F.M.C. 659) (loyalty contracts); and Docket No. 84–24 (26 F.M.C. 663) (other foreign tariff regulations). These Interim Rules also requested comments by the public and, as a result, were commented on by many diverse interests. The Commission is now issuing Final Rules in these three proceedings. However, since they all relate to the general of area of tariffs and are all to be contained in a new Part 580 of the Code, they are consolidated in this Rule and Part 580 is published in its entirety. The comments to the Interim Rules will nonetheless be considered separately and, therefore, the remainder of this discussion will be divided as follows:

Part I. SERVICE CONTRACTS AND TIME/VOLUME RATES
(Sections 580.7 and 580.12)
[Docket No. 84–21]

Part II. LOYALTY CONTRACTS
(Section 580.16)
[Docket No. 84–23]

Part III. FOREIGN TARIFF FILING REGULATIONS—GENERAL
(Sections 580.0 to 580.6; 580.8 to 580.11; 580.13 to 580.15)
[Docket No. 84–24]

I. *SERVICE CONTRACTS AND TIME VOLUME RATES—DOCKET NO. 84–21* (Sections 580.7 and 580.12)

The Commission initiated Docket No. 84–21 on May 3, 1984, by publishing an Interim Rule (49 F. R. 18849) to implement certain provisions of the 1984 Act relating to service contracts and time/volume rates. Interested persons were given 90 days to comment on the rule. In addition the Commission indicated that concerned individuals could file comments prior to the effective date of the Interim Rule (June 18, 1984) if they perceived serious difficulties with it. The Commission subsequently modified the Interim Rule on June 14, 1984, in response to these emergency comments and solicited additional final comments by August 1, 1984 (49 F.R. 24701.

The Commission received 17 additional final comments on the Interim Rule. Commenting parties or groups of parties are: (1) Port of Oakland; (2) National Maritime Council; (3) Sea-Land Service, Inc.; (4) Tobacco Association of the United States; (5) Matson Navigation Company, Inc.; (6) The Journal of Commerce; (7) Chemical Manufacturers Association (CMA); (8) E.I. du Pont de Nemours and Company (DuPont); (9) United States Department of Transportation (DOT); (10) NPS International; (11) International Association of NVOCCs (IANVOCC); (12) Inter-American Freight Conference; (13) U.S. Atlantic & Gulf/Australia-New Zealand Conference; Iberian/U.S. North Atlantic Westbound Freight Conference; Greece/U.S. Atlantic Rate Agreement; Italy, South France, South Spain, Portugal/U.S. Gulf and the Island of Puerto Rico (Med-Gulf) conference; Mediterranean-North Pacific Coast Freight Conference; the "8900" Lines; The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference; and Marseilles/North Atlantic U.S.A. Freight Conference (North Atlantic Conferences); (14) Pacific Coast European Conference; Latin America/Pacific Coast Steamship Conference; and Pacific Coast River Plate Brazil Conference (Pacific Coast Conferences); (15) Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; Trans-Pacific Freight Conference; Trans-Pacific Freight Conference (Hong Kong); New York Freight Bureau; and Philippines North America Conference (Trans-Pacific Conferences); (16) Pacific Westbound Conference; Far East Conference; Pacific Straits Conference; and Pacific Indonesian

Conference (Far East Conferences); and, (17) 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; North Europe—U.S. South Atlantic Rate Agreement; and U.S. South Atlantic-Europe Rate Agreement (North European Conferences or NEC).

The following is a section-by-section summary of the various comments received and the Commission's disposition of them. Any comment not directly addressed here has nonetheless been fully considered by the Commission. In addition, the Commission has taken this opportunity to make minor editorial changes in the Final Rule for the sake of greater clarity.

I. *580.7(a) Definitions*

Section 580.7(a)(1)—"Contract Party"

Section 580.7(a)(1) of the Interim Rule defines "contract party" as "a party signing a contract as shipper or ocean common carrier" and any "related" entity "who may engage in the shipment of commodities in the trade covered by the contract." The Inter-American Freight Conference believes that only entities who have actually signed a service contract should be considered contract parties, and the North European Conferences suggest that all entities with any remote interest in the contract or relation to the contract signatories be specifically named in the contract. CMA suggests revisions which would allow less than the entire membership of an organization to enter into a contract.

The Commission has revised the definition of "contract party" originally proposed, in part, to resolve these comments. While the designation of contract parties is not an essential term subject to public disclosure under the Act, the Commission believes that all parties able to take advantage of the contract must be named in the contract itself. This will allow the Commission to determine which shipments by a carrier are covered by a contract and therefore entitled to a contract rate, and which must be charged the tariff rate. Without such disclosure, it would be virtually impossible to enforce the tariff adherence requirements of the Act. Accordingly, the Rule has been revised to require that all persons or entities entitled to receive or authorized to offer the service contract's non-tariff rates be expressly named in the contract as contract parties.

The Commission has also taken this opportunity to amend the definition of "contract party" to take into account the fluctuating membership which may occur in a shippers' association. The revision accomplishes this by considering any member of a shippers' association, regardless of whether

it joined or left the association during the course of the contract, to be a contract party without having to be specifically named in the contract.

Section 580.7(a)(2)—"Geographic Area"

Section 580.7(a)(2) of the Interim Rule defines "geographic area" as "the general location from which or to which the contract cargo will move in intermodal service."

The Inter-American Freight Conference and the North Atlantic Conferences contend that the Commission lacks the authority to require the application of a service contract to any location not actually agreed to by the contract parties, a result which they believe occurs when this definition is applied to the contract filing requirements of section 580.7(b). The North European Conferences argue that only the concise statement of essential terms, and not the service contract itself, is required by statute to include a reference to geographic areas.

The Commission does not believe that anything in these comments requires it to alter its definition of "geographic area." It is taken directly from language contained in the legislative history to the Act. See S. Rep. No. 3, 98th Cong., 1st Sess. 31 (1983). The confusion which has arisen over its use in the Interim Rule derives from the fact that though it was only intended to apply to the statement of essential terms, it might also have applied to the contract itself.

Section 580.7(b) requires service contracts filed with the Commission to state, among other things, "the essential terms." Section 580.7(g)(2) requires the essential terms to include ". . . the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements." Taken together, in conjunction with the definition of "geographic area," these sections could be read to require a broader statement of scope in the service contract than had been actually agreed to by the parties. To clarify this situation, section 580.7 is amended in paragraph (b)(3)(ii) to provide that, in the context of the contract filing requirements, the contract need only "reflect the actual locations agreed to by the contract parties."

However, as indicated above, the statement of essential terms must be set forth in terms of geographic areas for through intermodal movements. The description of the geographic area in the statement of essential terms may, within reason, be as broad or as narrow as the parties desire. Depending on the circumstances, "geographic areas" might be stated in terms of counties, regions, states, counties, cities, or zip codes. The propriety of any particular geographic area description contained in an essential terms publication in the initial stages of the implementation of this Final Rule will have to be determined on an *ad hoc* basis. As further experience is gained in this area, section 580.7 may be further amended to reflect the operational realities of this new commercial practice.

Section 580.7(a)(3)—"Port Range"

Comments similar to those discussed above in terms of "geographic area" were also received concerning the definition of "port range". The commenters again assume that the Commission is attempting to impose a broader scope on a service contract than that which may be intended by the contract parties. The amendment to section 580.7(b)(3)(ii), discussed above, should alleviate these concerns, at least with respect to the contract filing requirement. The Commission continues to believe, however, that the statement of essential terms must be in terms of "port ranges" in the case of port-to-port movements and that, in certain instances, this may result in a broader scope than that stated in the contract. This is nonetheless consistent with the Congressional intent referenced above.

Section 580.7(a)(4)—"Service Contract"

DuPont proposes that the definition of "service contract" include a statement that they are contract carriage arrangements and not common carriage. The Northern European Conferences suggest that the definition allow for a "fixed portion" of a shipper's cargoes and provide antitrust immunity for such arrangements.

The definition of "service contract" in the Interim Rule is taken directly from the Act and will not be modified. In any event DuPont's suggestion would not appear to be legally feasible, because the Act's service contract concept appears to contain elements of common carriage.

NEC's suggestion would, in effect, convert a service contract to a "loyalty contract" as that term is defined by the Act (46 U.S.C. app. 1702(14)). It would be inconsistent with Congress' treatment of loyalty contracts elsewhere in the Act (46 U.S.C. app. 1709(b)(9)) and will not therefore be adopted.

Section 580.7(a)(5)—"Shipper"

The definition of "shipper" is also derived directly from the Act and will be retained. We will, however, accommodate the suggestion of the inter-American Freight Conference and include a definition of "shippers' association" in the Final Rule for purposes of consistency.

Section 580.7(a)(6)—"Time/Volume Rate"

Section 580.7(a)(6) of the Interim Rule defines a "time/volume rate" as "a freight rate published in a tariff which must vary with the volume of cargo offered or freight revenues received over a specified period of time."

The North European Conferences express concern over use of the words "must vary", which they interpret as meaning that a time/volume rate must vary internally—*i.e.* it must be offered on a sliding scale—and if it merely varies from other tariff rates, only in that it is based on a volume of cargo over time, it is subject to rejection. In addition, noting

that the word "freight" is not used in the Act, they state that the Commission has not offered any reason for making a distinction between "freight rates" and "rates." The Inter-American Freight Conference offers an alternative definition for "time/volume rate", and also suggests that it and section 580.7(1), which relates to the use of time/volume rates, be moved to the tariff filing sections of Part 580.

The Commission agrees with this latter point and is redesignating Interim Rule sections 580.7(a)(6) and 580.7(1) as sections 580.12(a) and 580.12(b), respectively, in the Final Rule. In addition, the Commission believes that the definition proffered by the Inter-American Freight Conference may serve to accommodate NEC's comment and otherwise clarify any ambiguity which may have been inherent in the Interim rule's definition of "time/volume rate." We are therefore adopting it.

Section 580.7(b)—Contract Filing Requirements

The North European Conferences suggest that the Commission allow the optional filing of service contracts involving exempted commodities referenced in section 8(c) of the Act. While there does not appear to be any legal barrier to allowing the filing of service contracts involving exempted commodities on an optional basis by an individual carrier, conferences' authority to enter into and file such contracts is not as clear. The issue is whether Congress' exemption of certain commodities precludes concerted rate action on those commodities with or without antitrust immunity. That issue will be made the subject of a separate proceeding. At this point, conferences may file service contracts on exempt commodities, at their option. However, this is permitted without prejudice to any subsequent Commission determination of the legality of such practices.

Permitting such contracts to be filed, but then exempting them from the otherwise applicable regulatory requirements could, however, lead to discrimination between similarly situated shippers and allow potential abuse of the filing and publication process. Therefore, although the Commission will permit the optional filing of exempted-commodity contracts, the Final Rule is amended to make it clear that all other regulatory requirements applicable to non-exempt service contracts will apply to such filings.

As mentioned above in the context of "geographic area" and "port range", section 580.7(b) will also be modified to make clear that the only locations which must be included in the service contract are those actually agreed upon by the contracting parties.

We have also modified the numbering system to be used in the filing of service contracts. These changes will enable the Commission to more properly fulfill its responsibilities under the Act. The Final Rule will require that the filing carrier or conference assign each service contract a unique number bearing the prefix "SC"; and reference the applicable essential terms "publication" and the specific "set" of essential terms (which are to be identified by the prefix "ET") within the identified publication.

This was done for two purposes: to permit potential shippers to accurately identify the specific "set" of essential terms in which they may have an interest; and to enable the Commission to distinguish among several contracts with the identical essential terms.

Section 580.7(b)(5) of the Interim Rule requires that carriers and conferences identify, in each service contract, the shipment records which will be maintained to support the contract. The North Atlantic Conferences contend that the maintenance of shipment records for service contracts is inequitable, because the requirement is imposed only on shipments moving under service contracts. We believe the record maintenance requirement is necessary to the effective and efficient administration and enforcement of the service contract system. If the need arises, these records will enable the Commission to ascertain whether a particular contract has been used as a device to rebate or grant other unlawful rates or concessions. This requirement should serve to provide valuable competitive safeguards to both carriers and shippers. In addition, it does not appear to be particularly burdensome to the carriers. The Commission's previous regulations applicable to time/volume contracts contained a similar requirement, which was promulgated to assure that records would be available to verify that the terms of the contract were met. It did not appear to cause any particular difficulties in practice.

If any burden exists with respect to the maintenance of records, it more likely arises from the related requirement that such records be maintained by a U.S. resident agent. This is discussed below in the context of section 580.7(k).

Section 580.7(c)—Confidentiality

The North European Conferences submit that service contract *amendments* should be afforded the same confidential treatment as service contracts and that section 580.7(c) should be amended accordingly. The Commission notes that, to the extent a contract amendment alters an essential term of a service contract, it would not be permitted under paragraph (d)(i) of this section. Amendments to non-consequential terms of a service contract are permissible, and should be filed with the Commission for informational purposes. The Commission will accord such amendments the same confidential treatment which the original contract received. Section 580.7(c) has been revised to make this clear.

Section 580.7(d)—Contract Amendments

Section 580.7(d) states that amendments to service contracts will be treated as new contracts for the purposes of the filing and publication requirements. In addition, this section provides that no new contract may retroactively modify the terms or effects of a previously filed contract.

DuPont and CMA propose that only amendments to the essential terms of a service contract be considered new contracts. They further suggest

that the reference to "publication" requirements should be changed to "availability requirements" to avoid any confusion with general tariff concepts and to more closely track the language of the Act. In addition, CMA proposes a change to clarify that contract amendments do not terminate the original contract.

The North European Conferences express difficulty in understanding the basis for section 580.7(d), which they believe serves to restrict service contract amendments. They nonetheless offer changes in the wording of the section to ameliorate what they perceive to be detrimental consequences of the Interim Rule.

In light of these comments, the Commission has made several changes in section 580.7(d) of the Interim Rule. In the first place, the Commission agrees that the only modifications to a service contract which should be of any concern are those which modify an essential term of the contract. Modifications to non-essential terms are of little consequence but should nonetheless be filed with the Commission for informational purposes. The Commission does not believe, however, that modifications to essential terms of a service contract should be permitted during the duration of the contract, because they could potentially affect the rights of other similarly situated shippers. For instance, if a shipper was unable to meet its cargo volume commitment under a contract and the parties agreed to lower that amount during the term of the contract, this could discriminate against another shipper who was not able to take advantage of the contract during its initial 30-day offering, because of the volume of cargo originally required to be committed but who could have done so under the lower minimum. Also, the contract parties could agree to alter the geographic areas or port ranges covered by the contract thereby including similarly situated shippers who were not included under the original contract. These situations could be exacerbated if the non-contract shipper had already shipped all or a substantial portion of its cargo prior to the time of the modifications and is, therefore, no longer able to take advantage of the altered terms. The Commission has concluded that the best approach to avoid such situations is to prohibit any modification to an essential term during the term of the contract.

The parties remain free, however, to mutually agree to terminate the contract at any time during its term. If they take such action, and the minimum quantity has not been met, the cargo previously carried under the contract must be rerated according to the otherwise applicable tariff rates in effect at the time of the shipments (unless the contract provides a different procedure). This procedure would be similar to the carrier's or conference's basic measure of damages if the shipper did not meet the quantity term of the contract and there was no mutually agreed termination. Section 580.7(d)(iii) further recognizes, however, that the contracting parties may, pursuant to section 580.7(g)(2)(vii), set forth in their initial

contract specific terms to govern situations in which the "volume requirement" may not be met.

Section 580.7(e)—Transmittal of Service Contracts

DuPont suggests that the Interim Rule be amended to allow carriers and conferences to annotate the inner envelope (containing the service contract) for the purpose of identifying the number assigned to the corresponding statement of essential terms. This would allegedly obviate the need to compare the contract with the filed essential terms.

While the Commission has made certain amendments in this provision, it did so in order to clarify and streamline the administrative processing of service contracts and related statements of essential terms. However, contracts must still be compared with filed essential terms to ensure that the statement of essential terms contains a *concise* statement of all of the essential terms of the contract(s). The Commission cannot rely on representations on an envelope to meet its statutory responsibilities.

The Final Rule will protect the contents of each envelope containing a service contract by limiting the amount of information on such envelope to the statement "This Envelope Contains a Confidential Service Contract." The Commission cannot maintain the confidentiality of any contract transmitted by any other procedure. If a filing party fails to utilize the specific procedures contained in this section, the confidentiality of the contract could inadvertently be compromised.

Section 580.7(f)—Return of Contracts

Section 580.7(f) of the Interim Rule permits the Commission to return a service contract if its provisions are not substantiated by reference to its statement of essential terms. In addition, section 580.7(j) of the Interim Rule allows the rejection of a statement of essential terms which fails to conform to any of the requirements of the Rule.

As an initial matter, the North European Conferences question the Commission's authority to return or reject service contract filings, lacking express statutory authority to do so. We believe that a carefully circumscribed return and rejection procedure falls within the ambit of the Act's rulemaking authority in section 17, because such procedures are necessary for the enforcement and implementation of section 8(c) of the Act. Without such a procedure, contracts or statements of essential terms which are contrary to the Act or the Commission's regulations could remain in effect for a considerable period of time before being challenged. This would not only subvert the purposes of the service contract provision, but would also substantially affect the rights of similarly situated shippers.

The Commission has determined, however, to treat its return and rejection procedures in one section for purposes of clarity and uniformity. Within 15 days of filing, the Commission can return a contract or statement of essential terms which does not conform to the requirements of paragraph

(b) or (g) of section 580.7. When it does so, the Commission will provide a written explanation of its reasons. Parties then have 15 days to refile the document and the Commission can then reject it if it continues to fail to conform. This procedure should satisfy various concerns raised by CMA, the Journal of Commerce, National Maritime Council, North European Conferences, Trans-Pacific Conferences and Pacific Coast Conferences.

We have not adopted the recommendation of CMA that the contract rate should apply to shipments made prior to return or rejection, regardless of whether the contract or statement of essential terms is "cured" and refiled. The otherwise applicable tariff rate must be charged in such situations where rejected terms or returned contracts are not cured and refiled. Any other procedure would unduly favor contract parties who fail to adhere to the requirements of the Act to the disadvantage of competing carriers and shippers and would operate to the detriment of similarly situated shippers not fortunate enough to be the first shipper signatory of a contract.

The Commission will exercise its return and rejection procedure only during a limited 15-day review period. Moreover, this procedure will apply in situations involving significant deficiencies in contract and essential terms provisions, as suggested by the Inter-American Freight Conference.

Section 580.7(g)—Publication of Essential Terms

Section 580.7(g)(1)

Section 580.7(g)(1) of the Interim Rule requires that the essential terms of all service contracts be filed with the Commission and be made available to the general public in tariff format. In addition, this provision requires that the essential terms be made available to all shippers or shippers' associations which are similarly situated under the same terms and conditions for no less than 30 days from the date of filing.

The Inter-American Freight Conference proposes that the phrase "schedule of essential terms" be substituted for "publication of essential term", and that the heading of section 580.7(g) be changed to "Essential Terms". It also suggests that the first sentence of section 580.7(g)(1) (which requires the essential terms to be filed with the Commission) be deleted, because section 580.7(h) requires a summary of essential terms to be filed with the Commission and is allegedly more in keeping with the Act's requirements that "a concise statement of essential terms shall be filed with the Commission. . . ."

Du Pont would add the words "A concise statement of" at the beginning of section 580.7(g)(1). This suggested change is intended to reflect the statutory language quoted above and to distinguish between the "concise statement of essential terms", which is available to the general public, and the "essential terms" themselves, which are to be made available to all similarly situated shippers. To the extent possible, these suggestions are incorporated in the final Rule.

The North European Conferences propose that the essential terms publication requirement of section 580.7(g) be revised to provide carriers or conferences with the option of filing a copy of the underlying service contract, minus the name of the shipper, in lieu of a concise statement of its essential terms. NEC further submits that, if such an option is exercised, there would be no reason to reject an essential terms' filing on the grounds that it did not include a term "essential" to the contract.

The Commission is not adopting this proposal. First, section 8(c) of the Act clearly requires that "each contract shall be filed with the Commission" and "*at the same time* a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format". (Emphasis added). This contemplates that initially two distinct documents are to be submitted to the Commission *simultaneously*—one, a contract, and the other, a summary of the contract's essential terms in tariff format. In addition, as explained above in the discussion of geographic areas and port ranges, the concise statement of essential terms may, in certain instances, be geographically broader than the locations stated in the contract. Lastly, a brief summary of essential terms will be easier for prospective shippers to review and will facilitate the administration of the service contract system generally and the possible future computerization of such data. To the extent that a service contract meets all the essential terms' format requirements and is appropriately stated in terms of geographic areas or port ranges, it could be submitted, minus the shipper's name, in lieu of a statement of essential terms.

The Trans-Pacific Conferences oppose section 580.7(g)(1) which requires a carrier or conference entering into a service contract to execute a similar contract, under the same essential terms, with any and all similarly situated shippers and shippers' associations which approach the carrier or conference within the first 30 days after the essential terms are filed. They contend that such a requirement is contrary to the Act and impractical under normal operating conditions. They read section 8(c) of the Act as mandating merely that the statement of essential terms must be made available to the general public and that a copy of those terms must be made separately available to any shipper similarly situated who specifically requests it. They do not believe, however, that they are *required* to accord those identical essential terms to other shippers.

The Commission rejects the contention that a carrier or conference which enters into a service contract has only to provide a copy of its essential terms to any similarly situated shipper who requests it. There is nothing in our review of the Act or its legislative history which supports this position. Section 8(c) makes it clear that carriers must make a concise statement of essential terms available to the general public, but that "*those essential terms shall be available to all shippers similarly situated.*" This latter requirement means more than providing similarly situated shippers with an opportunity to view a copy of the essential terms. If it meant

only that, it would be redundant, given the preceding requirement that a concise statement of essential terms be made available "to the general public."

The House Merchant Marine and Fisheries Committee put the publication requirement for essential terms in its proper context when it noted:

> It is hoped that the requirement that a service contract's essential terms be filed publicly so that those terms are available to all other shippers who may wish to use them, will preserve an important element of the common-carriage concept that the bill is based on.

H.R. Rep. No. 53, 98th Cong., 1st Sess. 17 (1983).

The Commission believes that section 8(c) requires a carrier which enters into a service contract to enter into similar contracts with other similarly situated shippers if they desire the same essential terms. This requires, of course, the exercise of sound business judgment on the part of the carrier. However, if a carrier chooses to induce business by means of a service contract, it should be prepared to offer the same essential terms to other similarly situated shippers.

The Commission will not attempt here to establish the limits of a carrier's or conference's obligations under a service contract. Nor will it attempt to define what constitutes a similarly situated shipper. These are matters which are more appropriately resolved on a case-by-case basis.

Section 580.7(g)(2)(iv)—Contract Rates

Section 580.7(g)(2)(iv) requires the statement of essential terms to include "the contract rate, rates or rate schedule, including any additional or other charges (viz. surcharges, terminal handling charges, etc.) that apply."

CMA objects to this provision on the ground that it is an unwarranted expansion of the statutory term "line-haul rate," which it believes is all that need be included. Whatever the definition of "line-haul rate" may be (and it is not defined in the statute), it is clear from the legislative history that this essential term was meant to encompass "all compensation to be paid" under a service contract. S. Rep. No. 3, 98th Cong., 1st Sess. 31, 32 (1983). The Commission's refinement of the term "line-haul rate" is thus fully supported and, moreover, should serve to provide all shippers the requisite information they will need in order to make an informed and intelligent decision concerning a service contract.

The Commission has modified section 580.7(g)(2)(iv) to incorporate Sea-Land's suggestion that conditions and terms of service or operation or concessions which in any way affect such rate or charge be disclosed. In addition, we have adopted Matson's suggestion that retroactive price adjustments based on experienced costs be allowed, if the method of determining such adjustments is disclosed in advance in the service contract and the statement of essential terms.

Section 580.7(g)(2)(v)—Term of Contract

Section 580.7(g)(2)(v) of the Interim Rule requires the statement of essential terms to include "the effective date, period, and expiration date of the contract." The North European Conferences contend that the essential terms' publication need only disclose the "term of the contract." The Commission has accepted this suggestion.

Section 580.7(g)(2)(viii)—Deviation

Section 580.7(g)(2)(viii) of the Interim Rule requires a clear description in the statement of essential terms of any circumstances which will permit deviations from the contract terms. CMA views this provision as an unwarranted expansion of the essential terms which are specified in the Act and suggests that it be deleted. The North European Conferences object to subsection (viii)(D) which permits "other deviations from the terms of the contract." NEC contends that the phrase "other deviations" is too vague, that the word "deviations" is incorrectly employed, and that such a catch-all provision is unnecessary to carry out the Act.

Admittedly, section 8(c) of the Act does not expressly include a deviation provision in its list of seven "essential terms." However, the Commission does not consider its deviation provision, section 580.7(g)(2)(viii), to be an "essential term" separate and apart from those set forth in the statute. Rather it relates back to those essential terms and states that if they are subject to change for any reason, that fact should be made apparent. Any contractual provision which can alter an essential term based on future events is a necessary part of the essential term which it affects. Any other interpretation would undermine the purpose for essential terms' publication and frustrate the requirement that such terms be made available to "similarly situated shippers." The Commission will therefore continue to require the statement of essential terms to include any deviation that may affect those terms.

Moreover, we do not believe that the term "other deviations" is vague or uncertain. A similar provision was included in the Commission's earlier time/volume rule and apparently engendered no confusion or difficulty. It is intended to be a catch-all provision so that the contracting parties have the maximum amount of flexibility to meet their commercial needs.

Section 580.7(h)—Form and Filing of Essential Terms

The Journal of Commerce suggests that carriers and conferences be allowed to publish essential terms' publication for both export and import trades. It believes that such a procedure would make it easier for the public and interested persons to determine applicable rates. The Journal of Commerce notes that it provides a computerized tariff watching service which would be better served by separate essential terms publications. We will not adopt its suggestion. It is the Commission's intent that a carrier or conference have only one publication containing its essential terms.

However, this publication may be divided by trade areas or any other way the carriers or conferences see fit. Requiring statements of essential terms to be included in one publication reduces the number of essential terms' publications and minimizes the scope of any inquiry to ascertain whether a carrier or conference has any essential terms in which a shipping party might be interested.

Section 580.7(h)(3) requires all essential terms' filings to be "printed on yellow paper using black ink." The North European Conferences would amend this provision to provide that the essential terms' publication be legibly printed in black, without using yellow paper. The yellow paper requirement was designed to facilitate mail sorting of essential terms' publications and thus permit their prompt review. The experience gained in the last 90 days has reinforced our belief that the requirement is workable and useful. It is, therefore, retained. The Commission is, however, incorporating the suggestion of NEC concerning clarification of the printing "in black" rather than "using black ink." This will permit the filing of documents printed other than with black ink (*e.g.*, photocopies).

Section 580.7(h)(5) is amended, as suggested by NEC, to require cross-references only in the general commodity tariff that applies in the particular area covered by the essential terms. In so doing, we reject CMA's suggestion that the requirement for cross-referencing be repealed altogether. Tariff cross-references are necessary for users of tariffs to identify all possible applicable rates.

The Commission is also adding a requirement that the essential terms of a service contract or contracts be identified by an essential terms' number in the governing essential terms publication, rather than a service contract number. Because it is anticipated that numerous contracts may be executed under the same essential terms, it is necessary to differentiate and identify which contracts correspond to the appropriate essential terms. *See also,* our discussion above on section 580.7(b).

Section 580.7(i)—Transmittals of Essential Terms Publications

Section 580.7(i) sets forth procedures for the transmittal of concise statements of essential terms. It is silent, however, on the timing of such filings vis-a-vis the filing of service contracts. The Journal of Commerce suggests the contemporaneous transmittal of a service contract with its statement of essential terms. This approach is consistent with the statutory language that a concise statement of essential terms be filed with the Commission "at the same time" a service contract is filed with the Commission. The Commission is amending section 580.7(i) accordingly.

Section 580.7(k)—Resident Agent

Section 580.7(k) of the Interim Rule requires every common carrier and conference to designate a United States resident representative to maintain contract shipment records for a period of five years from completion of

each contract. The North Atlantic Conferences and the Trans-Pacific Conferences oppose this provision, on the grounds that it is burdensome, will result in duplication and increased costs, is not directly supported by the Act, and may conflict with foreign non-disclosure statutes. The Trans-Pacific Conferences also contend that the Commission already possesses sufficient means to ensure that service contracts comport with the Act and that users of service contracts should not be burdened with requirements not applicable to others. They also note that the Commission previously rejected a proposal to require the maintenance of all self-policing records in the United States. Lastly, the North Atlantic Conferences recommend that, because of the impact of a U.S. recordkeeping requirement on inbound conferences, which mainly conduct their shipping transactions abroad, the Commission should, if a recordkeeping requirement is retained, permit inbound conferences to designate a representative abroad.

The Commission has determined to delete the U.S. recordkeeping requirement. Experience gained under our prior time/volume contract rules, which contained a similar provision, does not reveal a compelling necessity for this requirement, at least at this time. Its primary purpose was to aid the Commission in its enforcement efforts. However, the Commission should be able to obtain such records through normal processes, if needed, on a case-by-case basis. If the Commission encounters any difficulties in obtaining such information, it will consider reimposing the U.S. recordkeeping requirement.

Carriers and conferences must, of course, retain whatever records they deem sufficient to support their contractual arrangements (so identified pursuant to section 580.7(b)(3)(vi) of this Rule) and should do so for at least the five-year statute of limitations period contained in section 13(f)(2) of the Act. However, such records need not be maintained in the United States. Section 580.7(j) of the Final Rule reflects this requirement.

Section 580.7(l)—Time/Volume Rates

As mentioned above, this section and the definition of "time/volume rate" in section 580.7(a)(6) will be redesignated sections 580.12(b) and 580.12(a), respectively.

Two commenters object to the advance enrollment requirement whereby a shipper utilizing a time/volume rate must notify the offering carrier prior to tendering any shipments. The Pacific Coast Conferences believe that such a requirement might preclude multiple-level time/volume rates which automatically apply a second tier, lower rate once a given volume has been achieved. The North European Conferences contend that the word "enrollment" implies that there is only one acceptable method of administering a time/volume rate offering. They further contend that adequate notice of shipper participation could be provided by means other than "enrollment."

We do not believe that a notice requirement for a shipper intending to utilize a time/volume rate is either unwarranted or impractical. It is difficult to conceive how carriers will know when to apply the lower rate unless informed by the shipper that it intends to use it. The Commission further believes that even with such a requirement, multiple-level time/volume rates are still feasible, assuming some initial notification is provided. The Commission did not intend the word "enrollment" to serve as a limitation on the methods by which a shipper can notify a carrier of its intention to use a time/volume rate. It is therefore amending section 580.7(l) (now section 580.12(b)(3)) to eliminate any confusion which may exist.

The North European Conferences also object to the requirement that time/volume rates "remain in effect without amendment for the term specified." They view this requirement as inconsistent with the tariff provisions of the Act and the Commission's tariff filing rules. They concede, however, that it would be inappropriate to allow a time/volume tariff filing to be amended to reduce or terminate the term, if it is being used by at least one shipper.

It was not our intention to require a time/volume rate offering to remain in effect in a tariff for the full term if such an offering has not been accepted by a single shipper. However, the Commission continues to believe that once a shipper gives notice that it is tendering cargo under a time/volume rate offering, the terms of that offering may not be amended during the term specified.

CMA proposes that the record of a shipper's notice of its intention to use a time/volume rate should be maintained for at least one year after the shipper has ceased to use the rate. We find this suggestion to have merit and to impose a minimal burden on the carriers. However, in order to be consistent with the retention requirements for service contracts and the relevant statute of limitations (46 U.S.C. app. 1712(f)(2)), the Commission is going to impose a five-year shipper-notice retention requirement and additionally require that shipment records supporting the time/volume rate be maintained for this period of time.

Lastly, the Trans-Pacific Conferences propose that records supporting a time/volume rate be identified in a manner similar to that by which the shipment records regarding service contracts must be identified pursuant to section 580.7(b)(5) of the Interim Rule, *i.e.*, that the parties identify which shipment records will be used to support the contract. They believe that such a requirement will ensure accountability and aid the Commission in its enforcement efforts.

There is merit to placing a similar record identification requirement on both service contracts and time/volume rates. The Commission has, therefore, decided to amend its time/volume rate provision to require the identification of the shipment records which will be maintained to support application of a time/volume rate. Such an identification can easily be made

in the context of the time/volume rate offering in the carrier or conference tariff and should impose little burden on shippers or carriers.

GENERAL COMMENTS

A. *Thirty Day Notice*

In the preamble to the Interim Rule, the Commission suggested the possibility of requiring a 30-day advance notice requirement for the implementation of service contracts as an alternative to return or rejection of defective filings after their effective date. The ten parties that filed comments on this issue were divided as to which method was less disruptive of commercial arrangements and whether the Commission was authorized by law to implement such proposals.

Neither the 30-day notice procedure nor the rejection procedure is based upon an express statutory provision. Either would have to rely upon the general rulemaking authority of section 17 of the Act on the basis that such procedures are necessary to enforce the requirements of section 8(c). One other alternative is to abandon both and rely upon the reactive enforcement methods of sections 11 and 13 of the Act. Given these alternatives, the Commission has determined that a carefully circumscribed return and rejection procedure is the best method of ensuring that service contract filings will meet the requirements of the Act with minimal commercial disruption.

B. *Minimum Quantity Guidelines*

The Tobacco Association recommends that the Commission establish guidelines on minimum quantities eligible for contract rates to prevent unreasonable preference being given to any one industry. The Commission rejects this suggestion. First, the Commission does not possess the empirical economic data, at this time, upon which it could promulgate such guidelines. More importantly, such action would appear contrary to the fundamental Congressional policy underlying the Act that commercial interests be given maximum flexibility in arriving at their business arrangements. Cases of discrimination can be dealt with on an *ad hoc* basis. Any shipper who believes it has been unlawfully disadvantaged has remedies under the Act and may file a complaint with the Commission.

C. *Time/Volume Contracts*

Under the 1916 Act, the Commission had permitted the use of time/volume contracts by common carriers by water and had issued regulations governing their use (46 CFR 536.7). The May 3, 1984 Interim Rule continued to permit the use of time/volume contracts by "common carriers" and separately permitted the use of service contracts by "ocean common carriers." This position engendered much opposition from those filing emergency comments on that Rule, prior to its June 18, effective date. In response to these comments, the Commission revised the Interim Rule

on June 14, 1984 to *inter alia,* treat time/volume contracts as a form of service contract. No separate provision was made concerning the use of time/volume contracts. The net result of this action is that non-vessel-operating common carriers (NVOCC's or NVO's), which do not meet the definition of "ocean common carrier", are no longer able to offer time/volume rates on a contractual basis. They can, however, continue to offer time/volume rates in their tariffs pursuant to the June 14, 1984 Interim Rule and section 8(b) of the Act.

Several commenters support this position, contending that service contracts are the only type of volume contracting authorized by the Act and that time/volume contracts have been subsumed within the concept of service contract because they implicitly, if not explicitly, include a carrier service commitment to carry at least the minimum volume within the contract period. One commenter also notes that NVO's, by definition, do not operate any vessels and, therefore, are in no position to offer any meaningful service commitment as a *guid pro quo* for a volume commitment.

IANVOCC and NPS International, an NVOCC, challenge the Commission's treatment of time/volume contracts. NPS argues that the Commission erred in equating time/volume contracts with service contracts, because the former do not contain any service commitments while the latter do. It submits that nothing in the Act requires the Commission to eliminate NVO time/volume contracting and points to the absence of any useful legislative history on this issue. NPS concedes that ultimately this is a policy issue and not a legal one, but contends that policy considerations support continued time/volume contracting by NVO's. This commenter concludes that the Commission should republish its time/volume regulations previously in effect under the 1916 Act and make them applicable to both ocean common carriers and NVO's. Alternatively, NPS suggests that the Commission could limit the use of time/volume contracts to NVO's. The IANVOCC essentially reiterates NPS' comments.

As noted above, the Commission's May 3 Interim Rule treated service contracts and time/volume contracts as separate and distinct forms of volume contracting but attempted to apply similar regulatory treatment to them. The Commission's June 14 amendment altered this position by treating time/volume contracts as a form of service contract and thereby deleted any reference to time/volume contracts in the Rule. This decision was not made with the purpose of denying to NVO's the ability to offer time/volume contract arrangements. Rather, it was arrived at because the Commission became convinced that what was previously known as a time/volume contract was nothing more than a type of service contract. This decision was further influenced by its conclusion that Congress has only authorized service contracts and time/volume rates under the 1984 Act.

Section 8(b) of the Act, titled "Time-Volume Rates," permits rates in tariffs to vary with the volume of cargo offered over a specified period of time. Section 8(c), titled "Service Contracts," allows ocean common

carriers and conferences to enter into service contracts with shippers or shippers' associations. Nothing else in the Act expressly authorizes any other volume arrangements.[1] Nor is there any discussion in the legislative history of the Act which specifically mentions time/volume contracts or would support the concept of time/volume contracts as separate and distinct from service contracts. Thus, a reading of the statute and its legislative history indicates that Congress contemplated but two types of volume arrangements—time/volume rates, which are set forth in tariffs and are not based upon any contractual arrangement between the shipper and carrier, and service contracts, which are not filed in tariffs, and are based on reciprocal commitments by both the carrier and the shipper.

This position is supported by the language of other provisions of the Act. For instance a shippers' association is defined in section 3(24) as "a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other *volume rates* or *service contracts*". (Emphasis added). If Congress had intended that time/volume contracts be offered as a separate category for volume contracting, it would surely have provided shippers' associations the opportunity to avail themselves of such arrangements. However, under the definition, as written, shippers' associations would be precluded from entering into time/volume contracts.

Sections 10(b)(1) through 10(b)(4) require common carriers to adhere to the rates and charges in their "tariffs" and "service contracts."[2] Time/volume contracts are not separately identified or treated. As a result, if time/volume contracts were allowed as a separate form of volume contracting, it is possible that they would not be subject to these constraints, which go to the essence of a common carrier's obligations to the public.

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[1] The Commission's May 3 Interim Rule relied on the definition of "loyalty contract" (section 3(14)) as an indication that Congress recognized the concept of a time/volume contract. In view of the other statutory provisions discussed below, the Commission no longer draws this inference. It is important to note, however, that section 3(14) is the only reference in the statute or its legislative history to time/volume "contracts." That reference in section 3(14) to a "contract based upon time-volume rates" may be to nothing more than the arrangement which arises from a time/volume rate offering in a tariff. In any event, whatever Congress may have meant by a "contract based upon time-volume rates," it was doing so in the context of contracts offered by *ocean common carriers* and not NVO's.

[2] Section 10(b) states in pertinent part:

No common carrier, either alone or in conjunction with any other person, directly or indirectly; may—

(1) charge, demand, collect or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its *tariffs* or *service contracts;*

(2) rebate, refund or remit in any manner, or by any device, any portion of its rates except in accordance with its *tariffs* or *service contracts;*

(3) extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its *tariffs* or *service contracts;*

(4) allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its *tariff* or *service contract* by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means. (Emphasis added).

Moreover, section 10(b)(6) prohibits any common carrier from engaging in any unfair or unjustly discriminatory practice in the matter of rates, cargo classifications, and cargo space accommodations. Likewise, section 10(b)(11) prohibits any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever. What is notable about both of these provisions is that they contain an express exception for *service contracts*. This reflects a Congressional recognition that service contracts would perforce favor some shippers, and might discriminate as to rates or cargo classification, or provide distinct preferences or advantages. *See* H.R. Rep. No. 600, 98th Cong., 2d Sess. 40 (1984). A similar exception was not made for time/volume contracts, which are just as inherently discriminatory. This leads us to conclude that Congress did not contemplate the separate availability of time/volume contracts under that name. Even assuming it did, however, it is clear that such contracts would soon run afoul of these proscriptions.

It has been argued that the reason a time/volume contract is different from a service contract is that the former contains no service commitment while the latter does. The Commission cannot accept this contention and moreover believes that its interpretation may explain Congress' silence on the matter of time/volume contracts—it also considered them subsumed within the definition of a service contract.

Under the Commission's prior time/volume rule, a time/volume rate was defined as "[a] rate conditioned upon the shipment of a specific or minimum quantity of cargo over a set period of time, implementation of which is accomplished pursuant to the terms of a time/volume contract. . . ." 46 CFR 536.2(p). However, any such contract had to provide, either explicitly or implicitly, basic service commitments on the carrier's part. The carrier had to provide the space necessary to meet the shipper's volume commitment and had to continue to operate in the trade for the duration of the contract. If a carrier failed to meet these obligations, the shipper would have a remedy at law for breach of contract. Time/volume contracts as previously recognized by the Commission thus fit into the definition of service contract contained in the 1984 Act. Whether explicitly or implicitly stated, it is clear that there were definite carrier service commitments under a time/volume contract. There is no meaningful difference between a service contract and a time/volume contract; the latter is simply a subcategory of the former.[3]

Any contrary conclusion would be inconsistent with Congress' treatment of independent action and its relation to service contracts. Congress gave

[3] While NVO's may have offered time/volume contracts under the Commission's previous rule, they had no actual service to commit since they do not actually operate vessels as ocean common carriers. However, that earlier rule had coupled the concept of time/volume rate with time/volume contract—a carrier could not offer one without entering into the other. Even though they had no service to commit, NVO's were forced by circumstances to enter into time/volume contracts with shippers. The 1984 Act expressly rectifies this anomaly by permitting time/volume rates by any common carrier (including NVO's) but restricting service contracts to ocean common carriers who have the requisite service.

conferences the authority to limit or prohibit the use of service contracts and also exempted such contracts from the mandatory right of independent action, since they were not required to be filed in tariffs. All conference agreements, however, had to provide their members independent action on any rate or service item required to be filed in a tariff, on not more than 10 days' notice. If the Commission were to permit all common carriers to offer time/volume contracts in lieu of or in competition with service contracts, the situation could arise where carriers, through the use of time/volume contracts (to which independent action would apply) could do indirectly what Congress has not authorized them to do directly.

The Commission is not unmindful of the concerns raised by NPS and IANVOCC. However, the Commission is constrained by the Act and is in no position to provide solely for NVO's something Congress saw fit to deny them. In any event, NVO's still have the option of offering time/volume rates, governed by the provisions of this Rule. Lastly, the Commission notes that even if time/volume contracts were permitted, it is likely that NVO's would have difficultly offering them, given their implicit service commitments and the fact that NVOs have, by definition, no meaningful service to commit and no control over the underlying carrier's schedules, capacity, or services in a particular trade.

II. *LOYALTY CONTRACTS—DOCKET NO. 84–23* (Section 580.16)

On May 17, 1984, the Commission published an Interim Rule (49 FR 20817) in Docket No. 84–23 governing loyalty contracts (or dual rate contracts, as they were referred to under 1916 Act regulation (46 CFR Part 538)). The purpose of the Interim Rule was to implement section 10(b)(9) of the 1984 Act (46 U.S.C. app. 1709(b)(9)) which states that:

> (b) No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—
>
> * * * * *
>
> (9) use a loyalty contract, except in conformity with the antitrust laws; [4]

The Interim Rule deleted the Commission's regulations governing "dual rate contracts" in 46 CFR Part 538 and added a new provision to the Commission's tariff filing regulations in 46 CFR Part 536 (now 46 CFR Part 580) reading as follows:

[4] "Loyalty contract" is defined in section 3(14) of the Act (and in the Commission's tariff rules at 46 CFR 580.2(k)) as:

> . . . a contract with an ocean common carrier or conference, other than a service contract or contract based upon time-volume rates, by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference.

§ 536.16 Loyalty Contracts

(a) A sample of any loyalty contract, as defined in this part, must be filed in the applicable tariff together with rules which set forth the scope and application of the contract system.

(b) Every sample loyalty contract and applicable rule filed for inclusion in a tariff under paragraph (a) of this section shall make specific reference to a Business Review Letter, issued pursuant to 28 CFR § 50.6, indicating no objection to the use of that contract. A copy of the Business Review Letter shall be simultaneously furnished to the Commission's Director, Bureau of Tariffs. Failure to comply with these requirements will result in the rejection of the contract and the applicable rules pursuant to § 536.10(d).

(c) The use of any loyalty contract in effect prior to June 18, 1984 shall be prohibited after September 18, 1984 unless supported by a Business Review Letter issued pursuant to 28 CFR § 50.6. Such Business Review Letter shall be furnished to the Director, Bureau of Tariffs.

The Interim Rule became effective on June 18, 1984 and interested persons were provided 60 days to comment on the Rule. Prior to the Interim Rule's effective date, "emergency" comments were received from Admiral R.A. Ratti, Chemical Manufacturers Association, and Trans-Pacific Freight Conference of Japan/Korea and Japan/Korea-Atlantic and Gulf Freight Conference (TPFCJ/K). The Commission published a response to the "emergency" comments on June 14, 1984 (49 FR 24696), in which it restated its earlier interpretation of the Act as it applied to loyalty contracts and affirmed the Interim Rule.

Ten additional comments were filed between the effective date of the Interim Rule and the close of the comment period. The Council of European & Japanese National Shipowner's Associations (CENSA), the National Maritime Council (NMC), TPFCJ/K and the Gulf Freight Conference, and U.S. Atlantic & Gulf/Australia New Zealand Conference, et al. (USA&G/A–NZ) generally oppose the Interim Rule. Sea-Land Service, Inc. favors the Rule with some modifications. The Department of Justice (DOJ), the Department of Transportation, and Corning Glass Works generally support the Rule as written, and the Tobacco Association of United States favors elimination of all loyalty contracts.[5]

USA&G/A–NZ, TPFCJ/K and CENSA argue that the Commission, as the agency charged with enforcement of the 1984 Act, is responsible for enforcing section 10(b)(9). They believe that the Commission's reliance on a Business Review Letter (BRL) improperly delegates enforcement of section 10(b)(9) to DOJ. These parties further submit that the Commission

[5] The suggestion that the Commission abolish *all* loyalty contracts goes beyond the scope of this rulemaking and, moreover, appears contrary to the 1984 Act.

has the necessary expertise to deal with the antitrust issues which will arise under section 10(b)(9).

USA&G/A–NZ, TPFCJ/K and CENSA point out that a BRL only states DOJ's current enforcement intentions and does not determine whether the proposed activity is contrary to the antitrust laws. Accordingly, they argue that, by relying on the BRL, the Commission is applying the wrong standard to determine whether carriers and conferences are in compliance with section 10(b)(9).

CENSA further contends that carriers and conferences do not have the burden of proving that they fall within the exception to section 10(b)(9). Accordingly, it believes that the Commission cannot even require carriers and conference to obtain BRL's before entering into loyalty contracts with shippers.

CENSA and TPFCJ/K also submit that the Commission has no summary tariff rejection authority for substantive violations of the 1984 Act, including a violation of section 10(b)(9). They argue therefore that a loyalty contract may only be rejected after notice and the opportunity for hearing. USA&G/A–NZ, TPFCJ/K and CENSA interpret the Interim Rule as providing no appeal from denial of a BRL and no opportunity for hearing under the procedure contemplated by the Interim Rule. Sea-Land concurs with these observations and suggests that carriers and conferences be permitted to either file a BRL or prove in a hearing that no antitrust violation exists by use of a particular loyalty contract.

In supporting the Interim Rule, DOJ argues that the Rule fully comports with the 1984 Act, properly reflects applicable antitrust law, and that its promulgation met all appropriate statutory procedures. With respect to the prospect of its issuance of the BRL's contemplated by the Rule, DOJ advises that:

> Such a favorable business review will be likely where the Department is presented with a unilateral loyalty contract involving but a single carrier that does not possess significant market power. A favorable business review letter will not be issued, however, for existing and future loyalty contracts of conferences or groups of competitors, because the Department of Justice does not intend to issue business review letters supporting collective loyalty contracts. [Footnote omitted]

All conference loyalty contracts in existence on June 18, 1984 have now been cancelled. This effectively renders moot that portion of the Interim Rule dealing with contracts "in effect" prior to that date (paragraph C) of the Interim Rule.[6] Thus, it is appropriate for the Commission to now

[6] On June 18, 1984, there were 34 loyalty contracts on file with, and approved by, the Commission. Thirty-three of these involved conferences of carriers. The limited legislative history relating to the loyalty contract provision in the Act indicates that while "loyalty contracts involving a single carrier would probably be law-

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focus on those portions of the Interim Rule that apply to *new* loyalty contracts, that is, contracts filed after June 18, 1984 (paragraphs (a) and (b) of the Interim Rule).

The regulatory scheme pertaining to loyalty contracts filed after June 18, 1984 differs in some respects from that applicable to loyalty contracts existing at the time the 1984 Act became effective. In the case of an existing loyalty contract that was not accompanied by a BRL, the Interim Rule contemplated that the Commission would afford the parties some form of hearing before terminating the contract.[7] The same procedure would not necessarily apply to new loyalty contracts because the Interim Rule provides that the Commission will "reject" any loyalty contract that is not accompanied by a BRL. In addition to this procedural distinction, the possible broader antitrust exposure of new loyalty contracts must also be considered. Whatever the antitrust exposure of existing loyalty contracts may have been, the Commission believes, for reasons discussed below, that the use of a loyalty contract filed after June 18, 1984 may violate *both* the antitrust laws[8] *and* section 10(b)(9) of the Act. This suggests that the considerations which prompted the mandatory BRL requirement for existing loyalty contracts may be different from those applicable to new loyalty contracts.

Therefore, the Commission has decided to modify its procedures applicable to loyalty contracts by deleting the mandatory Business Review Letter requirement in the Final Rule. Section 580.16 will be modified in paragraph (b) to make the filing of a BRL *permissive*, with BRL's creating a presumption of legality under section 10(b)(9) of the 1984 Act. Paragraph (a) of section 580.16, which requires that conferences and carriers reflect in their tariffs on file with the Commission any loyalty contract system employed, is mandated by section 8(a)(1)(E) of the 1984 Act and will be retained.

This amended procedure will leave the Commission free to address the merits of individual loyalty contracts under section 10(b)(9) on a case-by-case basis upon complaint or its own motion where circumstances war-

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ful, . . . any concerted use of loyalty contracts by carriers is likely to violate the antitrust laws." 129 Cong. Rec. H8125 (daily ed. Oct. 6, 1983) (statement of Rep. Jones).

[7] As was stated in the Supplementary Information to be Interim Rule in addressing the concerns expressed by a commenter that paragraph (c) of the Interim Rule automatically terminated existing contracts without opportunity for hearing:

> The rule simply does not provide for the "automatic" termination of loyalty contracts. Failure by the carriers and conferences to comply with the rule would require further action by the Commission under the 1984 Act. Such further action would necessarily afford the opportunity for any hearing required by law.

49 FR at 24697.

[8] In mandating BRL's in its Interim Rule, the Commission explained that:

> Only the Department of Justice, which is charged with the enforcement of the antitrust laws, can provide carriers with some assurance that they will not be prosecuted under the antitrust laws for use of a loyalty contract.

49 FR at 20818 n. 2.

rant. The result will be to treat section 10(b)(9) in the same manner as any other act "prohibited" under section 10.[9]

It has been suggested that the use of a loyalty contract filed after June 18, 1984, while required to be "in conformity with the antitrust laws" under section 10(b)(9) of the 1984 Act, is an "activity" which otherwise enjoys antitrust immunity by virtue of section 7(a)(2) of that Act.[10] A review of the legislative history of the 1984 Act suggests otherwise.

Section 7(a)(3) of H.R. 1878, as reported out of the House Merchant Marine and Fisheries Committee and the House Judiciary Committee, conferred antitrust immunity on:

> (3) any loyalty contract in compliance with section 6 or any activity pursuant to such loyalty contract:

Section 6, to which section 7(a)(3) referred, set forth the requirements pertaining to loyalty contracts. There was significant disagreement between the two Committees regarding the contents of section 6. In order to resolve this dispute, the two Committees reached a compromise which resulted in the deletion of sections 6 and 7(a)(3) and the addition of what is now section 10(b)(9). The following explanation of the deletion of antitrust immunity was given on the floor of the House of Representative Jones:

> The compromise eliminates subsection (a)(3), a provision no longer needed in view of the broader proscription on the use of loyalty contracts in section 9(b)(9) [now 10(b)(9)].

129 Cong. Rec. H 8125 (daily ed. Oct. 6, 1983) (statement of Rep. Jones).

It would appear, therefore, that Congress intended to subject loyalty contracts filed after June 18, 1984 to both section 10(b)(9) of the 1984 Act *and* the antitrust laws.[11] Accordingly, to construe section 7(a)(2) as conferring antitrust immunity on loyalty contracts could well frustrate the intent of Congress. Moreover, if Congress did not intend to impose liability apart from the antitrust laws, there would appear to have been no need for section 10(b)(9). In order to give meaning to section 10(b)(9), therefore,

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[9] As indicated in the "Supplementary Information" to the Interim Rule, substantive provisions of section 10, other than 10(b)(9), may be applicable to loyalty contracts. In *Federal Maritime Board* v. *Isbrandtsen Company, Inc.*, 356 U.S. 481 (1958), the Supreme Court set aside the Board's approval of a dual-rate system on the ground that it was a discriminatory and unfair method to stifle outside competition in violation of the 1916 Act. The substantive prohibitions underlying the *Isbrandtsen* decision have been carried over in one form or another to the 1984 Act in section 10. While the *Isbrandtsen* decision led to the 1961 enactment of section 14b, an amendment to the 1916 Act to permit dual rate contracts with Commission approval, section 14b was repealed by section 20 of the 1984 Act (46 U.S.C. app. 1719).

[10] Section 7(a)(2) of the 1984 Act (46 U.S.C. app. 1706) provides:

> The antitrust laws do not apply to . . . any activity . . . within the scope of this Act, whether permitted or prohibited by this Act, undertaken or entered into with a reasonable basis to conclude that . . . it is pursuant to an agreement on file with the Commission and in effect when the activity took place . . . .

[11] It is possible that shippers may also have antitrust exposure to the extent they are party to unlawful loyalty arrangements with such carriers.

it would be logical and reasonable to construe it as imposing liability separate from that imposed by the antitrust laws.

III. *FOREIGN TARIFF REGULATIONS GENERAL—DOCKET NO. 84–24* (Sections 580.0 to 580.6; 580.8 to 580.11; 580.13 to 580.15)

On May 23, 1984, the Commission issued an Interim Rule in Docket No. 84–24 governing the publishing and filing of tariffs by common carriers in the foreign commerce of the United States to implement the 1984 Act (49 FR 21713). The Interim Rule was to become effective on June 18, 1984, and interested persons were permitted to file comments on or before June 22, 1984. In addition, persons believing the Interim Rule created serious problems were urged to bring those concerns to the Commission's attention in writing for immediate review without prejudice to the right of any such party to file further comments within the comment period.

Thereafter, on June 11, 1984, the Commission extended the comment period to July 23, 1984 (49 FR 24023). Between the May 23 and June 11 notices, two carriers filed "emergency" comments requesting certain technical amendments to the Interim Rule. The Commission acceded to the requests of those parties and adopted appropriate modifications.

Thereafter, final comments were filed by 36 parties or groups of parties [12] representing all segments of the maritime community.

All of the comments have been carefully considered and many adopted. Several miscellaneous non-substantive administrative and technical changes have been incorporated into the Final Rule without being expressly discussed.

Some comments were received concerning sections of 46 CFR 580 which were not changed by the Interim Rule. The revisions to Part 580 that were made in this proceeding were limited to those required by changes in law brought about by the enactment of the 1984 Act. Accordingly, whatever their merits, comments suggesting substantive changes to Part

[12] North Atlantic European Conferences (NEC); Greece/U.S. Atlantic Rate Agreement, Iberian/U.S. North Atlantic Freight Conference, Marseilles North Atlantic U.S.A. Freight Conference, Med-Gulf Conference, Mediterranean-North Pacific Coast Freight Conference, U.S. Atlantic & Gulf/Australia-New Zealand Conference, and West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC); Trans-Pacific Freight Conference of Japan/Korea, Japan/Korea Atlantic and Gulf Freight Conferences, Trans Pacific Freight Conference (Hong Kong), New York Freight Bureau and Philippines North America Conference; Latin America Pacific Coast Steamship Conference, North Europe-U.S. Pacific Freight Conference, and Pacific Coast River Plate Brazil Conference and their Member Lines (Latampac); Chemical Manufacturers Association (CMA); Matson Navigation Company, Inc. (Matson); Zim Container Service; Inter-American Freight Conference (IAFC); Sea-Land Service, Inc. (Sea-Land); National Maritime Council (NMC); Westwood Shipping Lines, Inc.; Greene Companies International, Inc.; Coordinated Caribbean Transport, Inc.; Neptune Orient Lines, Ltd.; Box Caribbean Agencies Trinidad Ltd.; Barber Blue Sea Lines, Inc.; Hanjin Container Lines, Ltd.; Central Gulf Lines, Inc.; International Tariff Filing Services, Inc. (Transax Data Corporation); Norton Lilly & Co., Inc.; Maritime Cost and Service Company; T.M.T. Shipping & Chartering of La. Inc.—Agents for Deppe Line; M. G. Otero Company Inc.; Hapag-Lloyd Transpacific Service; Yellow Freight International; Spartan International; Pacific Coast European Conference, Latin America/Pacific Coast Steamship Conference; Pacific Coast River Plate Brazil Conference; Southern Cross Overseas Agency, Inc.; Traffic Service Bureau, Inc.; Distribution-Publications, Inc.; Transmares S.A.; Interocean Express Line; Sherwood Medical; Foss Alaska Lines; TAT Airfreight, Inc.; and F.W. Myers & Co.; Inc.

580 not contemplated by the Interim Rule are beyond the scope of this proceeding and will not be considered. Among such comments are NEC's suggestion to further define the term "all or a fixed portion" in the "loyalty contract" definition (section 580.2(k)), and the recommended expansion of the "open rate" definition (section 580.2(o)). Several other suggested non-substantive style or technical revisions which result in a simplification or clarification of Part 580 provisions were adopted, *e.g.*, section 580.3(j) (exceptions to the single tariff requirement) and section 580.2(w)(1) (electronic tariff filing format exception).

Summarized below are the significant suggestions of the commenting parties. These comments, together with discussion and disposition, are presented sequentially, according to the section number they address. Any comments not expressly mentioned herein, have either been incorporated as a technical change without discussion or have been found to be without merit, unwarranted, or unnecessary.

GENERAL COMMENTS

One of the stated purposes of the 1984 Act is to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the U.S. foreign commerce. These regulations implement the tariff filing requirements of the Act.

Included in section 3 of the Act (46 U.S.C. app. 1702) are new and revised common carrier definitions. Common carriers are divided into two categories: ocean common carriers (otherwise known as vessel operating common carriers or VOCC's) and non-vessel-operating common carriers (also known as NVOCC's or NVO's). This latter type of carrier was not previously defined by statute. Because the Act makes no distinctions in the tariff filing responsibilities between VOCC's and NVOCC's, parties should note that the requirements contained in the Final Rule are equally applicable to both types of common carriers, whether they are domiciled in the United States or in a foreign country.

IAFC suggests that the Commission should explicitly state that any references to a section in Part 536 are amended to refer to the section with the same suffix number in Part 580.

The Commission has adopted IAFC's suggestion to the maximum extent possible. The Interim Rule stated that Part 536 of Title 46, Code of Federal Regulations was redesignated Part 580 and that all internal references would be changed accordingly. Such changes have now been made and any references to Part 536 have been deleted.

Section 580.1—Exemptions and Exclusions

Section 580.1(a)

Sections 580.1(a) exempts bulk cargo, forest products, recycled metal scrap, waste from tariff filing requirements consistent with the treatment of those commodities under the Act. NEC suggests that this paragraph

be revised to allow common carriers and conferences to optionally file rates and charges on those exempted commodities in their tariffs.

While there does not appear to be any legal barrier to allowing the filing of rates and charges on exempted commodities on an optional basis by an individual carrier, conferences' authority to do so is not as clear. The issue is whether Congress' exemption of certain commodities precludes concerned rate action on those commodities with or without antitrust immunity. That issue will be the subject of a separate proceeding. At this point, conferences may file rates and charges on exempt commodities, at their option. However, this is permitted without prejudice to any subsequent Commission determination of the legality of such practices.

However, to the extent carriers and conferences elect to file rates and charges on exempt commodities, the Final Rule makes it clear that the prohibitions of section 10 of the 1984 Act and any other statutory and/or regulatory requirements applicable to non-exempt commodities will apply to such filings.

Section 580.2—Definitions

Section 580.2(b)

CMA urges the Commission to clarify that bulk cargo loaded in LASH and Seabee barges is included within the definition of "bulk cargo." This suggestion is consistent with earlier Commission interpretations, and has, accordingly, been incorporated into the Final Rule.

Section 580.2(e)

NEC notes that the Commission, in defining "common carrier" in section 580.2(e), used the term "responsibility", but used the term "liability" in section 580.8(b)(3) when describing the obligations of common carriers, and requests a clarification of these terms.

The definition contained in section 580.2(e) reflects the Act's definition of "common carrier." There was no intention to create a distinction between "responsibility" and "liability." In the interest of consistency, "responsibility" is substituted for "liability" in section 580.8(b)(3) of the Final Rule.

Section 580.2(i) and (j)

NEC submits that the definitions of "joint rates" and "local rates" in sections 580.2(i) and (j), respectively, are inadequate. It suggests that: (1) both be characterized as "ocean" rates; (2) "joint rates" be limited to route combinations resulting from transshipment agreements, and; (3) the definition of "local rates" expressly identify the specified types of prior or subsequent movements which do not alter the rate charged. The purpose of those suggestions is to allow a common carrier to employ other types of water carriers to perform part of the all-water service covered by its "local rates."

The Commission has substantially revised the intermodal tariff filing requirements of section 580.8 and has reduced the number of definitions. These revisions should eliminate any confusion between joint rates and local rates. Similarly, because the definition of "local rates" can reasonably be construed as permitting the employment of other water carriers by a common carrier in establishing an all-water route, the revisions suggested by NEC are not required.

Section 580.2(k)

Transpac, IAFC and NEC recommend that the definition of "loyalty contract" be revised to track the definition of section 3(14) of the 1984 Act. Transpac claims that the Interim Rule could be read to cover forms of arrangements not includable under the statutory definition.

The Commission has modified the definition of "loyalty contract" in the Final Rule as suggested by Transpac, IAFC, and NEC.

Section 580.2(p)

NEC suggests that the "open for public inspection" requirement for tariffs be eliminated entirely. It argues that no regulatory or commercial purpose is served by requiring carriers to maintain tariffs in all of the places the Interim Rule describes.

The Commission is presently giving consideration to the automation of tariffs. If and when tariff publications are automated, which would permit the ready retrieval of information at a variety of locations, this requirement may become unnecessary. Until that time, however, the need to have tariffs "open for public inspection" at locations convenient to the tariff user is the only practical way of implementing the publication requirement of section 8 of the Act.

Section 580.2(q)

NEC suggests that "another country" be used instead of "foreign country" in defining "person" and elsewhere in the Final Rule. "Foreign country" is used in the Act's definition of "person" and will be retained.

Section 580.2(w)(1)

NEC recommends that the Final Rule allow the electronic filing of entire tariffs and not just "tariff pages." It argues that because section 580.5(a) requires title pages to be filed on "heavier paper than the paper used in the body of the tariff" an exception should be made for those title pages filed electronically to avoid the problems inherent in using two different qualities of paper on computer printers.

The NEC comment is well taken. Accordingly, the Final Rule eliminates the "heavy paper" requirement for title pages in section 580.5(a).

Section 580.3—Filing of Tariffs; General

Section 580.3(j)

NEC suggests that an exception to the single tariff requirement for conferences and rate agreements be allowed for ratemaking agreements between groups of conferences, or between conferences and independent carriers, or new conference agreements, new members to such agreements, or enlargements of the geographic scope of conference agreements. NEC argues that, administratively and practically, effective tariff harmonization cannot be accomplished by a newly approved agreement's effective date and that, therefore, the Commission's present single tariff requirement has to be routinely waived whenever a new conference is formed or an existing conference's authority is expanded.

NEC's suggestion has merit and is incorporated in the Final Rule.

Section 580.4—Tariff Format

Section 580.4(f)

The Interim Rule eliminated a previous Part 536 requirement that a check sheet be included in a tariff. The Final Rule makes such "check sheets" optional. Check sheets are used to provide a record of the correction numbers assigned to amendments issued to tariffs. Typically, correction numbers are handwritten on the check sheet as the new tariff amendments are published or, for the agency's purposes, as the amendments are received for filing with the Commission. A limited number of tariff publishers avoid the manual notation of correction numbers on check sheets by publishing and filing a check sheet containing the preprinted numbers of all the effective corrections with page identifications each time the tariff is amended. This practice stems from the domestic tariff filing rules of the Interstate Commerce Commission which require such a control system.

Those opposing the elimination of check sheets described its use as a necessary means of confirming or ensuring that all amendments have been received and accounted for up to the date and correction number shown on the last entry on the check sheet. It is also argued that the procedure preserves the integrity of rate quotations.

Many comments were directed towards describing the commenters' individual needs for tariff check sheets. Most of the comments noted that without a check sheet a tariff user would be unable to determine whether the publication was complete at any given time. It is pointed out that under the check sheet recording system, gaps in the numbers noted on the check sheet alert a tariff user to the potential that there may be page amendments missing or unaccounted for which could affect any rate quotation or tariff rule. Check sheets are also said to be used to monitor rate changes of selected carriers where, by merely recording the latest correction number, a competing carrier or tariff watching service can readily determine at any later date the identification of pages or rate changes which were filed since the tariff was last reviewed.

Admittedly, the check sheets provide a simple means of monitoring tariff changes. However, at issue here is whether the Commission should be called upon to bear the considerable expense and burden of maintaining the tariff check sheet requirement for use by the shipping industry when, for the purpose of carrying out its functions and responsibilities, the check sheet is not necessary to the Commission.

From the Commission's standpoint the check sheet serves little, if any, regulatory or tariff husbanding purpose. When a new or initial tariff is filed, every page is reflected as "original page." When a page is amended, the replacement page must be numbered in a numerically consecutive order with the first revised page cancelling the original page, the 2nd revised page cancelling the first revised page, etc. Hence, the highest numbered revised page contains the rates in effect. The effective time period of any rate item is easily traced by observing the effective date published on each and every revised page. In the event that any consecutively numbered revised page is not received for filing (which would show up as a gap on a check sheet) the subsequent filing could be rejected since it would cancel a non-existing tariff page. The check sheet, it should be noted, does not alter the application of rates in any manner.

It is neither practical nor meaningful for the Commission to expend considerable time and resources working with a carrier or publishing agent when gaps or missing correction references occur on a check sheet because there is no requirement that the relating correction numbers be filed in consecutive order. A tariff filer who fails to place its publication on file, or fails to ensure that amendments are received by the Commission, does so at its own risk. The Final Rule contains provisions to provide for the receipt of tariffs and amendments. Because "filing" is elsewhere defined as receipt *by the Commission* (*see* section 580.3(a)(1)) and the failure to file is a statutory violation, the check sheet safeguard is only a commercial convenience.

The Commission is not insensitive to the needs of persons utilizing tariffs and check sheets. However, it cannot afford to dedicate a substantial portion of its resources on functions which are superfluous to its regulatory responsibilities. In order to accommodate the needs of these persons, the use of check sheets will be permitted on a voluntary basis for use by such entities and not for processing by the Commission. This alternative is preferable to either prohibiting them or imposing them as an additional regulatory burden on all tariff filers.

Section 580.5—Tariff Contents

Section 580.5(d)

Former section 536.5(d) governing "transshipment service" was deleted in the Interim Rule. Certain commenters note that the Commission's Interim Rule on agreements continues to require that any transshipment service

be reflected in a tariff (46 CFR 572.310).[13] The Commission is urged to resolve the apparent conflict.

The Commission has decided to reinstate the transshipment service provision in the Final Rule to ensure consistency between the requirements of Part 580 and Part 572. However, to avoid subjecting tariff filers to unnecessary paperwork or expense, the Commission is deleting Exhibit 8, referred to in the previous section 536.5(c)(13), which specified a detailed format for transshipment service tariffs. Transshipment service tariffs which comply with the general tariff format requirements and the specific requirements of section 580.5(d)(13) should be sufficiently clear to serve their regulatory purpose.

Section 580.5(d)(18)

This section, redesignated section 580.5(d)(2) in the Final Rule, governs "overcharge claims" and provides, *inter alia,* that refund claims for overcharges may be filed within three years of the date the cause of action accrued. NEC contends that compliance with this section could be construed to constitute a waiver of constitutional rights and defenses.

Section 11(g) of the 1984 Act (46 U.S.C. app. 1710(g)) permits claims to be filed within three years. This change from the Shipping Act, 1916, which provided a two year limitations period, is reflected in the Final Rule. Questions regarding attempts to revive claims barred by the two year limitation of the 1916 Act will be determined on an *ad hoc* basis in cases where they arise. *See Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984,* 49 FR 21798, May 23, 1984.

Section 580.6—Statement of Rates and Charges

IAFC urges clarification of the use of the terms "rate" and "charge", noting that although the terms are used conjunctively in the title to section 580.6, there is no reference to the term "charges" in the text of the section itself.

The Act requires the filing of both "rates" and "charges" but draws no clear distinction between them. The Final Rule will, therefore, reflect the statutory language where appropriate.

Section 580.8—Tariffs Containing Through Rates for Through Transportation

Many of the commenters suggestions intended to simplify and clarify filing regulations have been incorporated into the Final Rule. The provisions contained in the Final Rule should also more closely follow the statutory scheme of the 1984 Act.

[13] Docket No. 84-26—*Rules Governing Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984,* (49 FR 22296; May 29, 1984).

Section 580.8(a)

Section 580.8(a) of the Final Rule defines only two intermodal tariffs terms: "through rate" and "through transportation." These are the only definitions needed to implement existing intermodal tariff filing requirements and concepts. The definitions of "contracting carrier," "joint through intermodal rate," "participating carrier," "through rate" and "through intermodal rate" contained in the Interim Rule were deemed unnecessary and have been deleted.

The Interim Rule defined the terms "contracting carrier" and "participating carrier" to draw distinctions between "through intermodal rates" and "joint through intermodal rates." The 1984 Act, however, does not make this distinction and requires only that each carrier and conference file tariffs showing all its rates, charges, etc., ". . . between all points or ports on its own route and on any through transportation route that has been established." (46 U.S.C. app. 1707). The Final Rule will allow common carriers and conferences to file through rates for any *type* of through transportation. The through transportation services provided by common carriers and conferences may be the result of various forms of contractual relationships between those participating in the service. The matter of a common carrier providing a through transportation service in conjunction with a carrier not subject to the Act is governed by section 580.8(b)(3), which requires common carriers to provide in the contract of affreightment a clear explanation of the carrier's responsibility when through transportation services are offered.

Section 580.8(b)

Section 580.8(b) prescribes tariff filing requirements for through transportation services. These requirements are in addition to those for port-to-port service tariffs.

Matson suggests that the Interim Rule be amended to clarify whether through rates must be published in separate tariffs or may be combined with tariffs containing port-to-port rates. Carriers and conferences will not be precluded from including both through rates and port-to-port rates in the same tariff publication. The Final Rule is clarified accordingly.

NEC commented that the Interim Rule should not be interpreted to require that a comprehensive list of services be named on the title page of each tariff. The Final Rule is amended to require that the title page of each through rate tariff contain only a list of the countries to, from, or between which the through rates apply, and a *brief* description of the modes of service offered under the tariff.

The Final Rule further modifies the previous tariff filing requirement that specific ports through which through shipments may move be listed, and permits carriers and conferences to name a range or ranges of ports to be utilized for through movements to reflect the routing for through intermodal transportation.

Likewise, the Final Rule carries forward the Interim Rule provisions which allow common carriers and conferences to establish through rates to, from or between all points within a region. While official government publications naming identified regions, such as the *National Five Digit ZIP Code and Post Office Directory,* are acceptable to specify a region, the suggestions of NEC and WINAC that tariff filers be permitted to define regions by non-official descriptions are rejected. Absent an objective standard to guide tariff writers and users, a proliferation of methods to describe regions can be anticipated, undermining the Commission's underlying policy of tariff simplification.

Sea-Land proposes several amendments to expand the disclosure of participating carrier services to all types of intermodal tariffs. In eliminating the definitions of "joint through intermodal rate" and "participating carrier", the Final Rule also necessarily does away with the Interim Rule's requirement that intermodal tariffs separately list each point served by each participating carrier. By expressly providing that inland through rate divisions need not be disclosed in intermodal tariffs, Congress made a basic determination not to subject the specifics of inland carrier rates to Shipping Act tariff disclosure. This policy underlies the elimination and simplication of many previously prescribed through rate tariff requirements as they applied to inland movements. Sea-Land's proposals are contrary to this basic policy and, therefore, are not adopted.

NEC suggests that the requirement in section 580.8(b) that tariffs contain on the "title page or an interior page referenced on the title page" a list of the points/ports to which the rates apply be eliminated because this information is already contained on the rate pages themselves and need not be repeated elsewhere. This suggestion will not be adopted. Absent a list or description on a tariff's title or interior page of the points/ports to which the tariff applies, tariff users would have great difficulty finding the rate to be applied to their particular shipments. Some title pages filed with the Commission have contained broad scope descriptions, *e.g.,* "European Continent," but internally listed ports/points in only a few countries. This has resulted in shippers being required to examine each page of a number of generally described tariffs, a practice which has substantially thwarted the underlying regulatory purpose of tariffs, *i.e.,* the ready disclosure of rates to shippers. It is only through a title or internal page listing that the tariff user is able to determine the scope of the publication and find the desired rate without having to page through each tariff. Accordingly, the Final Rule requires that the listing of points, ports, or regions be shown in Rule No. 1 of the tariff, and that the title page describe the general scope of the tariff by naming the countries to, from or between which the rates apply. These requirements will facilitate rapid determination of the appropriate intermodal tariff.

Section 580.8(c)

Section 580.8(c) of the Interim Rule governs amendments to intermodal tariffs. Latampac contends that this paragraph could allow an individual conference line to take one-day independent action on a new service point. This would allegedly cause disruptive intra-conference competition with a deleterious impact on the trades as a whole and would be inconsistent with conference authority to regulate advance notice of independent action, subject to the 10-day limitation of section 5 of the 1984 Act. Latampac urges the Commission to clarify section 580.8(c) by reference to such conference authority under section 5 of the 1984 Act.

The Final Rule contains a number of provisions which may generally authorize filings that conflict with limitations placed on conference members by their particular conference agreement. Rather than complicate the Final Rule with a number of exceptions such as the one suggested by Latampac, the Commission will generally interpret such provisions as not authorizing violations of conference agreements. The provision allowing the filing of new inland points is retained and now appears in section 580.8(b).

NEC opposes exempting controlled carriers from the 30-day notice requirements with respect to tariffs establishing new or initial joint through intermodal rates and/or through intermodal rates. NEC argues that the Interim Rule repeals the special permission provisions of section 9(c) of the 1984 Act (46 U.S.C. app. 1708(c)) and that such an exemption otherwise undermines the purposes of the controlled carrier provisions of the statute.

NMC is also opposed to easing the 30-day notice requirements for controlled carriers. NMC contends that the Interim Rule appears to be inconsistent with the 1984 Act and recommends that the Commission reinstate the requirement that controlled carriers observe a 30-day filing period, subject to *ad hoc* exceptions, rather than extend exceptions on an across-the-board basis.

Likewise, Sea-Land recommends that the Commission apply a special permission approach similar to that found in section 580.10(a)(3) to allow controlled carriers' rates to be filed on less than 30 days notice in lieu of a general waiver of the notice period for rates that meet but do not go below those previously established by non-controlled carriers. Sea-Land claims that the proposed modifications would maintain the proper conformity between Part 580 and section 9 of the 1984 Act.

To avoid a possible conflict with the intent of the controlled carrier provisions of the Act, section 580.8(c) is deleted. Controlled carriers will, therefore, remain fully subject to the requirements of section 9 of the 1984 Act when publishing new or initial through rates for through intermodal transportation, unless special permission is granted under the provisions of section 580.15 of the Final Rule. This does not alter the previous provisions of former Part 536, carried forward in the Final Rule, allowing the filing of open rates and lower independent action rates by controlled carriers on less than 30-days notice. *See,* sections 580.6(m) and 580.10(a).

In lieu of a provision governing amendments to intermodal tariffs, a new provision has been substituted at section 580.8(c) which governs multiple tariffs. As a result of the determination to allow multiple tariffs in a trade, common carriers and conferences can now be expected to publish rates for the same commodity in different tariffs based upon differences in the modes of service. Similarly, a commodity rate could also be closely related to a separately filed rate in a specialized commodity tariff. Therefore, to allow rate filers needed flexibility and at the same time enable the Commission and all tariff users to locate the appropriate through rate tariff, a new requirement to cross-reference all through rate tariffs when more than one such tariff is published in the same general trade area is imposed. This information must also be disclosed in Rule No. 1 of each tariff.

EXHIBITS

In addition to the other changes to the tariff filing requirements, new exhibits are provided to facilitate understanding of and compliance with the regulations.

The Commission has determined that this Final Rule is not a "major rule" as defined in Executive Order 12291, dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with Foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizations and small governmental jurisdictions.

List of Subjects in 46 CFR Part 580.

Antitrust, Cargo, Cargo vessels, Contracts, Exports, Harbors, Imports, Maritime carriers, Rates and fares, Reporting and recordkeeping requirements, Water carriers, Water transportation.

CORRECTIONS

These final rules are subject to review and editing of form before publication in the Code of Federal Regulations. Users are requested to notify the Commission of any omissions and typographical type errors in order that corrections can be made before the Commission's CFR book goes to press in January 1985.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

THEREFORE, pursuant to 5 U.S.C. 553: secs. 3, 4, 5, 6, 8, 9, 10, 13, 15, 16, 17, and 19 of the Shipping Act of 1984 (46 U.S.C. app. 1702–1705, 1707, 1709, 1712, 1714–1716, and 1718) Part 538 of Title 46, Code of Federal Regulations, is removed and Part 580 of Title 46, Code of Federal Regulations, is revised to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 580]

PUBLISHING AND FILING OF TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

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Exhibition No. 1 to Part 580—Title Page (Front) Format

Exhibit No. 2 to Part 580—Title Page (Reverse) Format

Exhibit No. 3 to Part 580—Class Tariff or Class and Commodity Tariff Index

Exhibit No. 4 to Part 580—Single Level of Rates, Packed/Unpacked Rates, Special Rates, Emergency Rates and Valuation Rates

Exhibit No. 5 to Part 580—Class Rate Tariff or Class Rate Section of Class and Commodity Tariff

AUTHORITY: 5 U.S.C. 553; secs. 3, 4, 5, 6, 8, 9, 10, 13, 15, 16, 17 and 19 of the Shipping Act of 1984 (46 U.S.C. app. 1702–1705, 1707, 1709, 1712, 1714–1716 and 1718).

§ 580.0 Scope.

(a) These regulations govern the publication and filing of tariffs for the transportation of property performed by common carriers in the foreign

commerce of the United States and by combinations of such common carriers, including through transportation offered in conjunction with one or more carriers not otherwise subject to the Shipping Act of 1984.

(b) Section 8 of the Shipping Act of 1984 requires common carriers and conferences of such common carriers to file with the Commission and keep open to public inspection, tariffs showing all rates and charges for transportation between U.S. and foreign ports and between points on any through route which is established. These regulations implement this requirement and, in addition, the requirements of section 9, 10 and 16 of the Shipping Act of 1984. The tariff format and content requirements of this part also reflect the Commission's responsibilities in identifying and preventing unreasonable preference or prejudice and unjust discrimination pursuant to section 10 of the Shipping Act of 1984.

(c)(1) Compliance with this part is mandatory and any tariff submitted for filing which fails to meet criteria specified in this part is subject to rejection pursuant to § 580.10(d)(1). Upon rejection it shall be void and its use unlawful.

(2) Operating without an effective tariff on file with the Commission or charging rates not in conformance with such a tariff is unlawful and, pursuant to section 13 of the Shipping Act of 1984, is subject to a civil penalty of not more than $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of civil penalty may not exceed $25,000 for each violation. Each day of a continuing violation constitutes a separate offense. Additionally, the Commission may suspend any or all tariffs of the common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member, for a period not to exceed 12 months.

§ 580.1 Exemptions and exclusions.

(a) This part does not apply to bulk cargo, forest products, recycled metal scrap, waste paper and paper waste, except that carriers or conferences which voluntarily file tariff provisions covering otherwise exempt transportation thereby subject themselves to all statutory provisions and the requirements of this part, including the requirement to adhere to the filed tariff provisions.

(b) This part does not apply to transportation of cargo between foreign countries, including that which is transshipped from one ocean common carrier to another (or between vessels of the same common carrier) at a U.S. port or transferred between an ocean common carrier and another transportation mode at a U.S. port for overland carriage through the United States, where the ocean common carrier accepts custody of the cargo in a foreign country and issues a through bill of lading covering its transportation to a foreign point of destination.

(c) The following services are exempt from the tariff filing requirements of the Act and the rules of this part:

(1) Transportation by vessels operated by the State of Alaska between Prince Rupert, Canada and ports in southeastern Alaska, if all the following conditions are met:

(i) Carriage of property is limited to vehicles;

(ii) Tolls levied for vehicles are based solely on space utilized rather than the weight or contents of the vehicle and are the same whether the vehicle is loaded or empty;

(iii) The vessel operator does not move the vehicles on or off the ship; and

(iv) The common carrier does not participate in any joint rates establishing through routes or in any other type of agreement with any other common carrier.

(2) Transportation of passengers, commercial buses carrying passengers, personal vehicles and personal effects by vessels operated by the State of Alaska between Seattle, Washington and Prince Rupert, Canada, if such vehicles and personal effects are the accompanying personal property of the passengers and are not transported for the purpose of sale.

(3) Transportation of mail between the United States and foreign countries.

(4) (i) Transportation by Incan Superior, Ltd. of cargo moving in railroad cars between Thunder Bay, Ontario and Superior, Wisconsin, if:

(A) The through rates are filed with the Interstate Commerce Commission and/or the Canadian Transport Commission; and

(B) Certified copies of the rate divisions and of all agreements, arrangements or concurrences entered into in connection with the transportation of such cargo are filed with the Commission within 30 days of the effectiveness of such rate divisions, agreements, arrangements or concurrences.

(ii) This exemption is inapplicable to cargo originating in or destined to foreign countries other than Canada.

(5) (i) Transportation by water of cargo moving in rail cars between British Columbia, Canada and United States ports on Puget Sound, and between British Columbia, Canada and ports or points in Alaska, if:

(A) The through rates are filed with the Interstate Commerce Commission and/or the Canadian Transport Commission; and

(B) Certified copies of the rate divisions and of all agreements, arrangements or concurrences entered into in connection with the transportation of such cargo are filed with the Commission within 30 days of the effectiveness of such rate divisions, agreements, arrangements or concurrences.

(ii) This Exemption is inapplicable to cargo originating in or destined to foreign countries other than Canada.

(6) (i) Transportation by water of cargo moving in bulk without mark or count in rail cars on a local port-to-port rate basis between ports in British Columbia, Canada and United States ports on Puget Sound, if the rates charged for any particular bulk type commodity on any one sailing are identical for all shippers.

(ii) This exemption shall not apply to cargo originating in or destined to foreign countries other than Canada.

(iii) The carrier will remain subject to all other provisions of the Shipping Act of 1984.

(7) Transportation of used military household goods and personal effects by non-vessel-operating common carriers.

(d) The following services are subject to continuing special permission authority to deviate from the 30-day notice requirement of section 8 of the Act and the form and content requirements of this part: Transportation of U.S. Department of Defense cargo by American-flag common carriers under terms and conditions negotiated and approved by the Military Sealift Command (MSC), if all the following conditions are met:

(1) Exact copies of all common carrier quotations or tenders accepted by MSC are filed with the Commission as soon as possible after they are approved by MSC, but on not less than one day's filing notice prior to the effective date thereof;

(2) All tenders are filed in triplicate, one copy of which is signed and maintained at the Commission's Washington Office for public inspection;

(3) A letter of transmittal accompanies the filing stating that the documents are submitted in accordance with the requirements of the Shipping Act of 1984 and this section;

(4) Tenders submitted for filing are to be numbered by the respective common carriers as part of a distinct tariff series, with each common carrier's series to begin with the number "1" and run consecutively thereafter;

(5) Each tender which supersedes a prior tender must specifically cancel the prior tender by its series number; and

(6) Amendments or supplements to tenders must also be filed with the Commission upon not less than one day's filing notice and contain an appropriate reference to the original tender being amended or supplemented.

(e) *Controlled common carriers.*

(1) A controlled common carrier shall be exempt from the provisions of this part exclusively applicable to controlled common carriers when:

(i) The vessels of the controlling state are entitled by a treaty of the United States to receive national or most-favored-nation treatment;

(ii) The controlling state subscribed, as of November 17, 1978, to the shipping policy statement contained in note 1, Annex "A" of the Code of Liberalization of Current Invisible Operations, adopted by the Council of the Organization for Economic Cooperation and Development;

(iii) As to any particular rate, the controlled common carrier's tariff contains an amount set by the duly authorized action of a ratemaking body, except that this exemption is inapplicable to rates established pursuant to an agreement in which all the members are controlled common carriers not otherwise excluded by this paragraph;

(iv) The controlled common carrier's rates, charges, classifications, rules or regulations govern transportation of cargo between the controlling state and the United States (including its districts, territories and possessions); or

(v) The controlled common carrier operates in a trade served exclusively by controlled common carriers.

(2) The Commission will notify any common carrier of its classification as a controlled common carrier.

(3) (i) Any common carrier contesting such a classification may, within 30 days after the date of the Commission's notice, submit a rebuttal statement.

(ii) The Commission shall review the rebuttal and notify the common carrier of its final decision within 30 days from the date the rebuttal statement was filed.

§ 580.2 Definitions.

For the purposes of this part, the following definitions of terms shall apply unless otherwise indicated by the context of this part (for other definitions see §§ 580.3(a)(1), 580.7(a), 580.8(a), 580.10(a)(1) and 580.12(a)):

(a) *Act* means the Shipping Act of 1984.

(b) *Bulk cargo* means cargo that is loaded and carried in bulk without mark or count, in a loose unpackaged form, having homogeneous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and is, therefore, subject to the tariff filing requirements of this part.

(c) *Class rates* means rates applicable to all articles which have been grouped or "classified" together in a classification tariff or a classification section of a rate tariff.

(d) *Commodity rates* means rates applying to a commodity or commodities specifically named or described in the tariff in which the rate or rates are published.

(e) *Common carrier* means a person holding itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

(f) *Conference* means an association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff; but the term does not include a joint service, consortium, pooling, sailing or transshipment arrangement.

(g) *Controlled common carrier* means an ocean common carrier that is, or whose operating assets are, directly or indirectly owned or controlled

by the government under whose registry the vessels of the common carrier operate; ownership or control by a government shall be deemed to exist with respect to any common carrier if:

(1) A majority portion of the interest in the common carrier is owned or controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(2) That government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer or the chief executive officer of the common carrier.

(h) *Forest products* means forest products in an unfinished or semifinished state that require special handling moving in lot sizes too large for a container, including, but not limited to, lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper board in rolls and paper in rolls.

(i) *Joint rates* means rates or charges established by two or more common carriers for ocean transportation over the combined routes of such common carriers.

(j) *Local rates* means rates or charges for transportation over the route of a single common carrier (or any one common carrier participating in a conference tariff), the application of which is not contingent upon a prior or subsequent movement.

(k) *Loyalty contract* means a contract with an ocean common carrier or conference, other than a service contract or contract based upon time-volume rates, by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference.

(l) *Non-vessel-operating common carrier* means a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier.

(m) *Ocean common carrier* means a vessel-operating common carrier; but the term does not include one engaged in ocean transportation by ferry boat or ocean tramp.

(n) *Ocean freight forwarder* means a person in the United States that:

(1) Dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and

(2) Processes the documentation or performs related activities incident to those shipments.

(o) *Open rate* means a rate on a specified commodity or commodities over which a conference relinquishes or suspends its ratemaking authority, in whole or in part, thereby permitting each individual common carrier member of the conference to fix its own rates on such commodity or commodities.

(p) *Open for public inspection* means the maintenance of a complete and current set of the tariffs used by a common carrier, or to which it is a party, in each of its offices and those of its agent in every city where it transacts business involving such tariffs.

(q) *Person* includes individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

(r) *Proportional rates* means rates or charges assessed by a common carrier for transportation services, the application of which is conditioned upon a prior or subsequent movement.

(s) *Shipment* means all of the cargo carried under the terms of a single bill of lading.

(t) *Shipper* means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(u) *Tariff* means a publication containing the actual rates, charges, classifications, rules, regulations and practices of a common carrier or conference of common carriers. The term "practices" refers to those usages, customs or modes of operation which in any way affect, determine or change the transportation rates, charges or services provided by a common carrier, and, in the case of conferences, must be restricted to activities authorized by the basic conference agreement.

(v) *Tariff filing* means any tariff, or modification thereto, which is received by the Commission as properly filed pursuant to these rules.

(w) *Tariff filing, electronic* means the transmission of tariff filings to the Commission through the use of commercial data processing terminals. The data processing receiving terminal(s) are to be located in the Commission's Washington, D.C. offices. Tariff material filed electronically must conform to all the regulations applicable to permanent tariff filings, except as follows:

(1) Electronically filed tariff pages received from data processing terminals may be used for filing with the Commission; and

(2) Electronically filed tariff matter shall be accompanied by an electronically filed letter of transmittal.

§ 580.3 Filing of tariffs; general.

(a)(1) As used in this part the terms "file," "filed" or "filing," when used with respect to the filing of tariffs with the Commission, mean actual receipt at the Commission's Washington, D.C. offices.

(2) The Commission will receive tariff filings on an around-the-clock basis. Receipt of tariff filings during other than normal business hours will be time-stamped at a tariff mail drop located in the lobby of the Commission's Washington, D.C. offices. Electronic tariff filings transmitted to the Commission by electronic modes will be receipted by a date/time device on the receiving machine.

(b) Tariffs shall be published and filed by an officer or employee of the common carrier or, if a conference tariff, by an officer or employee of the conference. In the alternative, publication and filing may be accomplished through an agent authorized to act for such common carrier or conference by a specific written delegation of authority.

(1) A common carrier or conference may delegate authority to a person, not an official or employee of such common carrier or conference, for the purpose of issuing all its tariffs or any particular tariff.

(2) Whenever there is a delegation of tariff-issuing authority by a common carrier or conference, there shall be filed with the Commission a written statement indicating the appointment of the agent and setting forth the exact limits of the agent's authority.

(c)(1) No common carrier or conference shall publish and file any tariff or modification thereto which duplicates or conflicts with any other tariff on file with the Commission to which such common carrier or conference is a party, whether filed by such common carrier, conference, or by an authorized agent.

(2) No common carrier shall publish and file any tariff or modification thereto which conflicts with any other tariff on file with the Commission and which names such common carrier as a participant therein.

(d) All tariffs published in a foreign language shall be accompanied by two true copies translated into the English language when submitted for filing, except that controlled common carriers shall submit three true copies translated into the English language.

(e) All tariff matter filed with the Commission shall be accompanied by a letter of transmittal which clearly identifies the tariff and pages involved. If the sender desires a receipt, a duplicate of such letter must be furnished together with a plain, self-addressed, stamped envelope measuring approximately 4½ by 9¾ inches. The duplicate letter will be stamped with the date of receipt and mailed to the sender in the envelope provided. If a duplicate letter and self-addressed stamped envelope are not submitted, a receipt will not be furnished.

(f) All tariff matter shall be filed in duplicate, except that controlled common carriers shall file all tariff matter in triplicate.

(g) Tariff filings shall be addressed to:

Bureau of Tariffs, Federal Maritime Commission, Washington, D.C. 20573.

(h) Each common carrier shall keep open for public inspection all tariffs published by it or to which it is a party in the foreign commerce of the United States.

(i) Common carrier participants in a conference tariff are not relieved from the necessity of complying with the Commission's regulations and the requirements of section 8(a)(1) of the Act with regard to keeping tariffs open for public inspection.

(j) A common carrier's obligation to file tariffs pursuant to section 8(a) of the Act and this part must be carried out as follows:

(1) When the common carrier is not a party to an agreement, by filing its own tariff or tariffs.

(2) When the common carrier is party to an agreement, by participation in a single tariff filed by the conference, except that this requirement shall not apply to:

(i) Ratemaking agreements either between or among conferences, or between one or more conferences and one or more independent carriers; or

(ii) New conference agreements, new members to such agreements, or enlargements of the geographic scope of conference agreements, until ninety (90) days after the fact, unless special permission to extend that period is granted for good cause shown.

(k) When a common carrier is admitted to membership in a conference, cancellation of the common carrier's individual tariff (if any) in the trade served by the conference and revision of the participating common carrier page of the conference tariff (naming the newly admitted common carrier) shall be published and filed with the Commission and may become effective upon the date of such filing, except that:

(1) If the common carrier has an individual tariff in the trade served by the conference and cancellation of that tariff and revision of the participating common carrier page of the conference tariff (naming the newly admitted common carrier) would result in an increase in that common carrier's rates, the common carrier shall, 30 days prior to being admitted as a new conference member, cancel its individual tariff effective 30 days from date of publication, making reference to the conference tariff and where it may be examined, unless special permission to become effective in less than 30 days has been granted by the Commission pursuant to § 580.15; and

(2) A controlled common carrier newly admitted to membership in a conference shall, 30 days prior to admission, file notice of cancellation of any applicable independent tariff effective upon the date of admission to conference membership, unless special permission has been granted by the Commission pursuant to § 580.15.

(l) [Reserved.]

(m) Copies of all tariffs on file with the Commission (including all subsequent revisions and changes thereto) shall be made available by common carriers and conferences to any person. A reasonable charge may be made for this service.

(n) New or initial tariffs shall be published and filed to become effective not earlier than 30 days after publication and filing, unless special permission to become effective on less than 30 days' notice has been granted by the Commission pursuant to § 580.15.

(o) Rules applicable to tariffs containing rates, charges, rules and regulations for through transportation, set forth in § 580.8, are additional requirements for use only for through transportation and are not a substitute for any other requirements of this part.

§ 580.4 Tariff format.

(a) All tariffs which are filed and kept open to public inspection shall be clear and legible and shall be plainly printed, mimeographed, multilithed or prepared by some other similar permanent process on durable paper of good quality.

(b) No alteration in writing or erasure shall be made in any tariff publication.

(c) Sufficient marginal space of not less than three-fourths of an inch shall be allowed at the left side of each tariff page to permit insertion in tariff binders. In addition, a margin of not less than one-half inch shall be allowed at the bottom of each tariff page for application of the Commission's receipt stamp.

(d) Tariffs shall be in looseleaf form and printed on pages approximately 8½ by 11 inches. If other than a looseleaf tariff is to be filed, application for permission to make such filing shall be made to the Commission. If permission to file other than a looseleaf tariff is granted by the Commission, such permission will set forth the form and manner of filing the tariff and any amendments or supplements thereto.

(e)(1) Tariff pages shall be printed on one side only and each page after the title page shall be numbered in the upper right-hand corner, except that the anti-rebating statement, as set forth in § 580.5(c)(2)(ii), must be published on the reverse side of the tariff title page (See Exhibit No. 2 to this part) or, alternatively, at any location in the tariff, provided that reference to such location is shown on the title page thereof.

(2) Each tariff page must show the name of the common carrier or conference for whose account the tariff is issued, the effective date, the page number, the FMC number of the tariff, etc., as illustrated by Exhibit No. 4 to this part.

(3) When the common carrier's tariff is a conference tariff, the common carrier shall ensure that the conference publishes the common carrier's tariff provisions in the conference tariff.

(f) To the extent applicable, all tariffs filed pursuant to this part shall be arranged in the following order:

> Title Page; Check Sheet (optional); Table of Contents; Participating Common 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; Classification and Class Rate Section; and Open Rate Section.

§ 580.5 Tariff contents.

(a) The first page of every tariff shall be a title page which shall contain the following information (see Exhibit No. 1 to this part):

(1) The name of the common carrier, appropriately identified as a Non-Vessel-Operating Common Carrier or a Vessel-Operating Common Carrier, or the name of the conference. Tariffs filed pursuant to an agreement shall be further identified with the agreement number. A controlled common carrier subject to section 9 of the Act shall so identify itself under the common carrier name on the title page.

(2) An FMC tariff number assigned by the common carrier or conference. For example:

Smith Line Tariff FMC–1.

The first tariff filed by a common carrier or conference pursuant to this or any prior regulation shall be assigned the number FMC–1. Each tariff thereafter issued by the common carrier or conference shall be assigned the next, consecutive FMC number. Beneath the FMC tariff number shall be shown the number or numbers of any FMC tariff or tariffs cancelled by the issuance of such tariff. For example:

Smith Line Tariff FMC–14 cancels Smith Line Tariff FMC–5 and Smith Line Tariff FMC–9.

or

Smith Line Tariff FMC–14 cancels Smith Line Tariff FMC–12.

(3) When an individual common carrier, partnership or joint service operates under a trade name, the legal name or names of each individual common carrier shall be shown as well as the trade name. Alternatively, reference may be made to an internal tariff page where this information is shown.

(4)(i) A list of the ports/regions covered by the tariff or reference to an internal tariff page where such ports/regions are listed. In lieu of such listing of ports, a statement of the range of ports served will be accepted if any exclusion of a port within the range or any restriction applying at a port within the range is specifically stated.

(ii) Whenever tariff application is shown by identification of a range of ports in lieu of listing individual ports, such range of ports must be within a geographical area generally served by the common carrier(s) participating in the tariff.

(5) A statement showing the type of service offered by the common carrier(s), e.g., direct service, transshipment, etc. When transshipment service is indicated, reference shall be made to the page in the tariff describing such service.

(6) A statement showing the type of rates contained in the tariff. For example: local, proportional, through, class, commodity, overland common point, etc.

(7) A reference to other publications which in any manner govern the tariff. Alternatively, reference may be made on the title page to an internal page identifying such governing publications as prescribed in paragraph (c)(8) of this section.

(8) The date on which the tariff will become effective. Every tariff in which any provision is to become effective upon a date different from the general effective date of such tariff shall so indicate in substantially the following form:

> Effective: _____ (except as otherwise herein provided) or (except as provided in Item No. _____) or (except as provided on page _____).

(9) The name, title and address of the person issuing the tariff or, if the common carrier or conference has appointed a tariff filing agent pursuant to § 580.3(b), the name, title and address of the agent making such filing.

(10) An expiration date if the entire tariff publication is to expire on a specified date.

(11) The names of all participating common carriers in the tariff if more than one common carrier participates. Alternatively, reference may be made to an internal page on which are listed the names of all participating common carriers (see paragraphs (c)(2) and (c)(3) of this section).

(12) The subscription price of the tariff (and any major components thereof offered separately) or a statement that the entire tariff will be furnished without charge, accompanied by a reference to a tariff rule which clearly states where subscriptions may be obtained and the materials which will be furnished to subscribers.

(b) All pages after the title page shall be numbered beginning with "Original Page 1," "Original Page 2," etc. Each page as thereafter revised shall be a consecutively numbered revision of the same page in the form required by paragraphs (a)(6) and (a)(8) of § 580.10. (See Exhibit No. 4 to this part). For example:

> The 7th page in a tariff as originally filed would be titled "Original Page 7." The first revision of this page would be titled "First Revised Page 7 cancels Original page 7."

(c) The body of the tariff shall contain the following:

(1) A table of contents containing a full and complete statement of the exact locations where information in the tariff will be found. Such statement shall list all subjects in alphabetical order and shall show the page number and number of the item, rule or unit where such subject will be found.

(2) (i) The full legal name of each participating common carrier, appropriately identified as a Non-Vessel-Operating Common Carrier or Vessel-Operating Common Carrier and the address of its principal office. Where a joint service participates, the FMC number of the agreement authorizing the joint service shall also be shown.

(ii) Every common carrier shall publish a tariff provision to be effective upon filing which shall read substantially as follows (see Exhibit No. 2 to this part):

> (Name of company) has a policy against the payment of any rebate by the company or by any officer, employee, or agent thereof, which payment would be unlawful under the United States Shipping Act of 1984. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act of 1984 and the regulations of the Commission set forth in 46 CFR 582.

(iii) When the common carriers's tariff is a conference tariff, the common carrier shall ensure that the conference publishes the common carrier's tariff provision set forth in paragraph (c)(2)(ii) of this section in the conference tariff.

(3) All trade names, if any, under which service will be provided and the names of the common carrier or common carriers operating under each such trade name if not shown on the title page.

(4) A list of the ports or ranges of ports to and from which the tariff rates apply, if not shown on the title page, in conformity with paragraph (a)(4) of this section.

(5) A statement indicating the extent of any limitation or restriction if the application of any of the rates, charges, rules or regulations stated in the tariff are restricted to any particular port, pier, etc., or otherwise limited.

(6) A single, complete, alphabetically arranged index listing all commodities for which the tariff names rates, together with a reference to each item or page where a particular article is shown. If a rate item embraces two (2) or more commodities, each commodity shall be shown in the index. Class rate tariffs and tariffs containing both class and commodity rates shall contain, in addition to applicable item or page references, the ratings of commodities to which class rates apply. (See Exhibit No. 3 to this part). Such index may be omitted where rates on less than 100 commodities are included in the tariff. All articles generic to different species of the same commodity should be grouped together. For example: Paper, building; paper, printing; paper, wrapping.

(7) A full explanation of any symbols, reference marks or abbreviations used in the tariff. If such explanation does not appear on the page where the reference marks or symbols are used, such page shall refer to the page in the tariff where the explanation is given. The symbols shown in § 580.10(a)(7)(i) shall be used only for the purposes indicated therein.

(8) If governed in any manner by other publications, as may be permitted herein, a reference thereto substantially in the following form:

> This tariff is governed, except as otherwise provided herein, by Bill of Lading Tariff FMC No. _____ (or by Rules Tariff No. _____), etc.

Where such reference is fully made on the title page, reference elsewhere in the tariff is unnecessary. Governing publications must be on file with the Federal Maritime Commission.

(9) All rates applicable to the transportation of the articles or classes of articles named in the tariff. Rates shall be stated as required by § 580.6.

(10) Rules and regulations which in any way affect the application of the tariff.

(d) Specific tariff rules shall be published to govern each of the following subjects and shall be designated in all tariffs by the numbers and headings specified below. In the event that a specified rule does not apply to the service offered, the rule number and heading shall be published with a statement that the rule is not applicable. For example: "*Rule No. 15. Open Rates.* Not Applicable."

(1) *Scope.* A list of the ports or range of ports to and from which the tariff rates apply, if not shown on the title page, in conformity with paragraph (a)(4) of this section.

(2) *Application of rates.* A clear statement of all the services provided to the shipper and included in the transportation rates set forth therein.

(3) *Rate applicability rule.* A clear and definite statement of the time at which a rate becomes applicable to any given shipment.

(4) *Heavy-lift.*

(5) *Extra length.*

(6) *Minimum bill of lading charge(s).*

(7) *Payment of freight charges.*

(i) A clear statement of all requirements for the payment of freight charges.

(ii) Currency restrictions, if any, must be specified and the basis for determining the rates of currency exchange must be set forth.

(iii) If credit is extended to shippers, the rule must include the credit terms available and the conditions upon which credit is extended. When credit applications or agreements are required, specimens of such applications or agreements shall be published as part of this rule.

(8) *Specimen Bill(s) of Lading.* A specimen copy of any bill of lading, contract of affreightment or other document evidencing the transportation agreement applicable to the service offered shall be submitted with the tariff, unless a separate bill of lading tariff is on file as permitted by § 580.13(a). Such documents shall not contain provisions inconsistent with the rules and regulations published in any applicable tariff.

(9) *Freight forwarder compensation.* A statement describing the rate or rates of compensation to be paid to licensed ocean freight forwarders on United States export shipments in accordance with § 510.23(b) of this chapter.

(10) *Application of surcharge and/or arbitraries, differentials, outport differentials or other identifying term.* Tariffs imposing upon the same shipment more than one surcharge and/or arbitrary, expressed in percentage terms, shall also clearly state the manner in which the percentages shall be applied in computing the additional charges.

(11) *Minimum quantity rates.* Tariffs naming two or more rates for different quantities of commodities covered by the same description shall state:

> When two or more freight rates are named for carriage of goods of the same description over the same route and under similar conditions and the application is dependent upon the quantity of the goods shipped, the total freight charges assessed against the shipment shall not exceed the total charges computed for a larger quantity, if the rate noted alongside a qualification specifying a required minimum quantity (either weight or measurement per container or in containers), will be applicable to the contents of the container(s), and if the minimum set forth is met or exceeded. At the shipper's option, a quantity less than the minimum level may be freighted at the lower rate if the weight or measurement declared for rating purposes is increased to the minimum level.

(12) *Ad Valorem rates.* A statement specifying the exact method of computing the charge (e.g., shipper's declaration, invoice value, delivered value), and the additional liability, if any, assumed by the common carrier in consideration therefor.

(13) *Transshipment.* Tariffs providing for transshipment service pursuant to an ongoing agreement shall provide:

(i) The through rate;

(ii) The routings (origin, transshipment and destination ports); additional charges, if any (e.g., port arbitrary and/or additional transshipment charges); and participating carriers; and

(iii) A tariff provision substantially as follows:

> The rules, regulations, and rates in this tariff apply to all transshipment arrangements between the publishing carrier or carriers and the participating connecting or feeder carrier. Every participating connecting or feeder carrier, which is a party to transshipment arrangements, has agreed to observe the rules, regulations, rates, and routings established herein as evidenced by a connecting carrier agreement between the parties.

(14) [Reserved.]

(15) *Open rates.* A clear and complete explanation of the extent to which conference rates have been opened pursuant to paragraphs (l) and (m) of § 580.6. Any restriction or limitation on the right of participating common carriers to fix their own rate items, and the extent to which applicable rules and regulations of the conference tariff will continue to govern the rates filed by each individual line, shall also be stated.

(16) *Explosives or other dangerous articles.* A clear statement of all regulations governing the transportation of explosives, inflammable or corrosive material, or other dangerous articles, or a reference to a separate publication which contains such regulations.

(17) *Green salted hides.* A rule which requires that:

(i) The shipping weight for purposes of assessing transportation charges be either a scale weight or a scale weight minus a deduction which amount and method of computation are specified in said rule; and

(ii) The shipper furnishes the common carrier a weighing certificate or dock receipt from an inland common carrier for each shipment of green salted hides at or before the time the shipment is tendered for ocean shipment.

(18) *Returned cargo.* Tariffs offering the return shipment of refused, damaged or rejected shipments, or exhibits at trade fairs, shows or expositions, to port of origin at the rates assessed on the original movement when such rates are lower than prevailing rates, shall also provide that:

(i) The return of shipments be accomplished within a specific period not to exceed one year;

(ii) The return movement be made over the line of the same common carrier performing the original movement, except that in the case of a conference tariff, return may be made by any member line when the original shipment was carried by a conference member under the conference tariff; and

(iii) A copy of the original bill of lading showing the rate assessed be surrendered to the return common carrier.

(19) *Shippers requests, consultations and complaints.* Clear and complete instructions in accordance with the effective agreement's provisions, stating where and by what method shippers may file their requests and complaints and how they may engage in consultation under section 5(b)(6) of the Act, together with a sample of the rate request form if one is used or, in lieu thereof, a description of the information necessary for processing the request or complaint.

(20) *Overcharge Claims.*

(i) No tariff in the foreign commerce shall limit the filing of overcharge claims with a common carrier for private settlement to a period of less than three years after accrual of the cause of action nor shall the acceptance of any overcharge claim be conditioned upon the payment of a fee or charge.

(ii) No tariff in the foreign commerce shall require that overcharge claims based on alleged errors in weight, measurement or description of cargo be filed before the cargo has left the custody of the common carrier.

(iii) Tariffs shall contain a rule which states that shippers or consignees may file claims for the refund of freight overcharges resulting from errors in weight, measurement, cargo description or tariff application. This rule shall clearly indicate where and by what method such claims are to be filed with the common carrier and shall further advise that such claims may also be filed with the Federal Maritime Commission. At a minimum, tariffs shall contain the following provisions:

(A) Claims seeking the refund of freight overcharges may be filed in the form of a complaint with the Federal Maritime Commission, Washington, DC 20573, pursuant to section 11(g) of the Shipping Act of 1984. Such claims must be filed within three years of the date the cause of action accrued; and

(B) Claims for freight rate adjustments filed in writing will be acknowledged by the common carrier within twenty days of receipt by written notice to the claimant of the tariff provisions actually applied and the claimant's rights under the Act.

(e) Additional rules which affect the application of the tariff shall follow immediately the rules specified in paragraph (d) of this section and shall be numbered consecutively.

(f) Where a tariff rule affects only particular items or rates, the affected items or rates shall specifically refer to such rule.

(g) No rate tariff shall require reference to any other rate tariff for determination of any applicable rate, except that:

(1) Reference may be made to another tariff for terminal and accessorial charges;

(2) Returned cargo rates accompanied by the rule specified in paragraph (d)(18) of this section are permitted;

(3) Reference may be made to another tariff (not containing rates) for commodity lists or generic descriptions as provided in paragraphs (f) and (g) of § 580.6; and

(4) References may be made to another tariff (not containing rates) covering:

(i) Explosives, inflammable or corrosive materials, or other dangerous articles;

(ii) Bills of lading or contracts of affreightment;

(iii) Commodity classifications; and

(iv) Routing guides or other similar tariffs as provided in § 580.13.

§ 580.6 Statement of rates and charges.

(a) The application of all rates and charges shall be clear and definite and explicitly stated per 100 pounds, per cubic foot, per ton of 2,000 pounds, per ton of 2,240 pounds or some other expressly defined unit.

(b) All rates and charges shall be stated in a simple and systematic manner. Commodities and generic commodity groupings on which rates are stated shall be listed in alphabetical order. If published in the index, item numbers shall also be shown in the body of the tariff.

(c) Where rates are stated in amounts per package, the method of packing and specifications, showing size, measurement or weight of the packages to which such rates apply shall be shown.

(d) Where rates vary depending upon whether cargo is packed, crated, palletized, bundled, strapped, loose or otherwise prepared or delivered for shipment, there shall be a statement clearly and specifically governing the application of such rates. See Exhibit No. 4 to this part.

(e) Where rates and charges to or from designated ports are determined by the adding or subtracting of arbitraries or differentials to or from rates applicable at other ports, such application shall be clearly shown.

(f) A commodity item may, by use of a generic term, provide rates on a number of articles if such term contains reference to an item in the tariff which clearly defines the type of commodities contained in such generic term or which contains a complete list of such articles, or contains a reference to the FMC number of a separate tariff of the same common carrier or conference containing such definition or list of such articles.

Example: Packinghouse products as described in Item _____; or packinghouse products as described under heading "Packinghouse products" in FMC No. _____ or successive issues thereof.

(g) A separate tariff, not containing rates, may be filed by a common carrier or conference showing a list of the commodities on which rates published by reference to generic terms will apply; rate tariffs shall be made subject thereto as provided in paragraph (f) of this section.

(h) When commodity rates are established, the description of the commodity must be specific. Rates may not be applied to analogous articles.

(i) The rate section of a tariff may include a rate applicable to all commodities, or all commodities of a class, on which specific commodity rates are not stated in the tariff, to be called "cargo, n.o.s." (not otherwise specified), "general cargo" or other identifying name, or by broad generic heading such as "chemicals, n.o.s."

(j) A separate tariff naming rates on a group of related commodities may be published if such tariff contains all of the rates applicable to such commodities, which are published by the same common carrier or conference, to or from the same ports or points. When such tariffs are published, reference shall be made thereto in the tariff of general application for the same common carrier or conference, to or from the same ports or points.

(k)(1) Publication of rates which duplicate or conflict with the rates published in the same or any other tariff is prohibited.

(2) The publication of a statement in a tariff to the effect that the rates published therein take precedence over the rates published in some

other tariff, or that the rates published in some other tariff take precedence over or alternate with rates published therein, is prohibited.

(3) Where a common carrier or conference publishes both commodity and class rates, a statement shall be published in the tariff clearly indicating which of the two rates shall apply on the commodity or commodities on which both class rates and commodity rates are published.

(l) Where a conference opens any or all rates, each tariff item so opened shall be amended to indicate the word "open" in place of the previously stated rates and shall indicate a reference to a published rule in the tariff clearly defining the word "open" as used in each tariff and indicate where the rates of the individual conference member lines on such items will be found.

(m)(1) Where a conference opens rates pursuant to paragraph (1) of this section, an individual conference member shall not charge rates on the open item unless and until the individual member files a proper tariff rate covering such item as required by these rules. This may be accomplished by the individual common carrier (or its tariff agent) filing a complete tariff pursuant to this part, or by the conference (or its tariff agent) filing a separate supplement at the end of the conference tariff indicating the rates which will be charged by each individual common carrier and the governing rules and provisions of the conference tariff applicable to each common carrier. Separate open rate tariffs may also be published by a conference (or its tariff agent). When conference members publish their open rates in a separate tariff, such tariffs must reference, on the title page, the conference tariff in which the open rated condition is reflected.

(2) (i) Controlled common carriers filing open rates are subject to the 30-day controlled common carrier notice requirement of § 580.10(a)(3)(i), except when special permission is granted by the Commission under § 580.15.

(ii) Notwithstanding paragraph (m)(2)(i) of this section, a conference may, on less than 30 days' notice, file reduced rates on behalf of controlled common carrier members for open-rated commodities:

(A) At or above the minimum level set by the conference; or

(B) At or above the level set by a member of the conference that has not been determined by the Commission to be a controlled common carrier subject to section 9 of the Act, in the trade involved.

(n) Special or emergency rates, or rates conditioned upon an expiration date or other factor, shall be shown under the same commodity item, generic heading or class, in the same place in the tariff as the ordinarily applicable rates. (See Exhibit No. 4 to this part.)

(1) If only a portion of particular rates or other provisions will expire with a special date, a notation to that effect shall clearly be shown in connection with such items as indicated in Exhibit No. 4 to this part.

(2) Project rates may be placed in a special section of the tariff if the Table of Contents or Commodity Index contains a specific reference to "Project Rates."

(o) All rate pages shall be filed in the form and manner shown in Exhibit Nos. 4 and 5 to this part.

(p) The number of rate columns may vary as required to state rates to one or more ports, port groupings or port ranges. The width of all columns in the rate block section of tariff rate pages may vary as required. (See Exhibit No. 5 to this part.)

§ 580.7 Filing of service contracts and availability of essential terms.

(a) *Definitions.* The following definitions shall apply for purposes of this section:

(1) *Contract party* means a party signing a service contract as shipper, shippers' association, or ocean common carrier and any other named entity associated with such party entitled to receive or authorized to offer services under the contract, except that in the case of a shippers' association, individual members need not be named in the contract.

(2) *Geographic area* means the general location from which or to which cargo subject to a service contract will move in intermodal service.

(3) *Port range* means those ports in the countries of loading or unloading of the contract cargo that are regularly served by the contracting carrier or conference, as specified in the tariff applicable to the service in which the contract is to be employed, even if the contract itself contemplates use of but a single port within that range.

(4) *Service contract* means a contract between a shipper or a shippers' association and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo or freight revenue over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as, assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of nonperformance on the part of either party.

(5) *Shipper* means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(6) *Shippers' association* means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(b) *Contract filing requirements.*

(1) Except for contracts relating to bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, every ocean common carrier and conference that enters into a service contract with a shipper or shippers' association shall file with the Director, Bureau of Tariffs, as specified

in paragraph (e) of this section, a true and complete copy of each contract prior to its effective date.

(2) Service contracts involving the exempted commodities listed in paragraph (b)(1) of this section may be filed pursuant to this section at the option of the contract parties. Upon filing, such contracts will be subject to the same requirements as those contracts involving non-exempt commodities.

(3) Service contracts shall clearly state:

(i) The contract parties;

(ii) The essential terms, except that the origin and destination of cargo moving pursuant to the contract need not be stated in the form of "port ranges" or "geographic areas" but shall reflect the actual locations agreed to by the contract parties;

(iii) A unique service contract number bearing the prefix "SC";

(iv) The FMC number of the governing essential terms publication which contains the carrier's or conference's statement of essential terms;

(v) A specific reference to the essential terms number ("ET No. _____") in the governing publication which contains the summary of the essential terms of the contract as provided in paragraph (h) of this section; and

(vi) The shipment records which will be maintained to support the contract.

(c) *Confidentiality.*

(1) All service contracts filed with the Commission will, to the full extent permitted by law, be held in confidence.

(2) Amendments to non-essential terms of a service contract will be accorded similar confidential treatment.

(d) *Modification and termination of contracts.*

(1) The essential terms of a service contract cannot be modified during the duration of the contract.

(2) Service contracts may be terminated by mutual agreement of the parties.

(3) In the event of a contract termination as provided in paragraph (d)(2) of this section, if the minimum quantity required by the contract has not been met, the cargo previously carried under the contract must be rerated according to the otherwise applicable tariff provisions of the carrier or conference in effect at the time of such shipments, unless the contract itself provides an alternative procedure for dealing with such a situation.

(e) *Transmittal of service contracts.*

Service contracts are to be filed in single copy contained in double envelopes which contain no other material. The outer envelope is to be addressed to the Director, Bureau of Tariffs, Federal Maritime Commission, Washington, D.C. 20573. The inner envelope is to be sealed, contain only the executed contract(s) and shall state: "This Envelope Contains a Con-

fidential Service Contract." The top of each page of a filed service contract shall be stamped "Confidential."

(f) *Contract implementation, return and rejection.*

(1) Performance under a service contract may begin without prior Commission authorization, on the date the service contract and statement of essential terms are on file with the Commission.

(2) (i) Within 15 days of filing of the contract and statement of essential terms, the Commission may return to the contract parties a service contract or statement of essential terms that does not conform to the requirements of paragraph (b) or paragraph (g) of this section. The Commission shall provide the contract parties a written explanation of the reasons for such return. The contract parties shall have 15 days from the date of return to refile the contract or statement of essential terms.

(ii) Within 15 days of refiling, the Commission may reject a refiled contract or statement of essential terms that does not conform to the requirements of paragraph (b) or paragraph (g) of this section.

(3)(i) If a returned service contract or statement of essential terms is not refiled, performance under the service contract shall be unlawful after the 15-day refiling period has expired.

(ii) If refiled and subsequently rejected, performance under the service contract shall be unlawful after the contract parties receive notice of the rejection.

(4) If performance under the service contract becomes unlawful by operation of this paragraph, all services theretofore performed under the service contract shall be rerated in accordance with the otherwise applicable tariff provisions for such services.

(5) The minimum 30-day period of availability of essential terms required by paragraph (g) of this section shall be suspended upon return of a service contract or statement of essential terms and a new 30-day period shall commence upon refiling thereof.

(g) *Availability of essential terms.*

(1)(i) A concise statement of the essential terms of each service contract shall be filed with the Commission and made available to the general public in tariff format pursuant to the requirements of paragraph (h) of this section.

(ii) The essential terms of each service contract must be made available to all shippers or shippers' associations similarly situated under the same terms and conditions for a specified period of no less than 30 days from the date of filing of the concise statement of essential terms.

(2) The essential terms shall include, where applicable, the following:

(i) The origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;

(ii) The commodity or commodities involved;

(iii) The minimum quantity of cargo or freight revenue necessary to obtain the rate or rate schedule(s);

(iv) The contract rate, rates or rate schedule(s), including any additional or other charges (viz. surcharges; terminal handling charges, etc.) that apply; provisions specifying methods or retroactive rate adjustments based upon experienced costs; and any and all conditions and terms of service or operation or concessions which in any way affect such rates or charges;

(v) The term of the contract;

(vi) Carrier or conference service commitments;

(vii) Liquidated damages for nonperformance, if any, or where the volume requirement may not be met during the contract period in situations other than those described in paragraph (g)(2)(viii) of this section, the rate, charge, or rate basis which will be applied; and

(viii) A clear description of any circumstances which will permit:

(A) A reduction in the quantity of cargo or amount of revenues required under the contract;

(B) An extension of the contract term without any change in the contract rate or rate schedule;

(C) A discontinuance of the contract; or

(D) Any other deviation from the terms of the contract.

(h) *Form and filing of essential terms.*

(1) Each carrier or conference shall summarize the essential terms of service contracts it has executed in a governing publication on file with the Commission.

(2) (i) The form and manner requirements applicable to governing tariffs as set forth in this part shall apply to the essential terms publication.

(ii) Such publication shall include an alphabetical index of the commodities covered by the service contracts.

(3) All essential terms filings shall be printed in black on yellow paper.

(4) The essential terms of a service contract or contracts shall be identified with an essential terms number bearing the prefix "ET No." The "ET No." shall be located on the top of each page used to summarize the essential terms of a service contract or contracts.

(5) (i) The essential terms publication shall contain on its title page or in a rule of such publication reference to the carrier's or conference's tariff(s) of general applicability. The tariff of general applicability is the tariff which would apply in the absence of a service contract.

(ii) Every tariff of general applicability shall bear a reference to the FMC number of a carrier's or conference's governing essential terms publication.

(i) *Transmittal of essential terms publications.*

At the same time that a service contract is filed with the Commission, publications containing the essential terms of service contracts shall be transmitted to the Commission with an accompanying transmittal letter in an envelope which contains only matter relating to essential terms. The

envelope and the inside address on the transmittal letter are to be addressed to the "Director, Bureau of Tariffs, Federal Maritime Commission, Washington, D.C. 20573."

(j) *Recordkeeping.*

Every common carrier or conference shall maintain contract shipment records for a period of five years from the termination of each contract.

(k) *Submission of modifications.*

Any time a service contract is modified, terminated, or extended, a notice to that effect shall be filed with the Commission.

§ 580.8 Tariffs containing through rates for through transportation.

(a) *Definitions.* The following definitions shall apply for purposes of this section:

(1) *Through rate* means the single amount charged by a common carrier in connection with through transportation.

(2) *Through transportation* means continuous transportation between points of origin and destination, either or both of which lie beyond port terminal areas, for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port.

(b) *Filing requirements.* Every common carrier and conference subject to the Act, which establishes through rates for through transportation shall file tariffs which state all such rates and related charges, rules, regulations, privileges or facilities, granted or allowed. Through rates may be filed in separate tariff publications or as a part of a port-to-port tariff. Such tariffs shall be filed and maintained in the manner set out in the Act and in accordance with the rules of this part. Through rate tariffs shall be filed in the name of the common carrier or conference subject to the Act. Through rate tariffs shall be initially filed on thirty days' notice as provided by sections 8 and 9 of the Act, unless a shorter notice is permitted pursuant to special permission. Amendments to tariffs containing through rates which provide for the addition of new inland points may, however, become effective upon publication and filing. Such tariffs shall contain the following provisions:

(1) The title page shall identify the tariff as a "through rate" tariff and shall also provide a brief description of the modes of services covered by the tariff (e.g., rail/motor/ocean services) and the trade area covered by the tariff. The trade area shall be described on the title page by naming the countries to, from or between which the through rates apply and the port(s) or range(s) of ports via which through transportation will be performed.

(2) Rule No. 1 of each through rate tariff shall provide:

(i) A clear description of the points, regions, or ports to, from or between which the rates apply. Each point, region or port shall be described by

its commonly used geographic name. The utilization of U.S. postal ZIP codes is permitted; and

(ii) The name of the port or ports via which through shipments will be moved; or a clear description of the range or ranges of ports via which through shipments will be moved.

(3) A contract of affreightment clearly setting forth the responsibility for through transportation which is consistent with the holding out provided by the application of the rates and conditions of the tariff.

(c) *Multiple tariffs.* Common carriers and conferences which publish more than one through rate tariff from, to or between the same points, ports or regions, based on mode of service, description of commodities, etc., shall provide in Rule No. 1 of each respective tariff a cross-reference to the FMC number and description of the application of such other tariff(s).

§ 580.9 Terminal rules, charges and allowances; free time allowed at New York.

(a) Every tariff filed pursuant to this part shall state separately all terminal or other charges, privileges or facilities under the control of the common carrier or conference which are granted or allowed to shippers.

(b) Wherever a tariff includes charges for terminal services, canal tolls or additional charges not under the control of the common carrier or conference, which merely acts as a collection agent for the charges, and the agency making such charges to the common carrier increases the charges without notice to the common carrier or conference, such charges may be increased in the common carrier or conference tariff without being subject to the 30-day advance filing requirement of this part or separately stated on the bill of lading.

(c) Every tariff naming rates on import traffic shipped through the port of New York, or to a range of ports which includes New York, shall contain a rule in compliance with Part 525 of this chapter.

§ 580.10 Amendments to tariffs; rejection.

(a) *Tariff amendments.*

(1) For the purposes of this part, "amendments" means all changes in, additions to, or deletions from a tariff.

(2) Amendments which provide for new or initial rates, or amendments which provide for changes in rates, charges, rules or other provisions resulting in an increase in cost to the shipper, 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 pursuant to § 580.15.

(3) (i) Amendments which provide for changes in rates, charges, rules, regulations or other provisions resulting in a decrease in cost to the shipper, or amendments which result in no change in cost to the shipper, may become effective upon publication and filing, except that all changes to controlled common carrier tariffs shall not become effective earlier than 30 days from the date of filing unless special permission has been granted

by the Commission under § 580.15, or the change affects tariff matters which are the subject of a suspension proceeding, in which case § 580.11(g) shall apply.

(ii) Conferences may file on behalf of their controlled common carrier members lower independent-action rates on less than 30 days' notice, subject to the requirements of their basic agreements and subject to such rates being filed at or above the level set by a member of the conference that has not been determined by the Commission to be a controlled common carrier subject to section 9 of the Act, in the trade involved.

(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, if:

(i) The tariff contains a "cargo, n.o.s." or similar general cargo rate which would otherwise be applicable to the specific commodity;

(ii) The specific commodity rate is equal to or lower than the previously applicable general cargo rate; and

(iii) The common carrier is not a controlled common carrier which has not received special permission authorizing the amendment.

(5) An amendment which deletes a specific commodity and rate applicable thereto from a tariff, thereby resulting in the application of a higher "Cargo, n.o.s." or similar general cargo rate, is a rate increase and shall be published and filed to become effective not earlier than 30 days after the date of filing in the absence of special permission for an earlier effective date pursuant to § 580.15.

(6) Looseleaf tariffs shall be amended by reprinting the entire page upon which any modification is made. An amended tariff page shall be designated in the upper right-hand corner as a "revised page" in the manner illustrated by Exhibit No. 4 to this part. For example:

First revised page 1;
or
First revised page 21.

(7) (i) The revised page filed to accomplish a tariff amendment shall reprint the page to be replaced in its entirety, changing only the matter on the page which is modified. Changes in existing rates, charges, classifications, rules or other provisions accomplished by an amendment shall be indicated on the revised page by the following uniform symbols:

(R) To denote a reduction.

(A) To denote an increase.

(C) To denote changes in wording which result in neither an increase nor a decrease in charges.

(D) To denote a deletion.

(E) To denote an exception to a general change.

(N) To denote reissued matter.

(I) To denote new or initial matter.

(K) To denote a rate or charge that is filed by a controlled common carrier member of a conference under independent action.

(ii) An explanation of such symbols shall be set forth in the tariff as required by § 580.5(c)(7).

(8) Each revised tariff page shall cancel the previously issued page upon which a change is made. The previous page being cancelled shall be indicated immediately under the designation of the new revised page number as illustrated by Exhibit No. 4 to this part. For example:

First revised page 1 cancels original page 1;

or

First revised page 21 cancels fourth revised page 21.

All matter on a cancelled page which is not being changed shall be reissued on the revised page as it appeared on the page being cancelled.

(9) Each revised page shall, in the upper right-hand corner, state the effective date of the changes made on that page. Such effective date shall be subject to the requirements of sections 8 and 9 of the Act and of this section. Revised pages may also state the issue date.

(10) When a revised page cancelling a previous page deletes any matter contained in the previous page, the deletion shall be indicated by the symbol "(D)" and any other symbol under paragraph (a)(7)(i) of this section applicable to the effect of the deletion upon the common carrier's rates or charges.

(11) Every tariff amendment effective upon less than statutory notice pursuant to special permission granted by the Commission, shall show in connection with such change the notation required by § 580.15(f).

(12) Increased rates brought forward from a previously filed page prior to their effective date, shall be designated with the symbol "(N)" as "reissued" and state their original effective date.

(13) If, on account of expansion of matter of any page, it becomes necessary to add an additional page in order to accommodate said new matter, such additional page (except when it follows the final page) shall be given the same number as the previous page with a letter suffix unless all subsequent pages are reissued and renumbered. For example:

Original Page 4–A, Original Page 4–B, etc.

If it is necessary to change matter on Original Page 4–A it may be done by issuing First Revised Page 4–A which shall indicate the cancellation of Original Page 4–A.

(14) When a revised page deletes rates, rules or other provisions previously published on the page which it cancels and such rates, rules or provisions are published on a different page, the revised page shall make a specific reference to the page on which the rates, rules or provisions will be found and the page to which reference is made shall contain

the following notation in connection with such rates, rules or other provisions:

> For (here insert rates, rules or other provisions in question) in effect prior to the effective date hereof see page _____.

Subsequently revised pages of the same number shall omit this notation insofar as this particular tariff matter is concerned.

(b) [Reserved]

(c) [Reserved]

(d) *Rejection of tariff amendments or other tariff publications.*

(1) Any amendment (or other tariff publication) submitted for filing which fails in any respect to conform with the Act, or with the provisions of this part, is subject to rejection or partial rejection. When tariff matter is rejected, either in whole or in part, the Commission, acting through a designated official, will inform the person tendering the material for filing of the rejection by telegram, cablegram or letter.

(2) Upon receipt of notice of a rejection, the filing party shall immediately remove such rejected material from its effective tariff and immediately notify all subscribers to affected tariffs that the rejected material is void.

(3) The number assigned to an amendment (or other tariff publication) which has been rejected may not be used again. The rejected material may not be referred to any subsequent amendment (or other tariff publication) in any manner whatsoever, except that a notation shall appear at the bottom of any new tariff matter issued to replace rejected matter which reads substantially as follows:

> Issued in lieu of _____ Page No. _____ rejected by the Federal Maritime Commission.

§ 580.11 Supplements to tariffs.

(a) Supplements to tariffs may be filed only to accomplish the following:

(1) To cancel a tariff in whole or in part.

(2) To provide for a general rate decrease applicable to all, or substantially all, the commodities listed in a tariff.

(3) To provide for a general rate increase applicable to all, or substantially all, the commodities listed in a tariff.

(4) To indicate seasonal discontinuance, temporary suspension or reinstitution of service covered by a tariff.

(5) To provide for change in name of the publishing common carrier or its tariff agent.

(6) To indicate controlled common carrier rates which have been suspended by the Commission.

(b) Supplements filed pursuant to paragraphs (a)(2) and (a)(3) of this section which do not change the rates applicable to all listed commodities shall bear one of the following notations:

(1) The general rate increase/decrease provided for on this page applies to all commodities stated herein except the following (here list the excepted commodities or commodity item number); or
(2) The general rate increase/decrease provided for on this page applies to all commodities stated herein except those noted on page _____.

(c) General rate change supplements (paragraphs (a)(2) and (a)(3) of this section) shall bear an expiration date that coincides with the date the changes will be reflected in the rates and charges in the tariff. Such date shall not be more than 90 days after the date of filing. No more than one such supplement may be in effect at any time.

(d) Additional supplements to other than looseleaf tariffs shall be filed as provided by any special permission authority granted by the Commission pursuant to §§ 580.4(d) and 580.15.

(e) Supplements shall be numbered consecutively on the upper right-hand corner of each page. For example:

Supplement No. 1 to FMC Tariff No. _____

(f) General rate increase/decrease supplements filed by controlled common carriers are subject to the 30-day notice requirements of § 580.10, unless special permission has been granted pursuant to § 580.15 or the change affects tariff matter which is the subject of a suspension proceeding, in which case § 580.11(g) shall apply.

(g) *Treatment of suspended tariff matter (controlled common carriers).*

(1) Tariff matter filed by a controlled common carrier may be suspended at any time before its effective date. Tariff matter already in effect may be suspended upon issuance of a show cause order on not less than 60 days' notice to the common carrier. In either instance, the suspension period shall not exceed 180 days.

(2) Upon receipt of a suspension order the controlled common carrier shall immediately file a supplement which:

(i) Contains the specific rates, charges, classifications or rules suspended;

(ii) Cites the date upon which the suspension becomes effective; and

(iii) States that all use and application of the suspended tariff matter is deferred for the period specified in the suspension order.

(3) Controlled common carrier tariff matter filed to become effective during a suspension period in lieu of the suspended matter may become effective immediately upon filing or upon the effective date of the suspension, whichever is later. In determining whether to reject replacement rates, the Commission will consider whether such rates result in total charges (e.g., rate plus applicable surcharges) that are lower than the lowest comparable charges effective for a U.S.-flag or reciprocal-flag common carrier serving the same trade.

(i) The filing controlled common carrier shall identify the specific U.S.-flag or reciprocal-flag common carrier's rates, charges, classifications or rules resulting in total charges which equal or are lower than its own.

(ii) All replacement filings shall state on the appropriate tariff page the following:

Filed pursuant to 46 U.S.C. app. 1708(d) and 46 CFR 580.11(g).

§ 580.12 Time/Volume Rates.

(a) *Definition.* "Time/volume rate", for the purposes of this section, means a rate published in a tariff which is conditional upon receipt of a specified aggregate volume of cargo or aggregate freight revenue over a specified period of time.

(b) *General requirements.*

(1) Time/volume rates may be offered by common carriers or conferences. All rates, charges, classifications, rules and practices concerning time/volume rates must be published in an applicable tariff on file with the Commission. The time/volume rate offering must identify the shipment records which will be maintained to support the rate.

(2) Once a time/volume rate is accepted by one shipper, it shall remain in effect for the time specified, without amendment.

(3) Any shipper utilizing a time/volume rate must give notice to the offering carrier or conference of its intention to use such a rate prior to tendering any shipments under such an arrangement. Notice may be accomplished by any effective method deemed appropriate by the offering carrier or conference and set forth in the applicable tariff.

(4) Shipper notices and shipment records supporting a time/volume rate shall be maintained by any offering carrier or conference for at least five years after any shipper's use of a time/volume rate has ended.

(c) *Continuation of contracts.*

Any contract with respect to a time/volume rate entered into prior to June 18, 1984, pursuant to former § 536.7, and in effect on that date, shall be permitted to remain in effect for the duration of the term specified in the contract or until June 17, 1985, whichever occurs first.

§ 580.13 Governing tariffs.

(a) If it is undesirable or impractical to include tariff rules or bills of lading/contracts of affreightment in a rate tariff as required by paragraphs (c)(10) and (d)(8) of § 580.5, such materials may be separately published and filed as a "rules tariff" and/or "bill of lading tariff." Classifications of freight and similar tariff matter may also be published and filed as separate "governing tariffs." Rate tariffs affected by such governing publications shall be made expressly subject thereto by the inclusion of a reference in substantially the following form:

Except as otherwise provided, this tariff is governed by (insert type of tariff) FMC No. _____.

(b) No rate tariff shall refer to or be governed by another rate tariff.

(c) Tariffs naming rates for the transportation of explosives, inflammable or corrosive material, or other dangerous articles, shall contain (as required by § 580.5(d)(16)) the rules and regulations issued by the common carrier or conference governing the transportation of such articles or reference to a separate publication, commercial or governmental, where such regulations are available to the general public.

§ 580.14 Transfer of operations, transfer of control, changes in common carrier name and changes in conference membership.

(a) Whenever a common carrier with an individual tariff on file changes its name or transfers operating control to another person, the person who will thereafter operate the common carrier service shall make appropriate tariff filings to indicate the change in name. Subsequent amendments to such tariffs shall be in the name of the new common carrier.

(b) Whenever the name of a common carrier which participates in a conference is changed, the conference shall file an appropriate amendment to its tariff indicating the participating common carrier's new name.

(c) Whenever the operation, control or ownership of a common carrier is transferred resulting in a majority portion of the interest of that common carrier being owned or controlled in any manner by a government under whose registry the vessels of the common carrier are operated, the common carrier shall immediately notify the Commission in writing of the details of the change.

§ 580.15 Applications for special permission.

(a)(1) Section 8(d) of the Act authorizes the Commission, in its discretion and for good cause shown, to permit increases in rates or the issuance of new or initial rates on less than statutory notice. Section 9(c) of the Act authorizes the Commission to permit a controlled common carrier's rates, charges, classifications, rules or regulations to become effective on less than 30 day's notice. The Commission may also in its discretion and for good cause shown, permit departures from the requirements of this part. The Commission will grant such permission only in cases where merit is demonstrated.

(2) Typographical and/or clerical errors constitute good cause for the exercise of special permission authority but every application based thereon must plainly specify the error and present clear evidence of its existence, together with a full statement of the attending circumstances, and shall be filed with reasonable promptness after issuance of the effective tariff publication.

(b) Application for special permission to establish rate increases or decreases on less than statutory notice or for waiver of the provisions of this part, shall be made by the common carrier, conference or agent that holds authorization to file the tariff publication. Such applications shall be accompanied by a filing fee of $90.

(c) Application for special permission shall be made only by cable, telegram or letter except that in emergency situations, application may be made by telephone if the telephone communication is promptly followed by a cable, telex or letter and the filing fee of $90.

(d)(1) If the authority granted by special permission is used, it must be used in its entirety and in the manner set forth by the Commission.

(2) If the exact authority granted by the special permission is not used, and more, less or different authority is desired, a new application complying with the requirements of this part in all respects and referring to the previous special permission must be filed.

(e) Applications for special permission shall contain the following information:

(1) The name of the conference or carrier.

(2) The FMC number and description of the specific tariff involved.

(3) The rate, commodity, rules, etc. (related to the application), and the special circumstances which the applicant believes constitute good cause to depart from the requirements of this part or to warrant a tariff change upon less than the statutory notice period.

(f) Every tariff or tariff amendment filed pursuant to special permission granted by the Commission shall contain the following notation:

> Issued under authority of Federal Maritime Commission Special Permission No. _____.

The filing common carrier(s) shall fill in the blank with the special permission letter and number assigned by the Commission. For example: No. F–1212 or No. CC–1212.

§ 580.16 Loyalty contracts.

(a) A sample of any loyalty contract, as defined in this part, must be filed in the applicable tariff together with rules which set forth the scope and application of the contract system.

(b) The use of any sample loyalty contract and applicable rules filed for inclusion in a tariff under paragraph (a) of this section shall be presumed to be "in conformity with the antitrust laws," within the meaning of section 10(b)(9) of the Act, if such contract makes reference to a Business Review Letter, issued pursuant to 28 CFR § 50.6, indicating no objection to the use of that contract.

§ 580.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the

Director of the Office of Management and Budget [OMB] for each agency information collection requirement:

Section	Current OMB Control No.
580.3	3072–0009
580.7(f)	3072–0044
580.8 through 580.15	3072–0009

EXHIBIT NO. 1 TO PART 580

Title Page (Front) Format
(See § 580.5(a))

ORIGINAL TITLE PAGE
TO
FMC NO. 1

EFFECTIVE DATE: JANUARY 1, 1985

CARLETON STEAMSHIP LINE

A VESSEL OPERATING COMMON CARRIER

FREIGHT TARIFF NO. I

NAMING
CLASS AND COMMODITY RATES
AND
RULES AND REGULATIONS

GOVERNING THE TRANSPORTATION OF
GENERAL COMMODITIES
VIA
DIRECT/TRANSSHIPMENT SERVICE
(SEE PAGE 8)

FROM
U. S. PACIFIC COAST PORTS
(AS SPECIFIED IN RULE 1)
TO
PORTS IN JAPAN AND KOREA
(AS SPECIFIED IN RULE 1)

FOR REFERENCE TO GOVERNING PUBLICATIONS, SEE PAGE 11.

FOR LIST OF PARTICIPATING COMMON CARRIERS, SEE PAGE 4.

SUBSCRIPTION PRICE: U. S. $200.00 PER CALENDAR YEAR OR FRACTION THEREOF, INCLUDING ALL SUPPLEMENTARY MATTER AND REVISIONS THERETO. SEE RULE NO. 23.

ISSUED BY:

CARLETON B. JOHANSEN
ISSUING OFFICER
6402 BRYAN STREET
BUCKLER, CALIFORNIA 94199

EXHIBIT NO. 2 TO PART 580

Title Page (Reverse) Format
(See §§ 580.4(e) and 580.5(c)(2))

ANTI-REBATING POLICY

Carleton Steamship Line has a policy against the payment of any rebate by the company or any officer, employee, or agent thereof, which payment would be unlawful under the United States Shipping Act of 1984. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act of 1984 and the regulations of the Commission set forth in 46 CFR 582.

EXHIBIT NO. 3 TO PART 580

Class Tariff or Class and Commodity Tariff Index
(See § 580.5(c)(6))

CARLETON STEAMSHIP LINE FREIGHT TARIFF NO. 1	FMC NO.	ORIG/REV	PAGE
	FMC NO. 1	1st Rev.	28
		CANCELS	PAGE
		Original	28
FROM: U. S. PACIFIC COAST PORTS		EFFECTIVE DATE:	
TO : PORTS IN JAPAN AND KOREA		January 3, 1985	

COMMODITY AND/OR CLASS RATE INDEX

Commodity	Class or Item Number	Commodity	Class or Item Number
Abrasives.....	5	Implements, Agricultural....	1000
Acids.....	1	Iron or steel articles, viz:	
Agricultural Implements...	1000	Cable, rope and strand.....	2400
		Pipes and tubes.....	100
		Structural, N.O.S.....	85
		Washers.....	1315

NOTE: Where a tariff publishes both class and commodity rates, different numerical series must be used to differentiate between item numbers and class rating numbers. For example, as shown above, the class ratings are numbered from 1 to 100 and the commodity item numbers series begin with 1000.

EXHIBIT NO. 4 TO PART 580

Single Level of Rates, Packed/Unpacked Rates,
Special Rates, Emergency Rates and Valuation Rates
(See §§ 580.4(e)(2); 580.5(b); 580.6(d); 580.6(m); 580.6(o) and 580.10(a))

	FMC NO.	ORIG/REV	PAGE
CARLETON STEAMSHIP LINE FREIGHT TARIFF NO. 1	FMC NO. 1	2nd Rev.	33
		CANCELS	PAGE
FROM: U. S. PACIFIC COAST PORTS TO : PORTS IN JAPAN AND KOREA		1st Rev.	33
		EFFECTIVE DATE:	
Except as otherwise provided herein, rates apply per ton of 1000 Kilos (W) or 1 Cubic Metre (M), whichever produces the greater revenue.		January 6, 1985	

Commodity Description and Packaging	Rate Basis	Rates in U.S. Dollars: Japan	Rates in U.S. Dollars: Korea	Item No.
Fans, electric	W/M	76.00	—	3100-00
Fish, frozen, in bulk	W	230.00	237.00	3110-90
Iron and steel:				3600-10
Turnbuckles	W	29.50	32.00	
Emergency rate effective 1-15-85 to 3-15-85(R)1/	W	26.00	28.00	
Lime, hydrated, packed	W	29.25	34.75	4125-40
Medicines, patent preparations:				5000-10
Values up to $200 per 40 CFT	M	34.00	37.00	
Values exceeding $200 but not exceeding $500 per 40 CFT	M	52.75	58.00	
Values exceeding $500 per 40 CFT	M	67.75	74.00	
Tractors:				7127-05
Unpacked	W/M	145.00	154.00	
Packed	W/M	140.00	149.00	
Zinc, viz:				9259-00
Bars, circles, ingots, pigs, plates, sheets and slabs	2240 lbs or 40 CFT	—	49.00	
Ingots: Special rate effective 1-15-85 expiring 3-15-85(R)1/	2240 lbs	—	47.00	
Ingots: Special rate effective 3-15-85 expiring 6-15-85(R)1/	2240 lbs	—	48.00	

1/Symbols denoting a change, as set forth in § 580.10(a)(7), must be shown in the commodity description column either to the left or right of the commodity.
NOTE: All tariff pages, except the title page and reverse side of the title page, shall be filed in the form and manner as prescribed above the rate block on this page.

EXHIBIT NO. 5 TO PART 580

Class Rate Tariff or Class Rate
Section of Class and Commodity Tariff
(See §§ 580.6(o) and 580.6(p))

CARLETON STEAMSHIP LINE FREIGHT TARIFF NO. 1	FMC NO.	ORIG/REV	PAGE
		ORIGINAL	35
	FMC NO. 1	CANCELS	PAGE
FROM: U. S. PACIFIC COAST PORTS			
TO : PORTS IN JAPAN AND KOREA		EFFECTIVE DATE:	
CLASS RATES		January 1, 1985	

Except as otherwise provided, rates apply per ton of 2240 lbs. or 40 CFT whichever produces the greater revenue.	CLASS			
PORTS TO WHICH RATES APPLY	5	10	15	20
Ports A, B, C	$50.00	$82.50	$95.00	$102.00
Ports D, E, F, G	47.00	56.30	84.00	90.00
Ports H, I	37.75	53.00	66.00	78.00

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 585 AND 587]

DOCKET NO. 84–22 (FOR PART 587)

ACTIONS TO ADDRESS CONDITIONS UNFAVORABLE TO SHIPPING IN THE FOREIGN TRADE OF THE UNITED STATES AND CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS

November 9, 1984

ACTION: Final Rules.

SUMMARY: These Final Rules revise and supersede the Commission's regulations in Subchapter D implementing section 19 of the Merchant Marine Act, 1920 and the Interim Rule implementing section 13(b)(5) of the Shipping Act of 1984 which became effective on June 18, 1984. The revision of Part 585 implementing section 19 of the 1920 Act merely makes technical corrections. The revisions of Part 587 implementing the 1984 Act relate to, among other items, definitions, factors which would indicate conditions unduly impairing access of U.S.-flag vessels in cross trades, petitions for relief, proceedings, decisions, sanctions and effective date of decisions.

DATES: Effective December 15, 1984.

SUPPLEMENTARY INFORMATION:

I. *REGULATIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE FOREIGN TRADE OF THE UNITED STATES*

In the Commission's program to review and republish all of its regulations since the passage of the Shipping Act of 1984 (the Act) (46 U.S.C. app. 1701), certain technical and style changes appeared to be required for Part 585, "*Regulations to Adjust or Meet Conditions Unfavorable to Shipping in the Foreign Trade of the United States*" (formerly 46 CFR Part 506). These regulations implement section 19(1)(b) of the Merchant Marine Act, 1920 (46 U.S.C. app. 876(1)(b)). Previously, a Final Rule on Part 585 was published in the *Federal Register* at 49 FR 20816 (May 17, 1984) but further changes were deemed necessary.

The non-substantive technical and style changes to Part 585 reflect revisions in nomenclature and Commission organization, correction of typographical errors and removal of superfluous verbiage. Outdated and obsolete provisions have also been deleted. Also changed or deleted, where feasible,

are citations to other laws required by recodifications and other statutory changes; references to the obsolete General Order system; "Provided, howevers"; and gender specific terms. There are no substantive changes to Part 585.

II. *ACTIONS TO ADDRESS CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS*

The Shipping Act of 1984 was enacted on March 20, 1984, with an effective date of June 18, 1984. Section 13(b)(5) (46 U.S.C. app. 1712(b)(5)) of the Act provides that:

> If, after notice and hearing, the Commission finds that the action of a common carrier, acting alone or in concert with any person, or a foreign government has unduly impaired access of a vessel documented under the laws of the United States to ocean trade between foreign ports, the Commission shall take action that it finds appropriate, including the imposition of any of the penalties authorized under paragraphs (1), (2), and (3) of this subsection [13(b)].[1]

On May 16, 1984, the Commission published in the *Federal Register* (49 FR 20654, corrected 49 FR 21931, May 24, 1984) (26 F.M.C. 649), an Interim Rule implementing section 13(b)(5) of the Act. The Commission provided ninety days for comments on the Interim Rule. Comments were received from: (1) Parties to FMC Agreement No. 10050 (Agreement No. 10050); (2) American President Lines, Ltd.; (3) Chilean Line, Inc.; (4) China Ocean Shipping Company (COSCO); (5) Council of European and Japanese National Shipowners' Associations (CENSA); (6) Consultative Shipping Group (CSG)[2] (7) Delta Steamship Lines, Inc. (Delta); (8) Government of Japan; (9) National Maritime Council (NMC); (10) Sea-Land Service, Inc.; (11) United States Department of State; (12) Transportes Navieros Ecuatorianos (Transnave); and (13) United States Department of Transportation (DOT). After consideration of these comments, the Commission is issuing this Final Rule to supersede the Interim Rule.

[1] These penalties include suspension of the tariffs of a common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member, and the imposition of a civil penalty of not more than $50,000 per shipment for the acceptance or handling of cargo for carriage under a tariff that has been suspended or after the common carrier's right to utilize that tariff has been suspended. *See* 46 U.S.C. app. 1712(b)91)(3).

[2] The CSG includes the governments of Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Italy, Japan, Netherlands, Norway, Spain, Sweden and the United Kingdom.

DISCUSSION OF COMMENTS

Section 587.1. Purpose.

Section 587.1(a)

Agreement No. 10050 proposes definitions that it believes will clarify three terms: "U.S.-flag vessel," "U.S.-flag carrier," and "ocean trade between foreign ports."

"U.S.-flag vessel" is defined in the Interim Rule as "a vessel documented under the laws of the United States". Agreement No. 10050 takes the position that, while this definition is technically correct, it should be amended to make clear that the term includes vessels of all types, whether liner, bulk, tramp or other category as recognized in section 587.39(a). The Commission agrees with this clarification and the Final Rule is being revised accordingly.

The suggested change clarifies the definition of a U.S.-flag vessel in the Final Rule. This definition is supported by the legislative history of the Act. Both the House and Senate Reports point out that section 13(b)(5) "is broad enough to permit retaliation against liner operators in U.S. trades for events occurring in foreign bulk trades."[3] As noted in the Reports, section 13(b)(5) supersedes section 14(a) of the Shipping Act, 1916. Congress, however, did not use the language of section 14(a) which limited relief to "a common carrier by water which is a citizen of the United States . . ." Instead, in section 13(b)(5) reference is made to the much broader category of vessels documented under the laws of the United States. For reasons stated above, we believe relief under section 13(b)(5) is intended to cover the types of U.S.-flag vessels mentioned in the Final Rule.

"U.S.-flag carrier" is defined in the Interim Rule as an "owner or operator of a U.S.-flag vessel." Agreement No. 10050 suggests that, in light of modern service freight systems, including intermodal, feeder, relay and other connecting operations, the definition be expanded so that relief under section 13(b)(5) is not limited to all-water or exclusively U.S.-flag vessel operations. The Commission has not adopted this suggestion because the Act only protects "vessels documented under the laws of the United States". The suggested changes would go beyond the scope of the Act.

In the area of intermodal transport, section 587.2(d) makes clear that relief is offered to U.S.-flag carriers in instances where a government or commercial practice results in, or may result in, unequal or unfair opportunity for U.S.-flag vessel access to port or intermodal facilities or services related to the carriage of cargo inland to or from ports in a cross trade. It is not necessary, therefore, to revise the definition of a U.S.-flag carrier to accomplish this purpose.

The phrase "ocean trade between foreign ports" was not defined in the Interim Rule. However, in the "Supplementary Information" accom-

[3] *See* H.R. Rep. No. 53, 98th Cong., 1st Sess. 22–23; S. Rep. No. 3, 98th Cong., 1st Sess. 38 (1983).

panying the Interim Rule, it was pointed out that the phrase "ocean trade between foreign ports," includes intermodal movements. Agreement No. 10050 suggests that the phrase "ocean trade between foreign ports" be defined as "cargo moving entirely or in part by ocean carriage between ports and/or points in foreign countries." The Commission agrees that the phrase should be explained in the text of the Final Rule and has done so in section 587.1(a)(1) by inserting the words, "which includes intermodal movements," after "ocean trade between foreign ports."

CENSA notes that section 587.1(a) of the Interim Rule refers to only one of the purposes of the Act, which is to encourage the development of the U.S.-flag liner fleet (46 U.S.C. app. 1701). CENSA suggests that any action taken by the Commission must balance all of the Act's "purposes," including the other two which are: (1) to establish a non-discriminatory regulatory process; and (2) to provide an efficient and economic transportation system insofar as possible, in harmony with, and responsive to international shipping practices.

Section 13(b)(5) protects U.S.-flag vessel access to cross trades, thus encouraging the development of the U.S.-flag liner fleet. To the extent that the other purposes of the Act are pertinent in any particular section 13(b)(5) matter, they will be taken into consideration.

Sections 587.1 (b) and (c)

Agreement No. 10050 suggests that sections 587.1 (b) and (c) be strengthened to provide relief for *prospective* harm. Delta suggests changes in section 587.1(c) to authorize Commission action upon a finding that a U.S.-flag carrier will incur "imminent" harm in the trade. Transnave objects to any imposition of sanctions for prospective harm and suggests that paragraph (c) be changed to allow Commission action, but no punitive sanctions until actual harm is shown.

It is the Commission's intention, as pointed out in the Supplementary Information accompanying the Interim Rule, that Commission flexibility to act swiftly when harm to a U.S.-flag carrier has been demonstrated or is imminent be preserved. In order to make this point clear, paragraphs (b) and (c) of section 587.1 of the Interim Rule are being amended to indicate that Commission action may be taken when undue impairment is "imminent."

On the other hand, we appreciate Transnave's concern with respect to remedial versus punitive measures that may be taken by the Commission on the basis of prospective harm. Should the Commission find that the adverse practice or activity from which relief is sought has not yet occurred, but that punitive sanctions are warranted when it does occur, such sanctions will be made effective concurrently with the actual implementation of the practice or activity threatening undue impairment of access. Section 587.7(c) of the Final Rule now so provides.

Delta points out that section 587.1(c) would appear to limit conditions unduly impairing the access of a U.S.-flag carrier to those where the carrier is unable to enter the trade or where actual participation is being eroded for reasons other than its commercial ability or competitiveness. Delta, therefore, suggests that this provision be expanded to enable the Commission to find impairment of access when a U.S.-flag carrier is prevented from *increasing* its participation in a cross trade for reasons other than its competitive ability.

The Commission agrees that the term "eroded" could be interpreted to limit the Commission's ability to find the expansion of a U.S.-flag carrier's participation in a trade may have been unfairly restricted. The Interim Rule is, therefore, being amended to clarify this point by substituting the term "restricted" for "eroded."

Agreement No. 10050 and Delta recommend the deletion of the cautionary language in section 587.1(c) of the Interim Rule, which provides that section 13(b)(5) procedures should not be used as an instrument for the harassment of foreign-flag carriers operating in the U.S. foreign trade. These commenters believe that adequate safeguards against the filing of frivolous petitions are elsewhere provided for in the Interim Rule. CENSA, however, favors retention of the cautionary language.

The Commission agrees that the Rule otherwise provides ample safeguards against potential harassment. Section 587.3 allows the Commission to reject frivolous or deficient petitions and requires petitions for relief to be supported by affidavits and other supporting documents. Given these safeguards, the cautionary language in section 587.1(c) would appear unnecessary and is, therefore, deleted. This deletion, however, does not reflect a change in Commission policy. The Commission will carefully review section 13(b)(5) petitions in order to ensure that the procedures of Part 587 are not abused.

CENSA suggests that, when the Commission evaluates the operational ability of a carrier to offer a service, it consider recent U.S./CSG discussions on the criteria which such a carrier should meet. CENSA goes on to note that the specific criteria set out in the Interim Rule have been overtaken by developments in those discussions.

The Commission is aware of and closely follows the U.S./CSG discussions, which have centered on reaching an agreement regarding reciprocal competitive access for U.S. and CSG vessels to U.S. and CSG trades with developing nations. These discussions are ongoing and no agreement has been concluded between the United States Government and the CSG Governments. It would, therefore, be premature to even consider formalizing, in the Final Rule, the policies still under discussion.

Section 587.1(c) of the Interim Rule provided that the condition of unduly impaired access would be found only where a U.S.-flag carrier is "fit, willing and able" to enter a trade in which its access is being unduly impaired. Upon further consideration, the Commission does not believe

that U.S.-flag carriers should be required to meet a rigid "fit, willing and able" standard with regard to foreign-to-foreign trades when foreign-flag carriers have free and unrestricted access to U.S. trades. Therefore, the term "fit, willing and able" has been deleted from the Final Rule and in its place is substituted the term "commercially able." The "commercially able" standard will still allow the Commission to screen out a frivolous petition without imposing an overly restrictive standard on U.S.-flag carriers.

Section 587.1(d)

Section 587.1(d) provides that when examining conditions in a trade between foreign ports, and considering appropriate action, the Commission will give due regard to U.S. maritime policy and U.S. Government shipping arrangements with other nations, as well as the degree of reciprocal access afforded in U.S. foreign trades to the carriers of the countries against whom action is requested.

CENSA and the CSG suggest that the Commission also give due regard to the U.S./CSG discussions, particularly on the issue of restrictive commercial practices and derogations from reciprocal competitive access. CENSA urges that complaints received by the Commission concerning restrictive commercial practices be first taken up at the diplomatic level with the governments of the carriers concerned. The CSG believes that the Commission should make clear that it would normally look to the CSG Governments to remedy any restrictive commercial practices in their trades. In addition, the CSG notes that the Commission should avoid any threat to derogations agreed upon in the U.S./CSG discussions. These derogations include certain government and commercial agreements which in some way restrict competitive access but were in effect prior to the start of the ongoing U.S./CSG discussions.

As discussed in connection with section 587.1(c) above, an agreement between the U.S. and CSG has not yet been accepted by either party and, therefore, cannot be considered by the Commission for the purposes of the Final Rule. In appropriate circumstances the Commission will, under section 587.6 of the Final Rule, request that the Secretary of State seek resolution of restrictive practices through diplomatic channels.

Section 587.2. Factors indicating conditions unduly impairing access.

This section provides various examples of factors which would be deemed to indicate conditions unduly impairing access of a U.S.-flag vessel to cross trades. Numerous comments addressed various portions of this section. DOT is generally concerned that certain of the listed practices of ocean carriers or foreign governments might be considered as *per se* impairment of access of U.S.-flag vessels to a cross trade. Specifically mentioned is section 587.2(c) which cites certain commercial activities, e.g. closed conferences employing deferred rebates, as indicating conditions unduly

impairing access. The discussion below with respect to section 587.2(c) should allay any concern that closed conferences employing deferred rebates would be treated by the Commission as *per se* violations of section 13(b)(5).

Delta suggests that this section be expanded to list additional factors indicating conditions of impaired access, including: (1) the existence of foreign intergovernmental agreements; (2) discriminatory fines, taxes or other financial penalties levied on cargo, shippers and consignees when using U.S.-flag vessels; and (3) discriminatory financial benefits granted to shippers or consignees when using other than U.S.-flag vessels.

The first factor suggested by Delta, i.e., foreign intergovernmental agreements, is too broad and indefinite to be included in this section. However, to the extent that an intergovernmental agreement reserved substantial amounts of cargo or otherwise restricted access to cargo, it could be a factor indicating unduly impaired access. Such cargo reservation arrangements are covered in section 587.2(b).

Fines (fees) for those employing U.S.-flag vessels or benefits for those not doing so are factors which the Commission would consider as unduly impairing access. Accordingly, section 587.2(a) is being so amended.

Section 587.2(a)

Section 587.2(a) states that the imposition upon U.S.-flag vessels of fees, charges, requirements, or restrictions different from those imposed on other vessels, or which preclude or tend to preclude U.S.-flag vessels from competing in the trade on the same basis as any other vessel, is a factor which may indicate unduly impaired access.

Agreement No. 10050 notes that section 587.2(a) of the Interim Rule does not make specific references to "national-flag" operators. Agreement No. 10050 is concerned that this omission might be read as an unintended limitation on the scope of this section especially in view of the express reference to national-flag vessels in section 587.2(b). Such a limitation on the scope of section 587.2(a) was not intended. Section 587.2(a) is, therefore, being clarified by amending the phrase "from those imposed on other vessels" to read "from those imposed on national-flag or other vessels" in the Final Rule. This is not to say that imposition of different restrictions on national and non-national carriers results in a *per se* finding of conditions unduly impairing the access of U.S.-flag vessels. The United States Government itself makes a distinction between U.S.-flag carriers and other carriers under its various cargo preference statutes. The Commission will determine whether the alleged restrictions are unfair or unreasonable after consideration of all the facts relevant to each case.

COSCO reads sections 587.2 (a) and (d) as requiring that U.S.-flag vessels receive not merely the same treatment as other cross-trading vessels, but instead, treatment as favorable as is accorded vessels flying the flag of the bilateral trading partners. COSCO believes that the effect of these sections is to require foreign governments to give U.S.-flag vessels most

favored nation (MFN) treatment.[4] COSCO asserts that the United States Government does not accord MFN treatment to COSCO vessels and concludes that these sections are contrary to principles of equality and mutual benefit.

As stated above, the Commission is charged by the Act with determining whether alleged restrictions are unfair or unreasonable to U.S.-flag vessel access. The Commission will make such a determination after consideration of all facts relevant to each case. Facts that the Commission would consider would include the treatment of national-flag and other vessels in U.S. cross trades, as well as the degree of reciprocal access afforded in U.S. foreign trades to the carriers of the countries against whom the Commission action is contemplated.

Agreement No. 10050 suggests that discriminatory burdens applied to intermodal and connecting services should be mentioned in section 587.2(a). We do not believe this change is necessary. As previously discussed, section 587.2(d) should adequately address the concerns regarding intermodal restrictions expressed by Agreement No. 10050.

Section 587.2(b)

Section 587.2(b) includes, as a factor indicating undue impairment, the "reservation" of a substantial portion of the total cargo in the trade to national-flag or other vessels which results in failure to provide reasonable competitive access to cargoes by U.S.-flag vessels. CENSA and the CSG suggest that this provision be clarified to indicate that it does not apply to commercial cargo-sharing arrangements. Agreement No. 10050 urges that it be strengthened to state that the United States will oppose cargo-sharing schemes and that 40/40/20 and other restrictive devices may be met by similar restrictions.

Use of the word "reservation" in section 587.2(b) refers to government reservation laws. Only governments can reserve cargoes to carriers. Commercial pools may allocate the commercial cargo captured by its members but these are cargoes for which they compete. Section 587.2(b) would, however, cover the situation where a commercial cargo-sharing agreement is government-influenced, or a conference pool or any other conference practice operates in a predatory fashion, such that it is unduly impairing the access of a U.S.-flag carrier in a cross trade.

Section 587.2(c)

The Interim Rule provides that the use of predatory practices, including, but not limited to, closed conferences employing fighting ships or deferred rebates, is a factor which may unduly impair the access of a U.S.-flag vessel to cross trades. Although the wording of this paragraph follows

[4] In these circumstances MFN treatment would generally require that a nation give U.S.-flag carriers treatment, e.g. regarding port call notice, fees, etc., no less favorable than the treatment accorded that nation's most favored trading partner.

the language used in both the House and Senate Reports,[5] which listed "closed conferences employing fighting ships or deferred rebates" as practices which could have the effect of unduly impairing the access of U.S.-flag vessels to trade between foreign ports, several commenters objected to its inclusion in the Interim Rule.

DOT, Department of State, CENSA, CSG and COSCO all suggest that specific references to closed conferences employing deferred rebates be deleted as a factor indicating unduly impaired access. It is pointed out that these practices are not unlawful in some foreign trades. As stated above, DOT believes that reference to these practices creates the impression that they may be considered as *per se* violations of section 13(b)(5).

Delta, on the other hand, submits that "closed conferences employing . . . deferred rebates," is one of the most effective devices used in foreign-to-foreign trades for closing a trade to outsiders and the fact that this practice is not considered predatory by many of our trading partners is irrelevant. Delta maintains that while the Commission need not impose U.S. open-conference policy on foreign-to-foreign trades to secure reasonable access to those trades for U.S. vessels, it should consider that policy in determining whether conditions exist which unduly impair the access of a U.S.-flag vessel.

Agreement No. 10050 suggests that the reference to possible entities which may engage in predatory practices be expanded to include not only "closed conferences" but all conferences, open or closed, pools and carriers employing fighting ships. Agreement No. 10050 would agree to the removal of the term "deferred rebates," provided that the Commission state that its removal is without prejudice to future consideration of finding deferred rebates as a factor impairing access.

The "factors" enumerated in section 587.2 were not intended to be either exclusive or conclusive. These practices would ultimately require a finding that they resulted in undue impairment of access before sanctions would be imposed. Thus, the mere existence in a trade of a closed conference which utilizes deferred rebates would not, in and of itself, support a conclusion that deferred rebates unduly impair access of a U.S.-flag vessel. It is only where they are used in a predatory fashion that such practices would violate this section. To make this clear we are inserting the word "possibly" prior to the phrase "including but not limited to closed conferences employing fighting ships or deferred rebates. . ." in section 587.2(c). Furthermore, the list of practices that may be predatory was not meant to be exhaustive. By its terms, section 587.2(c) includes use of any "predatory practice." Delta's suggestion that the Commission consider U.S. open-conference policy when determining whether undue impairment exists under section 587.2(c), is accommodated by section 587.1(d) which provides that the Commission will consider the degree of reciprocal

[5] *See* H.R. Rep. No. 53, 98th Cong., 1st Sess. 22–23; S. Rep. No. 3, 98th Cong., 1st Sess. 38 (1983).

access afforded in U.S. foreign trades to the carriers of the countries against whom Commission action is contemplated.

Section 587.2(d)

The Government of Japan suggests that the reference in section 587.2(d) to unequal treatment with respect to intermodal facilities is inappropriate for inclusion as a factor requiring retaliatory action because it extends U.S. regulatory authority to the domestic transportation systems of another country. Agreement No. 10050 supports retention of section 587.2(d).

In light of the world-wide growth and development of intermodal transportation systems, the reference in section 587.2(d) to "intermodal facilities and services" is necessary in order to provide meaningful protection to U.S.-flag vessels. Denial of the opportunity to compete for intermodal cargo on a fair basis can constitute an undue impairment of access in the same fashion as unfair discrimination in access to port-to-port cargo movements. For this reason, no change to section 587.2(d) is being made.

Sections 587.2 (b), (c), (d) and (e)

Agreement No. 10050 suggests that references to "U.S.-flag vessel(s)" in sections 587.2 (b), (c), (d) and (e) should be changed to "U.S.-flag carrier(s)," thereby incorporating this commenter's proposed definition of "U.S.-flag carrier" which, in part, was meant to expand the coverage for relief to foreign-flag feederships of U.S. carriers. For the reasons discussed above in connection with section 587.1(a), Agreement No. 10050's proposed definition of "U.S.-flag carrier" is not accepted and changes to these paragraphs are not made.

Section 587.3. Petitions for relief.

Agreement No. 10050 suggests that a new paragraph be added to section 587.3 stating that petitioners may recommend time periods for Commission action on a petition. We are not adopting this suggestion. If a filing party desires to specify a time period for Commission action, it may do so under section 587.3(b)(9). However, due to the possible significant foreign policy implications of any action taken, the Commission believes it requires maximum flexibility in structuring section 13(b)(5) proceedings and determining when sanctions should be applied. It cannot be locked into any rigid, pre-determined time frames.

Section 587.3(a)—Filing

Agreement No. 10050 suggests that the term "U.S.-flag carrier" be substituted for the "owner or operator of a liner, bulk, tramp or other vessel documented under the laws of the United States" as the person who may file a petition for relief under section 587.3(a). This suggested language change is predicated on the Commission's acceptance of Agreement No. 10050's definition of "U.S.-flag carrier." For the reason discussed above in connection with section 587.1(a), this suggestion is not adopted.

In any event, a "U.S.-flag carrier" obviously may file a petition under section 587.3(a).

Section 587.3(b)—Contents

Section 587.3(b) lists what should be included in the contents of petitions for relief. Delta and Agreement No. 10050 believe that many of the mandatory submission requirements, e.g., certified documents, statistics, affidavits, of fact and memoranda of law, should be made permissive. We disagree. By requiring a complete submission at the initial stage of the proceeding, the Commission is better able to move with dispatch if warranted. The mandatory requirements of this section therefore shall, except as modified below, be continued.

Delta and Agreement No. 10050 suggest that certain information, i.e., certified copies of foreign laws and certain statistics, may be difficult or impossible for the petitioner to provide, and that in such a case, the petition could be rejected by the Commission as deficient, causing undue delay or denial of consideration of an otherwise meritorious petition. The Commission understands that obtaining a certified copy of a foreign law may sometimes be difficult and is revising section 587.3(b)(4) to provide that certified copies of the law, rule, regulation or other document are to be provided "when available." The Commission believes, however, that the petitioning parties should *generally* be able to provide a concise description and citation of the foreign law, rule, or government or commercial practice which is alleged to impair access to a trade. This information will obviously be essential to section 13(b)(5) deliberations.

Likewise, the Commission concludes that statistics relating to alleged harm required under sections 587.3(b)(7)(i) and (b)(7)(iii), are necessary to make an informed decision regarding the merits of the petition and the harm alleged. The Commission will exercise its judgment when evaluating the statistics provided, including the particular circumstances surrounding each petition, and will consider the difficulties involved in obtaining and/or compiling these statistics.

In addition, affidavits of fact and memoranda of law provide needed information to enable the Commission to evaluate the merits of the petition and proceed expeditiously where swift action may be critical to prevent irreparable harm to the U.S.-flag carrier. Therefore, these documents remain a requirement for petition contents.

Section 587.3(b)(2)

Section 587.3(b)(2) of the Interim Rule requires that "the name and address of each party (carrier, person, or foreign government agency) against whom the petition is made" be included in the petition. DOT believes that this section should be amended to require "the name of each party (foreign government, agency or instrumentality thereof, carrier or other person) against whom the petition is made." DOT points out that addition of the language "foreign government, agency or instrumentality thereof,"

would enable a petitioner to name a quasi-governmental organization, such as a national commodity or cargo allocation authority, that is acting in concert with common carriers to unduly impair the access of a U.S.-flag vessel. The language, "carrier or other person" is intended to make section 587.3(b)(2) more consistent with the Act which defines "person" to, in effect, include a carrier. DOT's suggestion clarifies the definition of "party" and is, therefore, being adopted.

CENSA notes that section 587.3(b)(2) fails to require the petition to be served on the parties. The CENSA comment has merit and section 587.4(b) of the Final Rule (previously section 587.6(b)) provides for such service by the Commission. In cases where a foreign government, agency or instrumentality thereof, is named as a party in the petition, the Commission will seek service through appropriate diplomatic channels. In order for the Commission to recognize, with certainty, whether a party name in a petition is a foreign government, agency or instrumentality thereof, it is requiring a statement to that effect under section 587.3(b)(2) of the Final Rule.

Section 587.3(b)(5)

Section 587.3(b)(5) of the Interim Rule requires that a petition include "any other evidence" of the existence of a government or commercial practice alleged to be causing undue impairment of access. Agreement No. 10050 has suggested that section 587.3(b)(5) be expanded to include other evidence relating to any "law, rule or regulation" as well as any "government or commercial practice." Agreement No. 10050 believes this change is appropriate because, as it noted in its comment on section 587.3(b)(4), a certified copy of foreign laws may not be obtainable. Although this section would probably allow for the inclusion of such information under either section 587.3(b)(3) or section 587.3(b)(7), the change suggested in section 587.3(b)(5) is being adopted to include "any other information relating to any law, rule, or regulation, or indicating the existence of any government or commercial practice."

One other change is being made to section 587.3(b)(5). The term "evidence" is being deleted and in its place the term "information" is being inserted. This change is made here and in any other section of the Final Rule where the term "evidence" is used. The contents of the petition cannot be properly characterized as "evidence" at this point in the section 13(b)(5) procedure.

Section 587.3(b)(8)

Section 587.3(b)(8) of the Interim Rule requires a memorandum of law addressing relevant legal issues. Agreement No. 10050 believes that it is not clear whether this provision contemplates submission of a separate document. It suggests that a change be made to indicate that any legal discussion, where appropriate, may be incorporated in the petition for relief.

This suggestion is being adopted in the Final Rule. The Commission will permit the petitioner to submit a separate memorandum as part of the petition or, where appropriate, incorporate any legal discussion within the petition. Section 587.3(b)(8) is being amended accordingly.

Section 587.4. Receipt of relevant information.

(Redesignated Section 587.5 in the Final Rule)

CENSA suggests that information submitted to the Commission be made available to all interested parties. Agreement No. 10050 suggests that any information submitted pursuant to this section should be provided to the petitioning or affected U.S.-flag carrier before it is made part of the record. DOT recommends the establishment of standards for confidential treatment and procedures for segregating proprietary information from other factual statements and arguments in order to provide maximum disclosure of information.

Persons submitting information pursuant to section 587.5 of the Final Rule may request that all or any portion of that information be accorded confidential treatment under an appropriate exemption of the Freedom of Information Act (FOIA) (5 U.S.C. 552). Where an exemption applies, proprietary or other information would be protected from disclosure. The Commission does not believe it is necessary to specifically provide for confidential treatment of business or other information in Part 587.

It should be noted that any information which is submitted, even if covered by a FOIA exemption, must be disclosed to all parties in any proceeding under Part 587 if that information is made part of the record in the proceeding upon which the Commission will base its decision. Fundamental precepts of due process require that such information be made available to all parties in a proceeding. Where appropriate, such information may be shielded from public disclosure through a protective order. In any event, Commission action will be based on the record before it. Finally, there does not appear to be any need or reason for submitting information to a petitioning or affected U.S.-flag carrier prior to making the information a part of the public record.

Section 587.4(a)

(Redesignated Section 587.5(a) in the Final Rule)

DOT recommends that section 587.4(a) of the Interim Rule be modified to provide for both compulsory production of information in appropriate circumstances and express sanctions for failure to produce information, noting comparable provisions under the Commission's regulations implementing section 19(1)(b) of the Merchant Marine Act of 1920.[6]

The Commission believes it unnecessary to make a specific reference in the Final Rule to the Commission's subpoena powers conferred by

[6] See 46 C.F.R. 585 (formerly Part 506), as amended. 49 FR 20816 (May 17, 1984).

section 12 of the Shipping Act of 1984 (46 U.S.C. app. 1711). Nothing precludes the Commission from employing its subpoena powers in a section 13(b)(5) proceeding. Furthermore, the failure of affected parties to provide information may result in findings or conclusions that would be adverse to them.

Section 587.4(b)

(Redesignated section 587.5(b) in the Final Rule)

The phrase "*bona fide*" has been deleted from section 587.5(b) of the Final Rule. A petition which has been published in the *Federal Register* has in effect been determined to be *bona fide* and the phrase "*bona fide*" in this section is unnecessary.

Section 587.5. Notification to Secretary of State.

(Redesignated Section 587.6 in the Final Rule)

Section 587.5 (now section 587.6 in the Final Rule) provides for notification to the Secretary of State by the Commission when there are indications that conditions unduly impairing the access of a U.S.-flag vessel to trade between foreign ports exist. The section provides that the Commission may request that the Secretary of State seek resolution of the matter through diplomatic channels and may request the Secretary to report the results of such efforts within a specified time period.

CENSA suggests that this section be amended to explicitly permit the Secretary of State to "concert" with friendly governments sharing the same aim of free access to trade, so that joint efforts may be made to seek a diplomatic solution. The CSG states that where resistance against restrictive trade practices is intended to be collective, the Commission should invariably request the Secretary of State to join in the pursuit of a diplomatic resolution to each problem.

COSCO suggests that in the event actions complained of are those of a controlled carrier or of a foreign government, the Final Rule should *require* the Commission to request that the Secretary of State seek diplomatic resolution and report to the Commission on those diplomatic efforts before a Commission proceeding begins.

These suggestions are not being adopted. The Commission would, of course, seek assistance from the State Department, where feasible and appropriate, and prefers, where possible, diplomatic resolution of matters raised in section 13(b)(5) petitions. However, in some cases, attempts to seek resolution through diplomatic channels may be time consuming and could result in a U.S.-flag carrier suffering irreparable harm. Commission requests that the Secretary of State seek diplomatic resolution of section 13(b)(5) matters will, therefore, be kept discretionary.

Delta seeks to clarify the Commission's enforcement role by modifying section 587.5 to clearly indicate that the Commission and not the Department of State is responsible for the enforcement of section 13(b)(5). Delta

also suggests that an affected U.S.-flag carrier be kept apprised of the progress of any diplomatic negotiations undertaken by the Secretary of State.

The Shipping Act of 1984 unequivocally entrusts this Commission with the administration and enforcement of section 13(b)(5). We have no intention of abdicating those responsibilities in any way. The Commission is neither required to request assistance from the Secretary of State nor required to delay action pending a diplomatic resolution. As noted above, however, the diplomatic resolution of grievances presented in section 13(b)(5) matters would generally appear preferable to unilateral Commission action. The Commission may, of course, assist in these diplomatic efforts if requested.

We do not believe it necessary or appropriate to provide in the Final Rule that the U.S.-flag carrier or any other party will be apprised by the Commission of the progress of diplomatic negotiations. U.S.-flag carriers or other parties can, of course, contact the Department of State with respect to the status of diplomatic negotiations.

The Department of Transportation suggests that section 587.5 be amended to provide that the Commission also notify the Secretary of Transportation and when appropriate consult with the Secretaries of State and Transportation on policy questions. The Interim Rule specifies notification to the Secretary of State because it is our understanding that the Department of State is the agency which would have the primary responsibility to seek diplomatic resolution of 13(b)(5) matters which will involve foreign laws and commercial practices existing in foreign-to-foreign trades. However, the Commission will, as in the past, consult with the Secretary of Transportation, who is the Administration's chief spokesperson for maritime policy, and with various other agencies of the Executive Branch in matters relevant to their areas of interest, and will keep them informed as requested. The Commission does not believe that DOT's proposal should be incorporated into the Final Rule, but rather that consultation with other agencies should be handled on an *ad hoc* basis.

NMC suggests that once a "proper" petition for relief has been filed, notification to the Secretary of State under section 587.5 should be provided within a specified number of days. As indicated in connection with section 587.3, the Commission requires maximum flexibility in structuring the procedures and cannot be locked into any pre-determined time frames. The Commission will act as expeditiously as possible in each instance.

Section 587.6. Hearing.

(Redesignated Section 587.4 in the Final Rule)

Section 587.6 (now section 587.4 in the Final Rule) provides for proceedings pursuant to section 13(b)(5). DOT believes that it is unclear whether the term "hearing" refers to oral argument or to the more general opportunity to be heard, either orally or in writing, on matters potentially affecting

one's interests. DOT suggests that the title of the section be changed to "Procedure" or "Notice and Opportunity to be Heard" and that the word "proceedings" be substituted for the word "hearing" where it appears in this section.

Section 587.6 establishes a basic procedure of notice and opportunity to be heard in a section 13(b)(5) proceeding. Section 587.6(a) provides for the institution of a proceeding upon the filing of a meritorious petition or upon the Commission's own motion. Section 587.6(b) further provides that notice of any such proceeding will be published in the *Federal Register* and interested or affected persons will have an opportunity to reply to the petition. Section 587.6(c) provides that the Commission may issue a final determination after there has been notice and opportunity to be heard or it may order further hearing if warranted. Any further hearings ordered by the Commission will be structured on a case-by-case basis.

The meaning of the term "hearing" in section 587.6(c) would appear to be sufficiently clear and this term shall be retained. However, the title of this section shall be changed from "Hearing" to "Proceeding" in order to more accurately reflect the contents of this section which includes procedures other than hearing procedures. This section is also being amended to require that an original and 15 copies of replies be filed with the Secretary. Finally, section 587.6 has been redesignated as section 587.4. This placement provides for a more logical sequence in the Final Rule.

Section 587.6(b) of the Interim Rule is being amended to indicate that notice of the institution of a proceeding will be served on the parties by the Commission (section 587.4(b)(1) of the Final Rule). Additionally, this paragraph is being amended to note that replies to a petition by interested, or adversely affected parties will be submitted pursuant to section 587.5 of the Final Rule (previously section 587.4). This amendment is being made to clarify that section 587.5 of the Final Rule provides respondents or other interested parties the opportunity to reply to a petition by submitting information. In addition, a technical language modification is being made to section 587.6(b) of the Interim Rule regarding the form of factual submissions (section 587.4(b)(2) of the Final Rule).

Transnave suggests that special procedures be established in the Final Rule to provide for expedited evidentiary hearings and Commission decision within 120 days. It believes that the Final Rule should expressly guarantee the respondent the right to challenge information received by the Commission under section 587.5 (previously section 587.4). Similarly, CENSA expresses concern that the *ad hoc* hearing procedures satisfy the standards of due process and the Administrative Procedure Act (APA) (5 U.S.C. 553).

A formal procedural framework for consideration of petitions would not provide the necessary flexibility to address all the various circumstances under which an action for impairment of access might arise. In establishing the appropriate procedures for each case, the mandates of fundamental

due process will, however, be observed and respondents will have an opportunity to confront petitioners' allegations. In certain situations the requirements of due process may be met by the filing of written submissions. In others, more formal procedures may be appropriate. Whatever procedures the Commission establishes, it will ensure that all procedures will satisfy the requirements of due process and, where applicable, the APA.

Section 587.6(b)

(Redesignated Section 587.4(b) in the Final Rule)

CENSA points out that section 587.6(b) of the Interim Rule appears to require that factual submissions of persons responding to a petition be supported by affidavits and sworn documents, but that it does not clearly make the same requirement for the submission of the petitioner's factual allegations. It is the Commission's intention that both the petitioner(s) and respondent(s) provide supporting affidavits and sworn documents. In addition to the requirement in section 587.4(b)(2) of the Final Rule, that factual submissions shall be in affidavit form, sections 587.3(b) and 587.5(a) (previously 587.4(a)) are being amended to make this clear.

CENSA suggests that actual notice of a proceeding should be given to affected parties. As mentioned above, such notice will be given by the Commission and section 587.4(b) of the Final Rule so provides.

Transnave submits that due process requires that affected parties be given not less than 30 days to reply to a petition. It is unlikely that the Commission would prescribe a period of less than 30 days for response to a petition, given the fact that certain responses might be based on information located outside of the United States and that certain documents might require English translations. The Commission, however, will consider the length of time needed to respond, as well as the likelihood that injury will result from a delay, on a case-by-case basis.

Agreement No. 10050 believes that procedural time frames are inadequately addressed in the Interim Rule and proposes that a new provision be added which states that prompt response and expeditious action may be required in any given case. NMC suggests the imposition of specific deadlines for completion of the various procedural stages of a section 13(b)(5) proceeding.

As noted earlier in discussing comments on section 587.3, because of the possible complexity and significant foreign policy considerations underlying section 13(b)(5) petitions, the Commission requires maximum flexibility in structuring appropriate proceedings and formulating the necessary time frames. The Commission will, therefore, not attempt to prescribe procedural deadlines in its Final Rule.

Section 587.7. Decisions; sanctions; effective date.

Section 587.7 (a) and (b)

COSCO suggests that prior to the imposition of sanctions, the Commission take into consideration the fault of the person against whom the sanction would be imposed and the effect of such sanctions on the trade. In resolving a section 13(b)(5) petition, the Commission intends, as the law requires it to do, to consider the complete record and make an informed decision based on all the facts, taking into account all the ramifications of its decision such as those raised by COSCO.

Section 587.7(b)

CENSA suggests that section 587.7(b) should be amended to provide that sanctions based on the restrictive trade practices of a foreign government will be imposed only against that government or a carrier of that government. COSCO notes that it is inappropriate for the Commission to impose sanctions against a carrier which is acting in compliance with the laws of a foreign government. The Commission cannot limit itself with respect to the nationality of a carrier on which sanctions may be imposed. In each case brought before the Commission, the role that a government plays in unduly impairing the access of a U.S.-flag carrier, as well as the role of the national-flag lines of that government and other carriers, will be considered. Whatever sanctions might be imposed by the Commission will be against those parties which are either directly or indirectly responsible for undue impairment of access of a U.S.-flag vessel.

Section 587.7(c)

(Redesignated Section 587.7(d) in the Final Rule)

Section 587.7(c) of the Interim Rule provides for the publication and effective date of a Commission decision. CENSA suggests that all parties should be served with a decision. It is the intention of the Commission to serve the decision on all parties and section 587.7(a) is being amended to make this clear.

CENSA suggests that all decisions should be published in the *Federal Register*. The Commission agrees with this suggestion and section 587.7(d) of the Final Rule is so amended.

CENSA believes it is improper to set the effective date of a Commission action under section 13(b)(5) prior to Presidential review. As previously discussed, the Executive Branch will have ample opportunity to comment on section 13(b)(5) petitions and participate in section 13(b)(5) proceedings, if it desires. Moreover, the Commission has already established procedures for advising, and consulting with, the Department of State, prior to the issuance of any final order. In no event will the Commission establish an effective date of less than 10 days from the date an order is issued. This should provide the President time to review a decision of the Commission issued under section 13(b)(5). It would neither be appropriate nor

fair to any affected carrier to allow the Presidential review period to delay publication of an effective date.

Agreement No. 10050 and Delta believe that 30 days is too lengthy a time period between publication of the Commission decision and its effective date. The Commission believes that a 30-day notice period would generally be appropriate and necessary, given the international ramifications of a section 13(b)(5) action. However, because there may be circumstances and situations requiring more expedited action, section 587.7(d)(2) of the Final Rule allows the Commission, "for good cause," to prescribe an effective date of less than 30 days.

Section 587.7(e)

A new procedure has been added to section 587.7 which provides that any party may file a petition for reconsideration of any final decision under this part. Section 587.7(e) further provides for service of the petition upon all parties and states that the petition does not in itself stay the effective date of Commission action.

Section 587.8. Submission of orders to the President.

Sections 587.7, 587.8, and 587.9

DOT suggests that sections 587.7, 587.8, and 587.9 be modified to allow the President a reasonable opportunity to classify the Commission's decision for national security reasons and thereby withhold it from publication in appropriate circumstances. We do not agree. Any potentially sensitive issue involving national defense or national security surrounding a section 13(b)(5) case or its outcome, can be expected to be brought to the Commission's attention by the Executive Branch well prior to a Commission decision. In addition, section 587.8 procedures are consistent with those established in section 9 of the Act (46 U.S.C. app. 1708), which provides for the publication of a Commission order of "suspension or final order of disapproval of rates, charges . . . of a controlled carrier . . .," concurrent with submission of the order for Presidential review. Similarly, as in any section 13(b)(5) order, the President may stay the effect of the Commission's order for reasons of national defense or foreign policy. Therefore, the Commission will not withhold a section 13(b)(5) decision pending Presidential review.

Section 587.8

The Interim Rule provided that a decision imposing sanctions would be transmitted to the President concurrently with the submission of the decision for publication in the *Federal Register*. CENSA believes that *all* decisions, including those that do not impose sanctions, should be submitted immediately to the President. We see no reason to submit decisions to the President which do not impose sanctions. If no action is being taken

there is no reason to involve the President. CENSA's suggestion, therefore, is not adopted.

To clarify the term "decision," this section is being amended in the Final Rule to refer to "any decision imposing sanctions." In certain situations where impairment of access may be "imminent," the Commission may wish to issue two decisions. The first decision would be a notice of intent to impose sanctions should the action threatening the impairment of access occur. This decision would be followed by a second notice imposing sanctions when the action impairing access actually takes place. In such a situation, both decisions would be transmitted to the President. Alternatively, the Commission could, in its discretion, issue a single decision, to be served on the President, imposing sanctions at the time the action impairing access actually occurs.

Conforming changes have been made throughout the Rule to accommodate this change. Reference to "final" determinations or decisions have, therefore, been dropped. A "decision" however must pertain to a substantive finding or conclusion as distinguished from a procedural ruling.

Section 587.9. Postponement, discontinuance or suspension of action.

Section 587.9 provides that the Commission may, on its own motion, upon petition or by order of the President, postpone, discontinue or suspend any or all actions taken by it under the provisions of this part. Agreement No. 10050 suggests that this section state that the filing of a petition does not stay the effective date of a Commission action except upon compelling showing. As with petitions for reconsideration under new section 587.7(e), the filing of a petition to postpone, discontinue or suspend would not, in and of itself, stay the effective date of that action. Section 587.9 of the Interim Rule is being amended to make this clear. In addition, section 587.9 has been reorganized in order to clarify the distinction between discretionary and mandatory postponements. Finally, some editorial changes have been made in the language of this section.

The Commission has carefully considered all comments submitted to the Interim Rule and as discussed above, has made a number of changes to accommodate valid suggestions therein. Other non-substantive technical or style changes have been made and not expressly discussed. Any comments not expressly mentioned herein, nevertheless have been considered and found to be without merit, unwarranted, or unnecessary.

The Chairman of the Federal Maritime Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) that the Final Rule published herein will not have a significant economic impact on a substantial number of small entities, within the meaning of that Act. The primary economic impact of the Final Rule would affect common carriers by water, which generally are not small entities. A secondary impact may fall on shippers, some of which may be small entities, but that impact is not considered to be significant.

List of Subjects in 46 CFR Parts 585 and 587.

Foreign relations; Foreign trade; Maritime carriers; Rates and fares.

Therefore, pursuant to 5 U.S.C. 553; section 19(1)(b) of the Merchant Marine Act, 1920 (46 U.S.C. app. 876(1)(b); sections 13(b)(5), 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1712(b)(5), 1714 and 1716); and Reorganization Plan No. 7 of 1961 (75 Stat. 840) Parts 585 and 587 of Title 46, Code of Federal Regulation are revised to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 585]

REGULATIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE FOREIGN TRADE OF THE UNITED STATES

Sec.

585.1 Purpose.

585.2 Scope.

585.3 Findings—Conditions unfavorable to shipping in the foreign trade of the United States.

585.4 Petitions for section 19 relief—General—Who may file.

585.5 Petitions—How filed.

585.6 Petitions—Contents.

585.7 Petitions—Amendment or dismissal of.

585.8 Initial action to meet apparent conditions unfavorable—Resolution through diplomatic channels.

585.9 Actions to meet conditions unfavorable to shipping in the foreign trade of the United States.

585.10 Participation of interested persons.

585.11 Production of information.

585.12 Production of information—Failure to produce.

585.13 Postponement, discontinuance, or suspension of action.

585.14 Content and effective date of regulation.

AUTHORITY: 5 U.S.C. 553; sec. 19(1)(b) of the Merchant Marine Act, 1920 (46 U.S.C. app. 876(1)(b)); secs. 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1714 and 1716); and Reorganization Plan No. 7 of 1961 (75 Stat. 840).

§ 585.1 Purpose.

It is the purpose of the regulations of this part to declare certain conditions resulting from governmental actions by foreign nations or from the competitive methods or practices of owners, operators, agents, or masters of vessels of a foreign country unfavorable to shipping in the foreign trade of the United States and to establish procedures by which persons who are or can reasonably expect to be adversely affected by such conditions may petition the Federal Maritime Commission for the issuance of regulations under the authority of section 19 of the Merchant Marine Act of 1920. It is the further purpose of the regulations of this part to afford notice of the general circumstances under which the authority granted to the Commission under section 19 may be invoked and the nature of the regulatory actions contemplated.

§ 585.2 Scope.

Regulatory actions may be taken when the Commission finds, on its own motion or upon petition, that a foreign government has promulgated and enforced or intends to enforce laws, decrees, regulations or the like, or has engaged in or intends to engage in practices which presently have or prospectively could create conditions unfavorable to shipping in the foreign trade of the United States, or when owners, operators, agents or masters of foreign vessels engage in or intend to engage in, competitive methods or practices which have created or could create such conditions.

§ 585.3 Findings—Conditions unfavorable to shipping in the foreign trade of the United States.

For the purposes of this part, conditions created by foreign governmental action or competitive methods of owners, operators, agents or masters of foreign vessels are found unfavorable to shipping in the foreign trade of the United States, if such conditions:

(a) Impose upon vessels in the foreign trade of the United States fees, charges, requirements, or restrictions different from those imposed on other vessels competing in the trade, or which preclude vessels in the foreign trade of the United States from competing in the trade on the same basis as any other vessel;

(b) Reserve substantial cargoes to the national flag or other vessels and fail to provide, on reasonable terms, for effective and equal access to such cargo by vessels in the foreign trade of the United States;

(c) Are otherwise unfavorable to shipping in the foreign trade of the United States;

(d) Are discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors and which cannot be justified under generally-accepted international agreements or practices and which operate to the detriment of the foreign commerce or the public interest of the United States.

§ 585.4 Petitions for section 19 relief—General—Who may file.

Any person, including, but not limited to, any importer, exporter, shipper, consignee, or owner, operator or charterer of a liner, bulk, or tramp vessel, who has been harmed by, or who can reasonably expect harm from existing or impending conditions unfavorable to shipping in the foreign trade of the United States, may file a petition for the relief under the provisions of this part.

§ 585.5 Petitions—How filed.

All requests for relief from conditions unfavorable to shipping in the foreign trade shall be by written petition. An original and fifteen copies of a petition for relief under the provisions of this part shall be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

§ 585.6 Petitions—Contents.

Petitions for relief from conditions unfavorable to shipping in the foreign trade of the United States shall set forth the following:

(a) A concise description and citation of the foreign law, rule, regulation, practice or competitive method complained of;

(b) A certified copy of any law, rule, regulation or other document involved and, if not English, a certified English translation thereof;

(c) Any other evidence of the existence of such practice or competitive method;

(d) A clear description, in detail, of the harm already caused or which may reasonably be expected to be caused petitioner, including:

(1) Statistics for the representative period showing a present or prospective cargo loss if harm is alleged on that basis. Such statistics shall include figures for the total cargo carried or projected in the trade for the period;

(2) Statistics or other evidence for the representative period showing increased costs, inferior services or other harm to cargo interest if injury is claimed on that basis; and

(3) A statement as to why the period is representative.

(e) A recommended regulation, the promulgation of which will, in view of the petitioner, adjust or meet the alleged conditions unfavorable to shipping in the foreign trade of the United States.

§ 585.7 Petitions—Amendment or dismissal of.

Upon the failure of a petitioner to comply with the provisions of this part, the petitioner will be notified by the Secretary and afforded reasonable opportunity to amend its petition. Failure to timely amend the petition will result in its dismissal. For good cause shown additional time for amendment may be granted.

§ 585.8 Initial action to meet apparent conditions unfavorable—Resolution through diplomatic channels.

Upon the filing of a petition, or on its own motion when there are indications that conditions unfavorable to shipping in the foreign trade of the United States may exist, the Commission will notify the Secretary of State that such conditions apparently exist, and may request he or she seek resolution of the matter through diplomatic channels. If request is made, the Commission will give every assistance in such efforts, and the Commission may request the Secretary to report the results of his or her efforts at a specified time.

§ 585.9 Actions to meet conditions unfavorable to shipping in the foreign trade of the United States.

Upon a submission of a petition filed under the rules of this part, or upon its own motion, the Commission may find that conditions unfavorable to shipping in the foreign trade of the United States do exist, and may, without further proceeding, issue regulations. Such regulations may effect the following:

(a) Imposition of equalizing fees or charges;

(b) Limitation of sailings to and from United States ports or of amount or type of cargo during a specified period;

(c) Suspension, in whole or in part, of any or all tariffs filed with the Commission for carriage to or from United States ports; and

(d) Any other action the Commission finds necessary and appropriate in the public interest to adjust or meet any condition unfavorable to shipping in the foreign trade of the United States.

§ 585.10 Participation of interested persons.

In the event that participation of interested persons is deemed necessary by the Commission, notice will be published in the *Federal Register* and interested persons will then be allowed to participate in this procedure by the submission of written data, views or arguments, with or without opportunity to present same orally.

§ 585.11 Production of information.

In order to aid in the determination of whether conditions unfavorable to shipping in the foreign trade of the United States exist, or in order to aid in the formulation of appropriate regulations subsequent to a finding that conditions unfavorable to shipping in the foreign trade of the United States exist, the Commission may, when it deems necessary or appropriate, and without further proceedings, order any owner, operator, or charterer in the affected trade to furnish any or all of the following information:

(a) Statistics for a representative period showing cargo carried to and from the United States in the affected trade on vessels owned, operated or chartered by it by type, source, value and directions.

(b) Information for a representative period on the activities of vessels owned, operated, or chartered, which shall include sailings to and from United States ports, costs incurred, taxes or other charges paid to authorities, and subsidies or other payments received from foreign authorities; and such other information that the Commission considers relevant to discovering or determining the existence of general or special conditions unfavorable to shipping in the foreign trade of the United States.

(c) Information for a specified future period on the prospective activities of vessels which it owns, operates or charters or plans to own, operate or charter, to and from United States ports, which shall include projected sailings, anticipated costs, taxes or other charges to be paid to authorities, and expected subsidies or other payments to be received from foreign authorities; and such other information that the Commission considers relevant to discovering or determining the existence of general or special conditions unfavorable to shipping in the foreign trade of the United States.

§ 585.12 Production of information—Failure to produce.

The Commission may, when there is a failure to produce any information ordered produced under § 585.11, make appropriate findings of fact or

deem such a failure to produce as an admission that conditions unfavorable to shipping in the foreign trade of the United States do exist.

§ 585.13 Postponement, discontinuance, or suspension of action.

The Commission may, on its own motion or upon petition, postpone, discontinue, or suspend any and all actions taken by it under the provisions of this part. The Commission shall postpone or discontinue any or all such actions if the President informs the Commission that postponement, discontinuance, or suspension is required for reasons of foreign policy or national security.

§ 585.14 Content and effective date of regulation.

The Commission shall incorporate in any regulations adopted under the rules of this part a concise statement of their basis and purpose. Regulations shall be published in the *Federal Register*. Except where conditions warrant and for good cause, regulations promulgated under the rules of this part shall not become effective until 30 days after the date of publication.

NOTE: In accordance with 44 U.S.C. 3506(c)(5), any information request or requirement in this part is not subject to the requirements of section 3507(f) of the Paperwork Reduction Act, because there are nine or fewer respondents.

FEDERAL MARITIME COMMISSION

[46 CFR PART 587]

ACTIONS TO ADDRESS CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS

Sec.
687.1 Purpose; general provisions.
687.2 Factors indicating conditions unduly impairing access.
687.3 Petitions for relief.
687.4 Proceeding.
687.5 Receipt of relevant information.
687.6 Notification to Secretary of State.
687.7 Decision; sanctions; effective date.
687.8 Submission of decision to the President.
687.9 Postponement, discontinuance, or suspension of action.

AUTHORITY: 5 U.S.C. 553; secs. 13(b)(5), 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1712(b)(5), 1714, and 1716).

§ 587.1 Purpose; general provisions.

(a)(1) It is the purpose of this part to enumerate certain conditions resulting from the action of a common carrier, acting alone or in concert with any person, or a foreign government, which unduly impair the access of a vessel documented under the laws of the United States whether liner, bulk, tramp or other vessel, (hereinafter "U.S.-flag vessel") to ocean trade between foreign ports, which includes intermodal movements, and to establish procedures by which the owner or operator of a U.S.-flag vessel (hereinafter "U.S.-flag carrier") may petition the Federal Maritime Commission for relief under the authority of section 13(b)(5) of the Shipping Act of 1984 ("the Act") [46 U.S.C. app. 1712(b)(5)].

(2) It is the further purpose of this part to indicate the general circumstances under which the authority granted to the Commission under section 13(b)(5) may be invoked, and the nature of the subsequent actions contemplated by the Commission.

(3) This part also furthers the goals of the Act with respect to encouraging the development of an economically sound and efficient U.S.-flag liner fleet as stated in section 2 of the Act (46 U.S.C. app. 1701).

(b)(1) This part implements the statutory notice and hearing requirement and ensures that due process is afforded to all affected parties. At the same time, it allows for flexibility in structuring proceedings so that the Commission may act expeditiously whenever harm to a U.S.-flag carrier resulting from impaired access to cross trades has been demonstrated or is imminent.

(2) The provisions of Part 502 of this chapter (Rules of Practice and Procedure) shall not apply to this part except for those provisions governing *ex parte* contacts (§ 502.11 of this chapter) and except as the Commission may otherwise determine by order.

(c) The condition of unduly impaired access will be found only where a U.S.-flag carrier is commercially able to enter a trade in which its access is being unduly impaired, or is reasonably expected to be impaired, or where actual participation in a trade by a U.S.-flag carrier is being restricted for reasons other than its commercial ability or competitiveness.

(d) In examining conditions in a trade between foreign ports, and in considering appropriate action, the Commission will give due regard to U.S. maritime policy and U.S. Government shipping arrangements with other nations, as well as the degree of reciprocal access afforded in U.S. foreign trades to the carriers of the countries against whom Commission action is contemplated.

§ 587.2 Factors indicating conditions unduly impairing access.

For the purpose of this part, factors which would indicate the existence of conditions created by foreign government action or action of a common carrier acting alone or in concert with any person, which unduly impair access of a U.S.-flag vessel engaged in or seeking access to ocean trade between foreign ports, include, but are not limited to:

(a) Imposition upon U.S.-flag vessels or upon shippers or consignees using such vessels, of fees, charges, requirements, or restrictions different from those imposed on national-flag or other vessels, or which preclude or tend to preclude U.S.-flag vessels from competing in the trade on the same basis as any other vessel.

(b) Reservation of a substantial portion of the total cargo in the trade to national-flag or other vessels which results in failure to provide reasonable competitive access to cargoes by U.S.-flag vessels.

(c) Use of predatory practices, possibly including but not limited to closed conferences employing fighting ships or deferred rebates, which unduly impair access of a U.S.-flag vessel to the trade.

(d) Any government or commercial practice that results in, or may result in, unequal and unfair opportunity for U.S.-flag vessel access to port or intermodal facilities or services related to the carriage of cargo inland to or from ports in the trade.

(e) Any other practice which unduly impairs access of a U.S.-flag vessel to trade between foreign ports.

§ 587.3 Petitions for relief.

(a) *Filing.*

(1) Any owner or operator of a liner, bulk, tramp or other vessel documented under the laws of the United States who believes that its access to ocean trade between foreign ports has been, or will be, unduly impaired may file a written petition for relief under the provisions of this part.

(2) An original and fifteen copies of such a petition including any supporting documents shall be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

(b) *Contents.* Petitions for relief shall include the following and shall also include an affidavit attesting to the truth and accuracy of the information submitted:

(1) The name and address of the petitioner;

(2) The name and address of each party (foreign government, agency or instrumentality thereof, carrier, or other person) against whom the petition is made and a statement as to whether the party is a foreign government, agency or instrumentality thereof;

(3) A concise description and citation of the foreign law, rule or government or commercial practice complained of;

(4) A certified copy of any law, rule, regulation or other document concerned, when available and, if not in English, a certified English translation thereof;

(5) Any other information relating to any law, rule or regulation, or indicating the existence of any government or commercial practice;

(6) A description of the service offered or proposed, as a result of which petitioner is alleging harm, including information which indicates the ability of the petitioner to otherwise participate in the trade;

(7) A clear description, in detail, of the harm already caused, or which may reasonably be expected to be caused, to the petitioner for a representative period, including:

(i) Statistics documenting present or prospective cargo loss due to discriminatory government or commercial practices if harm is alleged on that basis; such statistics shall include figures for the total cargo carried or projected to be carried by petitioner in the trade for the period, and the sources of the statistics;

(ii) Information documenting how the petitioner is being prevented from entering a trade, if injury is claimed on that basis;

(iii) Statistics or other information documenting the impact of discriminatory government or commercial practices resulting in an increase in costs, service restrictions, or other harm on the basis of which injury is claimed, and the sources of the statistics; and

(iv) A statement as to why the period is representative.

(8) A separate memorandum of law or a discussion of the relevant legal issues.

(9) A recommended action, rule or regulation, the result of which will, in the view of the petitioner, address the alleged conditions unduly impairing the access of petitioner to the affected trade.

(c) *Deficient petition.* A petition which substantially fails to comply with the requirements of paragraph (b) of this section shall be rejected and the person filing the petition shall be notified of the reasons for

such rejection. Rejection is without prejudice to filing of an amended petition.

§ 587.4 Proceeding.

(a) Upon the Commission's own motion or upon the filing of a petition which meets the requirements of § 587.3, when there are indications that conditions unduly impairing the access of a U.S.-flag vessel to trade between foreign ports may exist, the Commission will institute a proceeding pursuant to this part.

(b)(1) Notice of the institution of any such proceeding will be published in the *Federal Register*, and that notice and petition, if any, will be served on the parties.

(2) Interested or adversely affected persons will be allowed a period of time to reply to the petition by the submission of written data, views or legal arguments pursuant to § 587.5 of this part. Factual submissions shall be in affidavit form.

(3) An original and 15 copies of such submissions will be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

(c) Following the close of the initial response period, the Commission may issue a decision or order further hearings if warranted. If further hearings are ordered, they will be conducted pursuant to procedures to be outlined by the Commission in its order.

§ 587.5 Receipt of relevant information.

(a) In making its decision on matters arising under section 13(b)(5) of the Act, the Commission may receive and consider relevant information from any owner, operator, or conference in an affected trade, or from any foreign government, either directly or through the Department of State or from any other reliable source. All such submissions should be supported by affidavits of fact and memorandum of law. Relevant information may include, but is not limited to:

(1) Statistics, with sources, or, if unavailable, the best estimates pertaining to:

(i) The total cargo carried in the affected liner or bulk trade by type, source, value, tonnage and direction.

(ii) Cargo carried in the affected trade on vessels owned or operated by any person or conference, by type, source, value, tonnage and direction.

(iii) The percentage such cargo carried is of the total affected liner or bulk trade, on a tonnage and value basis.

(iv) The amount of cargo reserved by a foreign government for national-flag or other vessels in the affected trade, on a tonnage and value basis, and a listing of the types of cargo and specific commodities which are reserved for national-flag or other vessels.

(2) Information on the operations of vessels of any party serving the affected trade, including sailings to and from ports in the trade, taxes or other charges paid to foreign authorities, and subsidies or other payments received from foreign authorities.

(3) Information clarifying the meaning of the foreign law, rule, regulation or practice complained of, and a description of its implementation.

(4) Complete copies of all conference and other agreements, including amendments and related documents, which apply in the trade.

(b) Once introduced or adduced, information of the character described in paragraph (a) of this section, and petitions and responses thereto, shall be made part of the record for decision and may provide the basis for Commission findings of fact and conclusions of law, and for the imposition of sanctions under the Act and this part.

§ 587.6 Notification to Secretary of State.

When there are indications that conditions unduly impairing the access of a U.S.-flag vessel to trade between foreign ports may exist, the Commission shall so notify the Secretary of State and may request that the Secretary of State seek resolution of the matter through diplomatic channels. If request is made, and the Commission will give every assistance in such efforts and the Commission may request the Secretary to report the results of such efforts within a specified time period.

§ 587.7 Decision; sanctions; effective date.

(a) Upon completion of any proceeding conducted under this part, the Commission will issue and serve a decision on all parties.

(b) If the Commission finds that conditions unduly impairing access of a U.S.-flag vessel to ocean trade between foreign ports exist, any of the following actions may be taken:

(1) Imposition of equalizing fees or charges applied in the foreign trade of the United States;

(2) Limitation of sailings to and from United States ports, or of amount or type of cargo carried, during a specified period;

(3)(i) Suspension, in whole or in part, of any or all tariffs filed with the Commission for carriage to or from United States ports, including the carrier's right to use any or all tariffs of conferences in U.S. trades of which it is a member for any period the Commission specifies, or until such time as unimpaired access is secured for U.S.-flag carriers in the affected trade.

(ii) Acceptance or handling of cargo for carriage under a tariff that has been suspended, or after a common carrier's right to utilize that tariff has been suspended pursuant to this part, will subject a carrier to the imposition of a civil penalty as provided under the Act (46 U.S.C. app. 1712(b)(3)) of not more than $50,000 per shipment; and

(4) Any other action the Commission finds necessary and appropriate to address conditions unduly impairing access of a U.S.-flag vessel to trade between foreign ports.

(c) If the Commission finds that conditions impairing access of a U.S.-flag vessel to ocean trade between foreign ports has not yet occurred, and punitive sanctions are warranted, such sanctions will be imposed to

become effective simultaneously with the implementation of the action that would unduly impair the access of a U.S.-flag vessel.

(d)(1) All decisions will be published in the *Federal Register.*

(2) Decisions imposing sanctions, except where conditions warrant and for good cause, will become effective 30 days after the date of publication.

(e) Any party may file a petition to reconsider any decision under this part. Such a petition shall be served on all other parties to the proceeding and shall not, in and of itself, stay the effective date of the Commission action.

§ 587.8 Submission of decision to the President.

Concurrently with the submission of any decision imposing sanctions to the *Federal Register* pursuant to § 587.7(d)(1), the Commission shall transmit that decision to the President of the United States who may, within ten days after receiving the decision, disapprove it if the President finds that disapproval is required for reasons of the national defense or the foreign policy of the United States.

§ 587.9 Postponement, discontinuance, or suspension of action.

(a) The Commission may, on its own motion or upon a petition, postpone, discontinue, or suspend any action taken by it under the provisions of this part. Such a petition will be served on all other parties and will not, in and of itself, stay the effective date of Commission action.

(b) The Commission shall postpone, discontinue or suspend any action provided for in its final decision if so directed by the President for reasons of national defense or foreign policy of the United States as provided in § 587.8.

NOTE: In accordance with 44 U.S.C. 3518(c)(1)(B), and except for investigations undertaken with reference to a category of individuals or entities (e.g., an entire industry), any information request or requirement in this part is not subject to the requirements of section 3507(f) of the Paperwork Reduction Act because such collection of information is pursuant to a civil, administrative action or investigation by an agency of the United States against specific individuals or entities.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–26 AND DOCKET NO. 84–32

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

November 14, 1984

ACTION: Final Rule.

SUMMARY: This Final Rule revises and supersedes the Interim Rule on agreements which implemented those provisions of the Shipping Act of 1984 governing agreements by or among ocean common carriers as well as certain marine terminal operator agreements. This Rule modified by addition, deletion, and revision the Interim Rule in the areas of definitions, exclusions and exemptions, agreement format, reporting and record keeping and the information requirements of the Information Form. In addition the transitional rules regarding mandatory provisions in agreements are deleted in their entirety. The Rule also makes various editorial, technical, and clarifying changes in the Interim Rule. As of this publication, all of the Commission's interim regulations to implement the 1984 Act are finalized.

DATE: This Rule is effective on December 15, 1984.

SUPPLEMENTARY INFORMATION:

I. *Background*

The Shipping Act of 1984, Public Law 98–237, 98 Stat. 67, 46 U.S.C. app. 1701–1720 (the Act or the 1984 Act) was signed into law on March 20, 1984 with an effective date of June 18, 1984. The 1984 Act superseded the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. 801 *et seq.*) with respect to the regulation of agreements by or among ocean common carriers, and certain other subject persons, in the foreign oceanborne commerce of the United States. The Act makes significant changes with regard to the kinds of agreements that are within its scope, the mandatory content of certain kinds of agreements, the procedures for filing, processing, and reviewing agreements, and the parameters on the antitrust immunity which it confers on agreements. Other areas of significant change include new statutory definitions, and a somewhat modified exemption authority. The

Act authorizes the requiring of periodical or special reports as well as the filing of conference minutes and provides for penalties for infringement of its provisions.

The Act and its legislative history sets forth certain policies to guide regulation under the new statutory scheme. One fundamental purpose of the Act is to establish a nondiscriminatory regulatory process with a minimum of government intervention and regulatory costs. Another is to provide an efficient and economic ocean transportation system in harmony with international shipping practices. To these ends, agreements are to be reviewed and processed within a fixed period of time and generally will become effective after a short waiting period. Only those pending agreements which raise concern under the general standard or the conduct prohibited by section 10 of the Act are to be subjected to injunctive challenge in federal court where the Commission has the burden of proof. The Act thereby places greater emphasis on the subsequent monitoring of an agreement after it has become effective in order to ensure that agreement operations are conducted consistent with the requirements of the Act.

On May 29, 1984, pursuant to section 17(b) of the Act (46 U.S.C. app. 1716(b)) which authorizes the Commission to prescribe interim rules without adhering to the usual notice and comment procedures under the Administrative Procedure Act (5 U.S.C. 553), the Commission published an Interim Rule implementing those provisions of the Act which govern agreements. *Rules Governing Agreements By Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984,* Docket No. 84–26 (26 F.M.C. 681). Interested persons were given 90 days to comment on the Interim Rule. In addition, interested persons were afforded an opportunity to submit emergency comments addressing any matters which might warrant modification prior to the June 18, 1984 effective date. A number of emergency comments were received and on June 14, 1984, the Commission published amendments to the Interim Rule (26 F.M.C. 748).[1]

Subsequently, during the comment period, the Commission received petitions from a number of conferences to suspend certain record keeping and reporting requirements in Subpart G. On September 17, 1984 the Commission published a further amendment to the Interim Rule which deferred the implementation of certain of those requirements pending the issuance of a Final Rule (27 F.M.C. 121).

Thirty-nine filings were received in Docket No. 84–26: 14 emergency comments filed prior to June 18, 1984; 23 final comments either timely filed or filed shortly after the deadline and granted an extension of time for filing;[2] and two petitions seeking relief from certain requirements of

[1] The Office of Management and Budget (OMB) clearance number was also published in the *Federal Register* on June 14, 1984 (49 FR 24521).

[2] Several persons sought to file late comments in Docket No. 84–26 well after the close of the comment period and these requests were denied. For the most part these comments are either repetitious of points al-

Continued

Subpart G. Because of the extensive number of parties that participated in this proceeding, comments are identified by number in the following discussion. A list of comments filed in Docket No. 84–26 is provided in the conclusion to the Supplementary Information.

On September 17, 1984, again pursuant to the section 17(b) rulemaking authority, the Commission published a third amendment to the Interim Rule. *Amendments to Rules Governing Agreements by Ocean Common Carriers and Other Persons,* Docket No. 84–32 (27 F.M.C. 121). This amendment added a new section 572.103(g) to state Commission policy regarding the completeness and definiteness with which agreement authority must be described, and a new section 572.406 to establish guidelines regarding open-ended authority and interstitial authority. Interested persons were given 30 days to comment on this amendment. Ten timely comments were received in Docket No. 84–32. These comments are also listed in the conclusion to the Supplementary Information.

Many of the concerns raised in the emergency comments and in the Subpart G petitions filed in Docket No. 84–26 have been addressed through changes in the mandatory provisions of Subpart H and through the temporary suspension of certain requirements in Subpart G. Matters raised in the emergency comments and the petitions which were not addressed in the June amendments or the September Order have been considered in connection with the issuance of the Final Rule. Thus, all timely comments received in Docket Nos. 84–26 and 84–32 have been reviewed and considered. The Supplementary Information discusses significant matters raised in the comments. Any comments not expressly mentioned herein, have either been incorporated as a technical change without discussion or have been found to be without merit or irrelevant.

In the discussion which follows, the term Interim Rule (designated Part 572) refers to the rules issued in Docket No. 84–26, as subsequently amended and suspended, and the amendment to Part 572 issued in Docket No. 84–32. The rule which is now published is referred to as the Final Rule.

II. *Discussion of Comments on Part 572 and Appendix A*

A number of technical changes have been made throughout Part 572 and Appendix A. Some changes were prompted by comments and others are clarifying or technical changes made to improve this Part. One change made throughout has been the substitution of the phrase "this part" for phrases such as "this rule" or "these rules."

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ready raised in other comments or are rendered moot by the Commission's action regarding Subpart H. For a discussion of the reasons for rejecting these late filed comments see the Commission's Order of Denial in Docket No. 84–26 dated October 17, 1984.

SUBPART A—GENERAL PROVISIONS

Subpart A contains provisions which are of general applicability to Part 572. Specific sections state the authorities, purpose and policies of part 572 and define certain terms.

Section 572.101—Authority

Section 572.101 states the statutory authorities for Part 572. No comments were received on this section and no substantive changes have been made to it in the Final Rule.

Section 572.102—Purpose

Section 572.102 states the purpose of Part 572, namely to implement those provisions of the Act which govern agreements among ocean common carriers and other subject entities. Comment 38 states that the words "other entities" should be changed to "marine terminal operators" because such operators are the only entities other than ocean common carriers which are required to file agreements under the Act. This point is well taken. Therefore, as a clarification, section 572.102 is amended to recite the language of section 4 of the Act which states that the Act applies to agreements by or among ocean common carriers and to agreements among marine terminal operators and among one or more ocean common carriers. Marine terminal operator agreements subject to Part 572 must have a nexus with foreign commerce.

Section 572.103—Policies

Section 572.103 sets forth the general policies to be followed in administering the regulatory regime established by Part 572.

Section 572.103(b)

Section 572.103(b) states that in reviewing agreements under the general standard only that information which is relevant and necessary to a section 6(g) review shall accompany particular types of agreements. Comment 22 takes issue with section 572.103(b) specifically and section 572.103 generally to the extent that they establish a basis for requiring the Information Form with certain agreement filings. The basis for the Information Form requirement is discussed below in connection with the comments to Subpart D, Subpart F and Appendix A. As indicated below, some adjustments have been made in the Information Form in response to comments. However, the basic requirement of a Form is being retained. Therefore, there is no need to modify the statement of policies with regard to informational needs.

Section 572.103(f)

Section 572.103(f) states Commission policy regarding the need for and means of achieving compliance with the Act's requirement that mandatory

provisions be included in certain kinds of agreements. Comment 22 urges that conferences continue to be allowed to draft their own mandatory provisions. As indicated below in the discussion of Subpart H, the purpose of requiring adoption of the model mandatory provisions in Subpart H has been achieved, and Subpart H is deleted from the Final Rule. Appropriate changes have been made in the statement of policy in paragraph (f) to indicate that parties to conference agreements may develop their own mandatory provisions.

Section 572.103(g)

Section 572.103(g) together with section 572.406, were added in Docket No. 84–32 as new sections of Part 572. Section 572.103(g) states Commission policy that agreements must be clear and definite, must embody the complete understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will operate.

Although Comment 102 expresses strong support for inclusion of section 572.103(g), a number of other comments suggest that it is vague, unnecessary, or inappropriate and should be deleted or modified. The necessity of such a policy statement was not apparent at the time the Interim Rule was issued. The principles set forth in the policy statement were well settled under the administration of the 1916 Act and nothing in the 1984 Act or its legislative history indicated any departure from those established principles. However, the early experience in the administration of the 1984 Act provided a number of significant instances in which filed agreements contained unacceptably vague, incomplete or indefinite statements of authority. It was this experience that prompted the addition of section 572.103(g) and section 572.406 to Part 572.

This statement of policy merely represents a codification of existing policy. As a point of clarification, it should be noted that it is not the intent of this section to provide a basis for imposing detailed limits on every agreement. Its purpose is to ensure that a complete agreement is filed in sufficient detail to conduct a meaningful review. However, no change in the language of section 572.103(g) is necessary and it is retained in the Final Rule. The other issues raised by the comments are addressed below in the discussion of section 572.406.

Section 572.104—Definitions

Section 572.104 lists definitions used in Part 572. Changes have been made in response to comments to state more precisely particular definitions.

Section 572.104(a)—Agreement

Section 572.104(a) recites the definition of agreement. This definition is amended to include "cancellation", thereby conforming the definition to the statute.

Section 572.104(b)—Antitrust Laws

Section 572.104(b) recites the definition of "antitrust laws" found in section 3(2) of the Act. Comment 38 states that this definition is used only once in the Interim Rule and should be eliminated, or, in the alternative, rephrased to provide the United States Code citations of the referenced statutes. This definition was included to improve the efficiency of Part 572 as a complete document and for that reason it shall be retained. The definition, however, has been modified to use the United States Code citations in order to make the definition more functional.

Section 572.104(c)—Appendix

Section 572.104(c) defines the additional material which is appended to, and constitutes a part of, an agreement as an "appendix". Comment 22 suggests that the definition is so narrow as to preclude the use of an appendix to publish provisions, such as self-policing rules, which have routinely been published in an appendix. Comment 39 suggests that the definition, in conjunction with other sections of Part 572, would impose the full 45-day waiting period on "appendices" contents.

The use of an appendix is explained at section 572.402(f), which governs the contents of such an appendix. Section 572.402(f) is amended to permit an expansion of the use of an appendix. The "appendix" publication is not mandatory, nor is there any prohibition against the "appendix" publication of other agreement provisions whose physical location in an agreement is not otherwise specified in this part. The period of review conducted for such filings depends upon the substantive content of the "appendix" and not its form. Parties are not precluded from routine use of appendices, unless the particular provision is one whose placement is required elsewhere in the agreement pursuant to sections 572.402, 572.501, and 572.502. The Interim Rule definition fulfills these objectives and is retained.

Section 572.104(e)—Common Carrier

Section 572.104(e) recites the definition of the term "common carrier" which is set forth in section 3(6) of the Act. The statutory definition is stated conjunctively rather than disjunctively and requires both the assumption of responsibility for transportation and the utilization of a vessel. Comment 2 suggests that the word "and" be deleted from paragraph (e)(1) and replaced with the word "or". Because this suggested change would substantively alter the statutory definition of a common carrier, the change is not appropriate. The Final Rule therefore continues to recite the statutory definition.

Section 572.104(f)—Conference Agreement

Section 572.104(f) defines a "conference agreement" as one which provides for the collective fixing of rates, an administrative structure, and the filing of a common tariff, unless other features of the arrangement

bring it within the definition of a consortium, joint service, pooling, sailing or transshipment agreement. Comment 22 suggests that the "central organization" element of this definition does not clearly encompass simple administrative structures. Comment 28 also suggests that the minimal administrative structure of agreements previously designated "rate agreements" is not clearly embraced by the definition. This definition is intended to include rate agreements. The Interim Rule definition shall therefore be revised to remove any implication that only a large, complex administrative structure would bring a ratemaking agreement within the scope of this definition.

Section 572.104(g)—Consultation

Section 572.104(g) defines "consultation" as the process of conferring between carriers and shippers for the purposes of resolving commercial disputes or reducing malpractices. Comment 39 suggests that the definition's "resolving commercial disputes" language potentially oversteps the "promote . . . commercial resolution" language of the Act and could be interpreted to impose a requirement of binding arbitration.

In response to this suggestion, the definition in the Final Rule shall be clarified to state that "consultation" means a process whereby a conference and a shipper confer for the purpose of promoting the commercial resolution of disputes and/or the prevention and elimination of the occurrence of malpractices.

Section 572.104(i)—Effective Agreement

Section 572.107(i) defines an "effective agreement" as one approved pursuant to section 15 of the 1916 Act or one permitted to become effective pursuant to sections 5 and 6 of the 1984 Act. Comment 38 states that the term is not used in Part 572 and should be deleted. Comment 24 contends that the definition does not encompass agreements which are exempted under either the 1984 Act of the 1916 Act.

The term "effective agreement" is used in the definition of "modification" in section 572.104(r), which in turn supports sections 572.402 and 572.403. Definition of the term is retained, but its scope is expanded to include an agreement previously approved pursuant to section 15 of the 1916 Act or effective pursuant to an exemption under the 1916 Act, or filed and effective pursuant to sections 5 and 6 of the 1984 Act or exempt pursuant to section 16 of the 1984 Act.

Section 572.104(m)—Interconference Agreement

Section 572.104(m) defined an "interconference agreement" as one between conferences serving different trades. Comments 22 and 28 contend that the definition is unnecessarily restricted by the "different trades"' condition. These Comments have merit. Because there is no prohibition against an agreement between two conferences in the same trade, such an agreement should be included in the definition of "interconference agreements" and made subject to the requirements placed on such agreements

by the Act and Part 572. The Final Rule therefore simply defines "interconference agreement" to mean an agreement between conferences.

Section 572.104(n)—Joint Service/Consortium Agreement

Section 572.104(n) Defines a "joint service" or "consortium" agreement as a price fixing arrangement between ocean common carriers wherein the parties operate generally as a single carrier, under a single operating name and common operating management.

Comment 27 suggests that the definition is too narrow and fails to contemplate a situation where a joint service holds out service only through its participation in a conference and does not independently fix its own rates or publish its own tariff. Comment 22 also contends that a joint service does not always include all of the attributes prescribed by the Interim Rule definition.

The 1984 Act refers to joint service/consortia but does not define these terms. In the interest of providing the industry same guidance in this area, we have developed a definition as consistent as possible with prior convention. We believe that agreements which engage in, or have the authority or potential to engage in, the activities described in this definition are properly treated as a single type of agreement and denominated a "joint service" or "consortium" agreement for the purposes of the Act and Part 572. We agree, however, that the joint service definition should be amended to include those agreements in which the parties choose to exercise their rate fixing and tariff authorities through participation, as a single entity, in a conference or other duly authorized agreement. Accordingly, section 572.104(n) (2) and (3) are revised to read: "(2) independently fixes its own rates, charges, practices and conditions of service or chooses to participate in its operating name in another agreement which is duly authorized to determine and implement such activities; (3) independently publishes its own tariff or chooses to participate in its operating name in an otherwise established tariff."

Section 572.104(o)—Marine Terminal Facilities

Section 572.104(o) defines the term "marine terminal facilities" to include off-dock container freight stations at inland locations. Comment 38 urges the deletion of this definition because the term does not otherwise appear in Part 572.

This term supports the definition of a marine terminal operator in section 572.104(p). It is appropriate, therefore, to define the facilities utilized by marine terminal operators in order to resolve uncertainties as to the Commission's jurisdiction over agreements governing the use or operation of such facilities. As indicated in some of the other comments, there appears to be some confusion concerning the facilities that are provided by the "marine terminal operator" defined in section 3 of the 1984 Act.

Comments 20 and 34 state that Commission jurisdiction is improperly expanded by defining the term "marine terminal facility" to include off-dock container freight stations at inland locations or other similar facilities from which cargo is tendered to a consignee or received from shippers for vessel or container loading. These Comments suggest that Congress intended the reach of the 1984 Act to be no greater than that of the 1916 Act with respect to marine terminals. Comment 22 argues that the definition would subject importers and exporters to commission regulation as marine terminal operators and enable them to obtain antitrust immunity under the 1984 Act.

Off-dock container freight stations are properly included within the term "marine terminal facilities." Both the 1984 Act and the 1916 Act refer to terminal operators as persons "furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." As Comment 20 acknowledges, this phrase has been construed under the provisions of the 1916 Act in *Richmond Transfer and Storage Company,* 23 F.M.C. 362, (1980), to include marine terminal facilities not located on the dock at the water's edge. There is nothing in the 1984 Act or its legislative history to indicate the Congress intended the Commission to now construe marine terminal facilities so as to exclude off-dock container freight stations. Accordingly, the Commission will not, as urged by some comments, delete off-dock container freight stations from the marine terminal facility definition is section 572.104(o).

Comment 28 is concerned that agreements for "pure labor services," such as stevedoring contracts, may be made subject to the filling requirements of the 1984 Act because the phrase "and services connected therewith" is used in defining "marine terminal facilities" in section 572.104(o). Comment 28 misconstrues this definition. The "Supplementary Information" to the Interim Rule indicated that neither the term "marine terminal facility," nor the term "marine terminal operator," would operate to extend Commission jurisdiction over stevedoring or "pure labor services." The phrase "and services connected therewith" is intended to refer to those labor services that are incidental to terminal operators, such as free time, checking, or handling accordingly, the suggestion that the above-referenced phrases be deleted has not been adopted.

Section 572.104(p)—Marine Terminal Operator

Section 572.104(p), which tracks the language of the 1984 Act, defines a "marine terminal operator" as a person:

> . . . *engaged* . . . in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. (Emphasis added).[3]

[3] There is a subtle but possibly significant difference between the 1984 Act's definition of marine terminal operator and the 1916 Act's definition of a terminal operator as an "other person." Section 1 of the 1916 Act defines the term "other person" as any person 'carrying on the business of forwarding' *or* furnishing

This definition shall be modified to make clear that shippers, or consignees, as well as their facilities, are not made subject to Part 572 and the Commission's jurisdiction merely because the shippers' or consignees' facilities are used to tender or receive proprietary cargo. Shippers or consignees, who for their own or the carrier's convenience, tender or receive proprietary cargo at their owned or leased facilities are not *engaged* in the business of furnishing terminal facilities in connection with a common carrier by water. Such shippers or consignees provide facilities to common carriers only as an incidental element of their primary business concern. Such consignees and shippers do not meet the statutory definition of a marine terminal operator and are not subject to Part 572 and the agreement provisions of the 1984 Act. Accordingly, section 572.104(p) is amended by adding a statement that the term "marine terminal operator" does not include shippers or consignees who exclusively furnish marine terminal facilities or services in connection with the tendering or receiving of proprietary cargo from a common carrier by water.

Section 572.104(r)—Modification

Section 572.104(r) defines those changes which are interpreted to be "modifications" to agreements and therefore subject to sections of Part 572 dealing with "modifications." Comment 22 contends that "cancellations" are not properly includable in the definition. The Act at section 3(l) suggests a distinction between "modification" and "cancellation." Section 572.104(r) is therefore amended to delete the reference to "cancellations."

Section 572.104(s)—Non-Vessel-Operating Common Carrier

Section 572.104(s) defines a common carrier which does not operate the vessels by which the ocean transportation is provided as a "non-vessel-operating common carrier" (NVOCC) and establishes its relationship to the underlying "ocean common carrier" as that of a "shipper." Comment 39 suggests that this definition be modified to expressly state that an NVOCC is a "common carrier" in its relationship with the underlying shipper. The Interim Rule definition, however, recites the statutory definition and shall be retained in the Final Rule.

Section 572.104(x)—Port

Section 572.104(x) defines the term "port" as the place at which an ocean common carrier originates or terminates (and/or transships) its actual ocean carriage of cargo or passengers as to any particular transportation

wharfage, dock, warehouse or other terminal facilities in connection with a common carrier." The term "carrying on the business of forwarding" is defined separately in the 1916 Act. Although the Commission has previously referred to terminal operators as persons carrying on the business of furnishing wharfage dockage etc., the phrase "carry on the business of" does not clearly modify the language "furnishing wharfage, dockage, etc." The 1984 Act, on the other hand, unequivocally requires marine terminal operators to be "engaged in the business of furnishing wharfage, dockage, etc."

movement. Comment 23 suggests certain revisions to the definition of "port" as well as to the instructions to part V(A) of the Information Form. Comment 23 objects that the way in which the term "port call" is used in the Form is overly broad and imposes an enormous data collection burden. Certain revisions have been made to the Information Form which should resolve this concern. Therefore, there is no need to change the definition of "port" in section 572.104(x).

Section 572.104(z)—Service Contract

Section 572.104(z) defines the term "service contract" as used in Part 572. This definition recites the definition set forth in the Act and makes no express reference to service contracts with shippers' associations. Comment 39 states that this definition would be improved by expressly recognizing the authority of conferences to enter into service contracts with shippers' associations. Comment 39 states that this change would better reflect the intent of the Act and its legislative history. This suggestion has merit and the definition shall be amended as suggested.

Section 572.104(aa)—Shipper

Section 572.104(aa) tracks section 3(23) of the Act and defines the term shipper as an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is made. Comment 28 suggests clarification of the definition by the inclusion of the word "other" after the words "owner or." Comment 33 suggests the addition of a statement that the term "shipper" also includes "shippers' associations." The first suggestion is adopted. This revision should also accommodate the other suggestion that the term "shipper" be expanded to include shippers' association.

Section 572.104(bb)—Shippers' Association

Section 572.104(bb) recites the statutory definition of a shippers' association. Comment 33 states that this definition should make clear that shippers' associations are included within the meaning of the term "shipper" wherever that term is used in Part 572. In view of the change made in the term "shipper," no change in this definition is deemed necessary. The question of whether a shippers' association should be composed only of persons who are the beneficial owners of cargo, as noted in Comment 22, is the subject of a pending petition and is not addressed here.

Section 572.104(cc)—Shippers' Requests and Complaints

Section 572.104(cc) describes the shipper/conference communications which constitute "shippers' requests and complaints" and which are subject to Part 572. Comment 39 suggests that the definition be limited to written communications and exclude misrating claims.

Limiting shippers' requests and complaints to written communications and excluding complaints pertaining to misratings is unduly restrictive and

unwarranted. The matter of written versus oral communications is a procedural matter better dealt with in the context of the conference's rules regarding shippers' requests and complaints. Moreover, there appears to be no reason for excluding misratings as a subject matter for shippers' requests and complaints. The handling of misratings is a matter commonly dealt with in tariff publications and as such should not be excluded. Given the nature of misratings, and as long as the conference tariff provides an efficient and fair mechanism for their resolution, it is doubtful that such matters would come to the conference as a shippers' request or complaint. However, if the tariff fails to provide an appropriate remedy, then the tariff itself is open to criticism and is a valid subject for a request or complaint.

It is also suggested that section 572.104(cc) be expanded to include communications involving service contracts. This suggestion has merit and section 572.104(cc) has, therefore, been revised to provide that "shippers' requests and complaints" includes a communication from a shipper to a conference "requesting to enter into a service contract."

Section 572.104(dd)—Space Charter Agreement

Section 572.104(dd) defines that combination of intercarrier activities which constitutes a "space charter agreement." Comment 28 suggests that there is a possible overlap between the "space charter" and "transshipment" agreement definitions and suggests that the definition of a space charter agreement expressly exclude transshipment agreements.

There is indeed some overlap between the two definitions. This occurs because a transshipment agreement is a type of space charter. To specifically exclude them from the definition of space charter would confuse this relationship. The suggestion therefore is not adopted.

Section 572.104(ff)—Transshipment Agreement

Section 572.104(ff) defines that combination of intercarrier activities and authorities which are classified as "transshipment agreements." Apart from the previously discussed comment relative to the overlap between "space charter" and "transshipment agreements," Comment 38 contends that the "transshipment agreement" definition is unused in Part 572 and should be deleted. The term "transshipment agreement" is used as an exclusion in defining conference agreements in section 572.104(f) (an exclusion cited in section 3(7) of the Act). The term is also used and components of its definition are repeated in the exemption for "non-exclusive transshipment agreements." The definition therefore will be retained.

SUBPART B—SCOPE

The purpose of Subpart B is to set forth those agreements which are subject to Part 572 and to specifically list certain kinds of agreements to which the rules of Part 572 do not apply. In response to certain comments

and in order to state the distinction between subject and non-subject agreements more clearly, Subpart B is being reorganized as two sections. Section 572.201 of the Final Rule encompasses the agreements which were set forth in sections 572.201 and 572.202 of the Interim Rule and is retitled "Subject Agreements." Section 572.202 of the Final Rule includes those agreements which were set forth in sections 572.203 through 572.208 of the Interim Rule and is retitled "Non-subject agreements."

Comment 38 proposes that Subpart B be expanded to include "agreements related to transportation to be performed within or between foreign countries." Comment 22, on the other hand, urges that this same category of agreements be added as an exclusion in Subpart C.

Section 5(a) of the Act expressly provides that foreign transportation agreements are not required to be filed with the Commission. Because these agreements are not subject to filing, Subpart B is being modified to include them as agreements which are not subject to Part 572. Because of this addition of the broad class of foreign transportation agreements in Subpart B, the inclusion of foreign inland agreements or foreign marine terminal agreements in Subpart C has been eliminated from the Final Rule. Foreign transportation agreements are not subject to Part 572.

Comment 22 argues that transshipment agreements fall within the class of foreign transportation agreements specified in section 5(a) of the Act and should be excluded from filing. The Comment objects to continued regulation of transshipment agreements whether exclusive or non-exclusive. To the extent that these agreements are not subject to this part under section 572.202(c) or fall within the exemption of section 572.306, they need not be filed. Other types of transshipment agreements, however, are subject to filing requirements.

Section 572.201 (redesignated section 572.201(a))—Agreements By or Among Ocean Common Carriers

Section 572.201 recites the listing of agreements in section 4(a) of the Act. No substantive changes have been made to this section in the Final Rule.

Section 572.202 (redesignated section 572.201(b))—Marine Terminal Operator Agreements Involving Foreign Commerce

This section is based on section 4(b) of the Act. In conjunction with section 572.202(e) it clarifies and implements the distinction under the Act between marine terminal operator agreements which involve foreign commerce and those which are exclusively in interstate commerce. The suggestion in Comment 20 that further clarification of the status and treatment of marine terminal operator agreements is necessary has been addressed above in discussing the definitions of "marine terminal facility" and "marine terminal operator".

Section 572.203 (redesignated section 572.202(e))—Marine Terminal Operator Agreements Exclusively in Interstate Commerce

This section states that a marine terminal operator agreement exclusively in interstate commerce is not subject to Part 572. Comment 38 suggests that this section is superfluous and recommends that it be deleted. Inasmuch as this section, together with section 572.201(b), distinguishes those exclusively domestic marine terminal operator agreements which are outside the scope of Part 572 from those terminal agreements involving foreign commerce, this section serves a useful purpose and shall be retained. Certain technical changes suggested by Comment 38, however, have been adopted.

Comment 21 expresses concern about inadvertent antitrust exposure and would prefer a procedure whereby parties could obtain antitrust immunity under both the 1984 and 1916 Shipping Acts. Parties that have such concern may file an agreement under both the 1984 and 1916 Shipping Acts and seek to obtain antitrust immunity under both Acts.

Section 572.204 (redesignated 572.202(d))—Common Carrier Marine Terminal Agreements

This section provides that Part 572 does not apply to common carrier terminal agreements. Comment 38 suggests that the word "marine" should be added before the word "terminal". This change would bring the language of this section into conformity with section 7(b)(3) of the Act and therefore it is adopted.

Section 572.205 (redesignated 572.202(f))—Non-Vessel-Operating Common Carrier Agreements

This section states that agreements solely and exclusively between non-vessel-operating common carriers are not subject to Part 572. Comment 38 states that this section is superfluous and should be deleted. The purpose of this section is to provide guidance with regard to agreements between or among NVOCC's. Such agreements were subject to the 1916 Act but are not within the Commission's jurisdiction under sections 4 and 5 of the 1984 Act. An express statement that these agreements are not subject to Part 572 is therefore appropriate and will be retained in the Final Rule.

Two technical changes shall be made in this section. Comment 38 believes that the use of the word "by" in this section might be read to exclude a three-party space-charter and sailing agreement between one NVOCC and two ocean common carriers. To avoid this unintended interpretation, the word "by" has been deleted from the Final Rule. In addition, the phrase "solely and exclusively" is added in order to further clarify the status of agreements among NVOCC's under the Act.

Section 572.206 (redesignated section 572.202(g))—Ocean Freight Forwarder Agreements

This section states that ocean freight forwarder agreements are not subject to Part 572. Comment 38 argues that this section is superfluous and should be deleted. Again there would appear to be a useful purpose served by retaining this section in order to provide guidance on those maritime industry agreements which were subject to the 1916 Act but not subject to sections 4 and 5 of the 1984 Act. The technical change suggested in Comment 38 would improve this section and the words "by or" are deleted. In addition, the phrase "solely and exclusively" is added to further clarify this section.

Section 572.207 (redesignated section 572.202(b))—Maritime Labor Agreements

This section is a restatement of section 5(e) of the Act. No comments were received on this section and no substantive changes have been made to it in the Final Rule.

Section 572.208 (redesignated section 572.202(a))—Acquisitions

This section is a restatement of section 4(c) of the Act. No comments were received on this section and no substantive changes have been made to it in the final Rule.

SUBPART C—EXEMPTIONS

Subpart C treats those agreements which have been exempted from filing or other requirements by the Commission pursuant to section 16 of the Act. In response to certain comments, Subpart C has been reorganized to deal solely with Commission ordered exemptions. The statutory exclusions formerly listed in this subpart have been relocated in Subpart B, as discussed above. Section 572.301 sets forth the procedures applicable to exemptions. Thereafter, each separate exemption is listed in a separate section. This arrangement will facilitate the orderly addition of any new exemptions to this subpart.

Section 572.301—Exemption Procedures

Section 572.301 sets forth procedures for exempting agreements subject to the Act from any requirement of the Act.

Section 572.301(a)—Authority

Section 572.301(a) concludes with the statement that: "The antitrust laws do not apply to any agreement exempted from any requirement of the Act, including filing and Information Form requirements." Comment 38 states that this sentence should be deleted because the Commission does not have jurisdiction over the antitrust laws. This language was suggested by section 7 of the Act which states that the antitrust laws do not apply to certain agreements. Its purpose was merely to indicate, as provided

in the Act, that agreements exempt pursuant to section 16 enjoy antitrust immunity. It was not the intention of this statement to assert or imply Commission jurisdiction over the antitrust laws. In order to eliminate any confusion, this sentence shall be deleted. Deletion, of course, does not in any way affect whatever antitrust immunity attaches to exempt agreements.

Section 572.301(c)—Application for Exemption

Comment 38 suggests that in the first sentence of section 572.301(c) the words "or revocation" should be changed to read "or revocation of an exemption." This suggested change clarifies this section and is adopted.

Section 572.301(f)—Retention of Agreement by Parties

Section 572.301(f) requires that any agreement which has been exempted pursuant to section 16 of the Act shall be retained by the parties and be made available upon request for inspection during the term of the agreement and for a period of three years after its termination.

Comments 22 and 38 object to the requirement that copies of exempt agreements be retained for a three-year period. These Comments do not question the Commission's authority to require retention of agreements but argue that the Commission should not, as a matter of policy, impose an across-the-board requirement for agreements with a *de minimis* impact.

This record keeping requirement is necessary to ensure that the Commission is able to carry out its trade monitoring responsibilities under the Act. Should a question of violation of the Act arise, the exempt agreement must be available for review. Moreover, a three-year period does not appear to be unreasonable. Finally, it does not appear to be a significant burden for parties to retain a copy of an agreement for a period of three years after its expiration. The record retention requirement, therefore, shall be retained as to exempt agreements.

Section 572.302—Foreign Inland Transportation Agreements—Exclusion

This section in the Interim Rule stated an exclusion from filing for foreign inland transportation agreements. Comment 38 states that such agreements are not statutorily excluded from filing but should nevertheless be exempt from filling pursuant to section 16 of the Act. Section 5(a) of the Act excludes from filing "agreements related to transportation to be performed within or between foreign countries." The Commission interprets this broad class of agreements to include foreign inland transportation agreements. Because of the inclusion of foreign transportation agreements in Subpart B there is no longer any need to retain this section and it is deleted from the Final Rule.

Section 572.303—Foreign Marine Terminal Agreements—Exclusion

Section 572.303 in the Interim Rule states the statutory exclusion from filing for foreign marine terminal agreements. Comment 38 states that these agreements should be treated as exemptions rather than as exclusions. Foreign marine terminal agreements, however, are also a specific type of the foreign transportation agreement referred to in section 5(a) of the Act. They are, therefore, included within the scope of section 572.202(c) in the Final Rule and are deleted from Subpart C.

Section 572.304 (redesignated section 572.302)—Non-Substantive Modifications to Existing Agreements—Exemption

This section is based on the exemption which formerly appeared at 46 CFR 524.3(d). The former exemption covered three specific kinds of agreements or modifications: (1) technical changes to the text of the agreement itself; (2) changes in titles of persons or committees; and (3) agreements and changes affecting office facilities, furnishings, supplies and other housekeeping matters. The exemption in the Interim Rule narrowed the former exemption by eliminating the first two types of changes.

Comments 22, 24, 26, 38 and 39 urge that the full scope of the former exemption be restored in the Final Rule. The reason for restricting the former exemption was to ensure that certain changes to the text of the agreement or in the personnel of the agreement administration would be filed so that the agreement on file with the Commission would accurately reflect the actual agreement currently in effect among the parties.

These Comments have merit and the full scope of the former exemption is restored. The purposes to be achieved by limiting the exemption can still be achieved if all such non-substantive agreements or modifications are filed with the Commission for informational purposes. Finally, this section is amended, as suggested by Comment 26, to allow parties to seek a determination from the Director, Bureau of Agreements and Trade Monitoring as to whether a particular agreement or modification is non-substantive.

Section 572.305 (redesignated section 572.303)—Husbanding Agreements—Exemption

This section in the Interim Rule clarified and continued the exemption of husbanding agreements. No comments were received on this section, and no substantive changes have been made to this section in the Final Rule.

Section 572.306 (redesignated section 572.304)—Agency Agreements—Exemption

This section in the Interim Rule clarified and continued the exemption for agency agreements pursuant to section 16 of the 1984 Act. Comment 19 states that a blanket exemption for agency agreements is not appropriate.

This comment, filed by the Port of Los Angeles, notes that in Docket No. 83–48, *Alaska Maritime Agencies, Inc., et al. v. Port of Anacortes, et al.,* agents took the position that they should not be responsible for certain charges where they act for disclosed principals. The Port, however, states that it is not always clear for whom an agent is working or whether the agent is authorized to make certain representations. The Port, therefore, seeks some modification of the exemption to address the alleged need of marine terminal operators to know the scope of the authority of the parties with whom they are dealing.

Subsequent to the filing of Comment 19, a settlement was reached and approved by the Presiding Officer in Docket No. 83–48 which may address the Port's concern. *See Alaska Maritime Agencies Inc., et al. v. Port of Anacortes, et al.,* 27 F.M.C. 137 (1984). In addition, section 572.301(f) requires that exempt agreements be retained for a period of three years. Should any problems develop, an affected party could bring them to the Commission's attention. Finally, ports or other parties may seek modification or revocation of this exemption at any time in a separate proceeding under the procedures of this subpart. Such modification, if warranted, would then be based upon a proper factual record. Neither substantive modification nor revocation, however, would appear to be warranted at this time.

Section 572.306(a) (redesignated section 572.304(a))

Comment 22 believes that the comma following "an agent" where it first appears in this section might imply that the agent is subject to the Act rather than merely state the type of agent whose agreement is subject to the Act. In order to remove any implication that all agents are subject to the Act, the recommended change shall be made and the comma shall be deleted.

572.306(b) (redesignated section 572.304(b))

Comment 22 also believes that a change is necessary to paragraph (b)(2). This Comment suggests that the words "do not" may have been omitted from paragraph (b)(2) and therefore suggests that the paragraph be revised to read "except those . . . (2) which *do not* permit an agent to enter into similar agreements with more than one carrier in the trade. . . ." There was no omission in the Interim Rule. The language in the Interim Rule carried over the exemption as it was formerly stated in 46 CFR 520.12(b). The former exemption did not apply to agency agreements which permit an agent to enter into similar agreements with more than one carrier in the trade. Because of the potential competitive significance of such agreements an exemption from filing would not be appropriate. This suggestion therefore has not been adopted.

Section 572.307 (redesignated section 572.305)—Equipment Interchange Agreements—Exemption

Section 572.307 in the Interim Rule clarified and continued the exemption for equipment interchange agreements. No comments were received on this section, and no substantive changes have been made to it in the Final Rule.

Section 572.308—Joint Policing Agreements—Exemption

Section 572.308 continued the 1916 Act exemption for joint policing agreements only for the period of the Interim Rule. This exemption terminates thirty days after the issuance of the Final Rule, and thereafter, joint policing agreements must be filed pursuant to the requirements of the Act and Part 572. Comment 33 supported the termination of this exemption. Comments 22 and 38 are opposed to termination. Comment 22 questions whether joint policing arrangements are even subject to filing.

Joint policing agreements, at a minimum, come within section 4(a)(5) of the Act which applies to agreements among ocean common carriers to engage in an exclusive, preferential, or cooperative working arrangement. In addition, sections 4(a) (1) and (2) of the Act might also apply under certain circumstances. Joint policing arrangements are therefore clearly within the scope of the Act.

Comment 22 argues further that even if such arrangements are subject to sections 4 and 5 of the Act, they should nevertheless be exempt from filing. Comment 22, as does Comment 38, maintains that this exemption may not be terminated at this time without further notice and opportunity for hearing.

This rulemaking proceeding was instituted, among other authorities, pursuant to section 16 of the 1984 Act. *See* 46 CFR 572.101. The Interim Rule published in the *Federal Register* on May 29, 1984, 49 FR 22300, notified all interested parties pursuant to the Administrative Procedure Act (APA) (5 U.S.C. 552(b)) of the proposed elimination of this exemption. All interested parties have had an opportunity to be heard through the filing of written comment in accordance with section 16 of the Act and the APA (5 U.S.C. 552(c)). Having provided the parties notice and opportunity for hearing, the Commission may properly terminate the exemption of joint policing agreements. Finally, no adequate reason not to terminate this exemption has been provided.

Comment 38 questions the rationale provided for terminating the exemption on joint policing agreements. As noted in the discussion of the Interim Rule, there are potential adverse effects on shippers resulting from a joint policing agreement. Joint policing arrangements may involve significant numbers of carriers and consequently may have a widespread effect on shippers utilizing these carriers. The Commission believes that these arrangements are significant enough to require that they they be filed and reviewed.

Comment 38 argues that joint policing arrangements are beneficial in that they promote cost savings. Elimination of the exemption, however, will not destroy this benefit. The only result of terminating the exemption is to subject such arrangements to the Act's filing requirements. Given the fact that such arrangements need not be accompanied by elaborate information, and the relatively short waiting period before effectiveness, the burden of requiring that they be filed is minimal. This exemption therefore is terminated in the Final Rule. In light of the fact that this exemption is being terminated, it is unnecessary to address changes to section 572.308 suggested in the comments.

Section 572.309—Credit Information Agreements—Exemption

Section 572.309 continued the 1916 Act exemption for credit information agreements only for the period of the Interim Rule. This exemption terminates thirty days after the issuance of the Final Rule, and thereafter, these agreements will be subject to the filing requirements of sections 4 and 5 of the Act and Part 572. Comment 33 supported the termination of the exemption for credit information agreements. Other comments (Comments 22, 24, 38, 39) urged that it be retained.

One misconception seems to be common to the comments opposed to termination of the exemption. The result of eliminating the exemption will not be to bar the formation of credit information agreements, but merely to require the parties to comply with the filing requirements. The filing requirements should not present a significant barrier to the formation of these agreements and the parties will be free to share credit information as they did under the 1916 Act.

Comments 24 and 38 take issue with the Commission's statement in the Supplemental Information that "credit is an important factor in price competition." Comment 24 maintains that this exemption does not authorize the collective pricing of credit. Comment 38 asserts that the limitation contained in section 572.309(c) barring the discussion of any matter which is required to be published in a tariff, ensures that these agreements will not result in antitrust abuses.

Credit information agreements must be filed because the distinction between the sharing of credit information and the collective formation of credit policy and pricing can easily become blurred. Accordingly, these agreements should be filed and reviewed in order to ensure that the directives of the Act are satisfied.

Similar to its position taken with respect to joint policing agreements, Comment 22 asserts that there is no requirement that credit information agreements be filed and that if the Commission wishes to terminate the exemption it must provide for additional notice and comment.

The Commission's position on this issue is the same as it is with respect to joint policing agreements. A credit information agreement is a "cooperative working arrangement," within the meaning of section 4(a)(5) of the

Act, and therefore is an agreement within the scope of the Act. Consequently, the filing requirements of section 5 and Part 572 must be met. In addition, adequate notice and comment has been provided. The termination of the exemption was duly noticed in the *Federal Register* with the publication of the Interim Rule (49 FR 22301 (1984)). Parties were given an opportunity to comment and the Commission has considered these submissions in accordance with the provisions of the APA.

Comment 24 asserts that the authority to set credit terms is interstitial to collective ratemaking authority. Therefore, according to this Comment, the exemption for credit information agreements should be continued where the parties already have collective ratemaking authority.

Although the establishment of credit rules is interstitial to collective ratemaking authority, establishment of credit rules is not within the scope of activity permitted by a credit information agreement. The two activities are distinct. As mentioned earlier, the purpose of a credit information agreement is the sharing of credit information, not the formation of credit rules. The Commission recognizes, however, that the sharing of certain credit information is inherent in the process of forming collective credit rules. Therefore, where the parties already have collective ratemaking authority and wish to form a credit information agreement, depending on the contents of that agreement, they may already have all the authority they require and may not need an additional agreement.

Finally, Comment 24 maintains that the expiration of this exemption is contrary to the provisions of section 2(1) of the Act to achieve a regulatory system involving a "minimum of government intervention and regulatory costs."

The Commission disagrees. This is not an example of the agency arbitrarily increasing the regulatory burden upon parties subject to the Act. Credit information agreements are properly within the scope of the Act and their significance to price competition requires that they not be exempted from the filing requirements. Because this exemption is being terminated, it is unnecessary to discuss the various suggested modifications to this section.

Section 572.310 (redesignated section 572.306)—Nonexclusive Transshipment Agreements—Exemption

Section 572.310 continues the exemption under the 1916 Act for nonexclusive transshipment agreements pursuant to section 16 of the 1984 Act. The exemption in the Interim Rule made a number of changes to the previous exemption in 46 CFR Part 524. The requirements appearing at section 572.310(a) (2) and (3) were added to the definition of the agreements which fall within the exemption. The specific items which must appear in a tariff were generally retained in section 572.310(c). Section 572.310(d) replaced the former mandatory agreement language with a description of the required and permissive contents of such agreements.

Section 572.310(a) (redesignated section 572.306(a))

Comment 28 objects to the requirement in section 572.310(a)(2) which limits the class of exempt agreements to those which, among other things, do not "guarantee any particular volume of traffic or available capacity." Comment 28 explains that often when a publishing carrier solicits the participation of a connecting or feeder carrier in meeting the needs of a developing trade or carrying cargoes of opportunity, the connecting carrier does not have sufficient unused vessel capacity in place and is obliged to charter additional vessel capacity. The connecting carrier, however, may be reluctant to charter additional capacity unless the publishing carrier agrees to guarantee a minimum volume of cargo. In order to facilitate such arrangements, Comment 28 urges the deletion of the second disqualifying element in paragraph (a)(2).

This exemption indeed is intended to be limited to arrangements that do not guarantee any particular volume of traffic or available capacity. Agreements that contain such guarantees may have anticompetitive consequences and are more akin to space charter arrangements and therefore are subject to all requirements applying to those arrangements. Accordingly, this suggested change is not made in the Final Rule.

Sections 572.310 (c), (d) and (e) (redesignated sections 572.306 (c), (d) and (e))

Comment 24 suggests that paragraphs (c)(2) and (d)(4) which refer to origin, transshipment and destination "ports" should be modified to make clear that such agreements can apply to intermodal cargo. Transshipment arrangements, by their nature, are limited to the all-water movement of cargo. The suggested change, therefore, is not appropriate. This does not in any way, however, preclude the filing of through intermodal rates by participants in such arrangements.

Comment 38 urges certain substantive modifications to section 572.310 (c) (d) and (e) and a conforming technical change in section 572.310(b). Comment 38 would delete the reference to the required tariff provisions cited in section 572.310(b) and enumerated in section 572.310(c). This Comment believes that the tariff regulations are sufficient in this regard. Comment 38 states that making the filing of a tariff a condition to the existence of an exemption is logically inconsistent because there can be no tariff provision until the agreement is effective and no such agreement can be effective unless it is exempt. The provision of section 572.310(c) will be retained in the Final Rule. There would appear to be no harm in having these tariff items enumerated in this exemption section as well as in the tariff rules. Moreover, this is a condition which will only be complied with subsequent to the effectiveness of a nonexclusive transshipment agreement. The apparent dilemma posed by Comment 38 is artificial.

Finally, Comment 38 suggests that section 572.310 (d) and (e) be deleted as unnecessary restrictions on the commercial arrangements of agreement

parties. Section 572.310(d) requires that nonexclusive transshipment agreements contain a declaration of the nonexclusive character of the arrangement and lists 13 permissible terms or specifications in such agreements. Section 572.310(e) states that no other subject other than those listed in section 572.310(d) shall be included in an exempted nonexclusive transshipment agreement.

The requirements of section 572.310 (d) and (e) shall be retained. Those provisions are necessary in order to ensure with some degree of specificity the exact parameters of the exemption. Only agreements which meet these requirements need not be subject to the usual filing and review. Parties that wish to have terms other than those permitted under the exemption may draft their agreements accordingly. Such agreements, however, will be subject to filing and review.

SUBPART D—FILING AND FORM OF AGREEMENTS

Subpart D implements the filing requirements of section 5 of the Act. It establishes filing and form requirements, defines and establishes procedures for filing modifications of agreements and specifies those agreements which must be accompanied by an Information Form. Subpart D also provides for a waiver of certain form requirements upon a showing of good cause.

Section 572.401—Filing of Agreements

Section 572.401 specifies the time and place for submitting an agreement, describes the contents of the transmittal letter, and provides that any agreement and accompanying Information Form which does not meet the requirements of filing shall be rejected in accordance with section 572.601.

Section 572.401(a)

Several comments (Comments 1, 22, 24, 28, 34, 38) suggested changes in the filing specifications of section 572.401(a). Comment 38 states that this section should fully carry out the terms of the Act and should therefore provide for the filing of a complete memorandum which specifies the substance of any oral agreement subject to the Act. This suggestion has merit and is adopted. Section 572.401(a) now makes it clear that all agreements, including oral agreements reduced to writing in accordance with the Act, are subject to Part 572 and must be filed.

Comments 24, 28, and 38 contend that the requirement regarding authority to file is cumbersome or unnecessary. Comments 1 and 34 suggest that, consistent with 46 CFR 502.24, an attorney should be allowed to file without further statement of authority. The purpose of the authority to file requirement as set forth in the Interim Rule was to ensure that persons purporting to represent a group of principals did in fact have the authority to do so. There have been some instances in the past where the submissions tendered by parties allegedly on behalf of a group of principals were

questionable representations of the intentions of the principals. In addition, there have been occasional failures under the Interim Rule and under predecessor agreement rules to provide verification of the authority to file. Upon inquiry, however, these deficiencies have been found to be an oversight or a technical failing and have been quickly remedied. In the case of a possible misrepresentation there appear to be sufficient safeguards (*e.g.*, public notice of filing and penalties for misrepresentation in the Final Rule to protect against or remedy any serious filing abuse. Therefore, the requirement for specification of authority to file has been deleted in the Final Rule.

Comment 22 notes that section 572.401(a) does not distinguish between a "subscribing" and "filing" party. Comments 22 and 38 take exception to the reference in this section to the Information Form. Inasmuch as this section is not intended to address the requirements governing the execution (*i.e.* "subscription") of agreements or the required supporting documents (those matters being addressed at section 572.402(d) and Appendix A, Part IX(c)) no change has been made in response to these comments.

Finally, section 572.401(a) has been changed to require only an original and two copies of the Information Form rather than 15 as in the Interim Rule, thereby alleviating the paperwork requirements for parties to agreements.

Section 572.401(b)

Section 572.401(b) describes the contents of the transmittal letter which accompanies an agreement filing. Its purpose is to describe the minimum information that is necessary to assure the timely and proper receipt, acknowledgement, public notice and initiation of the review process associated with a filed agreement.

Comment 24 suggests that this section unnecessarily requires the repetition of the submitting party's address and telephone number beneath the letter signature when that information is already provided in the letterhead. An appropriate change has been made to eliminate repetition.

Comment 34 contends that this section should not require that the person executing the agreement and the person signing the transmittal letter be the same. In order to clarify section 572.401(b) in this respect, an appropriate change has been made.

Comment 38 suggests that this section be amended to make clear that the transmittal letter is "submitted" rather than "filed". An appropriate change has been made.

In addition to these changes, this section has been reorganized to more clearly set forth the contents of the transmittal letter.

Section 572.401(c)

Section 572.401(c) provides that any agreement and accompanying Information Form which does not meet the requirements of filing shall be

rejected in accordance with section 572.601. Comment 38 contends that the reference to the Information Form, and any filing deficiencies therein, as a basis for rejection of a filing exceeds the authority granted in section 6(b) of the Act. Comment 34 criticizes section 572.401(c) as an imprecise paraphrase of the statutory language and redundant of section 572.601 and urges its deletion.

The purpose of section 572.401(c) is to emphasize the consequences of failure to meet the submission requirements of the Act and Part 572, to include both those requirements applicable to the filed agreement itself and those applicable to any submissions required in support of that filing. The authority to include deficiencies in the Information Form as a basis for rejection is clearly provided in section 5(a) of the Act which empowers the Commission by regulation to prescribe the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate the agreement. Section 6(b) of the Act directs the rejection of any agreement that does not meet the requirements of section 5. The Information Form is, by the regulations of Part 572, part of the "requirements" referenced in section 5 of the Act and any substantive failure in its submission is a failure to meet the requirements of section 5 and, therefore, an appropriate basis for rejection. While section 572.401(c) does, to some extent, repeat the requirements expressed in section 572.601, early experience in the administration of the 1984 Act has shown a need for the additional cautionary emphasis. Section 572.401(c) is therefore retained without change.

Section 572.402—Form of Agreements

Section 572.402 prescribes the form of agreements, with the exception of marine terminal and assessment agreements, filed with the Commission pursuant to section 5 of the Act. The provisions of this section were applicable to new and initial or replacement agreements filed on or after June 18, 1984. They were also made voluntarily applicable to modifications or restatements of agreements in effect before June 18, 1984 until such time as the Commission specifies a schedule for all governed agreements to be in conformity. The Commission's Interim Rule specifically solicited comments as to the compliance schedule to be established.

Comment 28 contends that the form requirements may be impractical and requests their voluntary application rather than their requirement. Comment 34 takes issue with the manner of page numbering specified at section 752.402(b) and the manner of page titling specified at section 572.402(c), stating that it would be preferable to begin the numbering of agreement pages with the first page after the required Title Page and Table of Contents. This Comment further submits that there is no basis for requiring an agreement to have both a "full" name and a "doing business as" name.

The purpose of section 572.402 is to establish a uniform format for agreements in order to facilitate: (1) timely, accurate execution of the

preliminary review imposed by section 6(b) of the Act and the substantive review and disposition directed generally by section 6 of the Act; (2) orderly maintenance and use of Commission records in support of the performance of its statutory obligations; and (3) eventual conversion of these records to a digitalized and/or micrographic form to enhance their cost effective use through computer assisted retrieval techniques. The brief experience under the Interim Rule has already served to demonstrate the utility of the new format in pursuing the first two of these objectives. Significant portions of the gains in processing efficiency can be directly attributed to this standardization.

With the eventual extension of these format requirements to all agreements, even greater economies may reasonably be expected. With respect to the numbering of the pages of an agreement, the division of an agreement into discretely numbered sections should enhance the efficiency with which an agreement can be compiled and maintained, and will improve the efficiency with which an agreement is utilized. As regards the matter of page titling, the purpose of this section is to avoid the identification problem that arises should the pages of a loose-leaf document become separated.

The Interim Rule requirement to use the agreement's "doing business as" name was primarily intended to minimize the space required to title the page because "dba" names are generally shorter than the full name. However, upon further consideration, we believe that it is preferable to require each page of an agreement to be titled with the name that appears on the Title Page and the Rule is modified accordingly.

The Supplementary Information to Interim Rule section 572.402 invited comment as to the time frames for making the format requirements of section 572.402 applicable to agreements existing prior to June 18, 1984. Comment 24 contends that the format requirements should not be made applicable to existing agreements prior to June 18, 1986. Comment 29 suggests a period of ninety days, presumably ninety days after publication of the Final Rule.

As indicated above, the Commission has already experienced significant benefit from the standardized format in terms of administrative efficiency in processing and reviewing agreements. The standardized format should also facilitate the implementation of the other record management initiatives discussed above. A fixed deadline for achieving compliance, however, might produce a crush of filings which would overtax the Commission's resources. Conformance to the format requirements therefore shall be achieved according to the following schedule: (1) all new agreements shall be submitted in the required format when initially filed; (2) any restatement of a previously effective agreement filed subsequent to December 15, 1984 shall be submitted in the required format; (3) any effective agreement which is modified to any degree and for whatever purpose subsequent to December 15, 1984 shall be restated in its entirety and filed in the required format, including the modification; and (4) all other governed agreements not other-

wise brought into compliance shall be conformed to the required format and filed with the Commission by not later than October 1, 1985. This schedule is set forth in section 572.402(h). Finally, we have amended section 572.402 to state that the form requirements do not apply to cancellations of agreements.

Section 572.403—Modification of Agreements

Section 572.403 establishes requirements with respect to modifications to agreements. Section 572.403(a) indicates which modifications are so significant as to require an accompanying Information Form. Section 572.403(d) provides a procedure for indicating textual changes in agreements and section 572.403(g) prescribes a two-year republication requirement. The comments addressing each of these sections are discussed below.

Section 572.403(a)

Section 572.403(a) defines significant modifications as those changes in an agreement that may result in a significant reduction in competition. Where the competitive consequences of an agreement modification are likely to be minor, the Information Form usually would not be required. For example, the addition of a single port to the geographic scope of an agreement would not be a significant modification, but the addition of an entire port range may have such a competitive impact as to be a significant modification. The June 12, 1984 amendment to the Interim Rule dropped the specification that the addition of members to a conference constitutes a significant modification. This amendment also added the word "significant" to changes in geographic scope, to reductions in service levels, and to changes in pool penalty provisions or varying charges, where such changes would require the filing of the Information Form.

Nine comments address section 572.403. Comment 18 argues that for joint service agreements, the Information Form should only be required where the modification entailed the addition of new parties to the agreement, but not for the addition of ports or vessels.

A joint service agreement may result in a substantial reduction in competition when two or more existing carriers in a trade consolidate their otherwise competing service. Modifications to a joint service agreement that add vessels or extend the port coverage of the agreement are not likely to lead to a substantial reduction in competition, except where the expansion of port coverage includes ports currently served outside the joint service by two or more of the parties. Modification to a joint service agreement that increases the number of parties and, therefore, increases the potential market power of the joint service may have a substantial competitive impact on the trade and raise questions under the general standard. Consequently, the Commission is persuaded that significant modifications to a joint service agreement also include those that add parties to the agreement. An appropriate change is made in the Final Rule.

Comment 22 argues that the Commission is not authorized to require an Information Form either for the initial filing of any agreement or for a modification of an agreement. The Commission addresses the question of its authority to require an Information Form in the discussion of Appendix A.

Comment 26 argues that for conference agreements the only modifications that should require the submission of an Information Form would involve a substantial expansion of geographic scope. The requirement that an Information Form be filed with any modification that results in a "significant reduction in competition" is argued to be too broad and vague.

The Commission generally concurs that, as a practical matter, modifications of conference agreements, which do not add new authorities, will ordinarily only require the Information Form where they substantially increase the geographic scope of the agreement. This requirement is outlined in the Commission's June 12, 1984 amendment to the Interim Rule. However, if a conference agreement is amended to add or expand authority authorizing reductions in service, then such a modification would likely be viewed by the Commission as a significant modification requiring the submission of an Information Form.

The concerns raised by Comment 28 regarding section 572.403 are discussed under Appendix A.

Comment 30, in addition to arguing for the requirement that equal access agreements and modifications thereto be accompanied by an Information Form (an argument that has been addressed along with the concerns of Comment 28 under the Commission's discussion of Appendix A), also urges express reference to specific types of modifications that might result in a significant reduction in competition. These would include: changes in cargo categories and descriptions that result in significant increases in cargo that is subject to a pooling, equal access, joint service, or consortium agreement; significant increases in the cargo or revenue share of a national-flag line in a pooling or equal access agreement; or a significant decrease in the cargo or revenue shares of a third-flag line in a pooling or equal access agreement.

The purpose of requiring an Information Form with significant modifications is to obtain needed information in order to properly and adequately review such modifications under the general standard. The Commission has specified certain modifications that may result in a significant reduction in competition, thereby requiring an Information Form. The Commission has not attempted to provide a *comprehensive* list of all such modifications. Because a pooling agreement is viewed as potentially substantially anti-competitive, any modification to such an agreement that reduced competition would likely be a significant modification requiring the Information Form.

The modifications to a pooling agreement referred to by Comment 30 would also likely result in a significant reduction in competition. Accordingly, as a clarification, section 572.403(a) is amended to state that signifi-

cant modifications also include "changes in cargo categories or descriptions that result in a significant increase in the amount of cargo subject to the pool, or changes in the allocation of cargo or revenue that significantly change the cargo or revenue shares of national or non-national flag lines."

Comment 30 also argues that the change effected by the June 12, 1984 amendment to the Interim Rule requiring the Information Form only for those modifications that result in "significant" changes in geographic scope, "significant" reductions in service levels and "significant" changes in penalty provisions allows the parties excessive discretion to determine what modifications are in fact "significant".

We do not agree. While parties to agreements are allowed some discretion, in the first instance, to determine which modifications to their agreements are significant, the Commission retains the option to request additional information from the parties under section 6(d) where the "modification" appears significant and the Information Form has not been filed. The Commission does not wish to impose burdensome filing requirements for each and every change regardless of its competitive significance. Parties should contact the Director, Bureau of Agreements and Trade Monitoring for advice as to whether or not a particular modification requires the filing of an Information Form.

Comment 34 urges that amendments to conference agreements which add authority to establish through intermodal rates should not be considered significant modifications.

One of the objectives of the 1984 Act is to clarify regulatory authority concerning conference intermodal authority. The Conference Report explicitly states that "no special stigma should attach" to conference agreement amendments that establish intermodal authority. H.R. Report 98–600, 98th Cong., 2d Sess. 34 (1984). This does not mean, however, that conference intermodal amendments which extend the scope of price fixing agreement and raised concerns under the general standard should not be scrutinized. An Information Form, therefore, is required. This should not place an excessive burden on the parties because the market share information required in the Form applies only to the relevant trade(s) as determined by the parties. Market share data need not be provided for interior points to be served.

Comment 37 argues that the Commission has no authority to request an Information Form for any conference agreement or modification, and that, in any event, it should not require the Form where the modification solely provides for the addition of members.

The Commission rejects the argument that it has no authority to require an Information Form for reasons stated in its discussion of Appendix A. In regard to the second point, the Commission has, in its June 12, 1984 amendment, already deleted the requirement that a modification adding members to conferences be accompanied by an Information Form.

Comment 38 makes two technical suggestions. First, it is suggested that the second paragraph of the Instructions in Appendix A be conformed with section 572.403(a) (repeating the requirement that the Information Form is to be filed with significant modifications). Second, the Commission is urged to list in one place all agreements that require the Information Form. The first change is adopted. The second recommendation is not practicable, at least for significant modifications under section 572.403(a), because not all the modifications encompassing various combinations of authorities that will be filed can be anticipated. A filing party may contact the Director, Bureau of Agreements and Trade Monitoring for advice in this regard. For the purposes of an initial agreement filing, the Instructions specify that parties to all agreements, with the exception of marine terminal agreements, assessment agreements and agreements exempted from filing under Subpart C of Part 572, are required to file an Information Form in conjunction with the agreement.

Section 572.403(d)

Section 572.403(d) establishes a mechanism for indicating textual changes in the language of an agreement. Comment 38 believes that the method of indicating changes is unnecessary and cumbersome. This comment suggests that parties should have the option of submitting separately, for information purposes, a copy of any agreement modification showing the deletions and new provisions.

Section 572.403(d) is intended to avoid any ambiguity as to what is being changed, deleted or added in an agreement and thereby facilitate the review of modifications to that agreement. This purpose may be equally achieved by the alternative method suggested by Comment 38. Section 572.403(d) therefore shall be amended to provide, as an alternative, for the informational filing of a page or pages indicating the proposed modification in the manner prescribed in sections 572.403(d)(1) and 572.403(d)(2).

Section 572.403(g)

Section 572.403(g) requires the republication of an agreement under certain circumstances but exempts such republication from certain requirements of Part 572 when no substantive changes are involved. Comments 24 and 26 contend that the republication requirement is unnecessary and wasteful.

The purpose of section 572.403(g) is to provide for the periodic republication of the entire text of an agreement and to remove those portions of the agreement which have been deleted through prior modifications. Removal of obsolete language enhances the readability of the agreement. This section, however, has been amended so that the republication requirement applies only to those agreements which retain deleted language within the text of the agreement. Agreements which make changes by indicating the change on a separate page filed for information purposes, as provided for in section 572.403(d)(3), need not republish the entire agreement.

Section 572.404—Application for Waiver

Section 572.404 provides for a waiver, upon a showing of good cause, of the form requirements of sections 572.401, 572.402 and 572.403 and establishes the procedure and content for waiver requests. No comments were received on this section.

Upon further consideration, the Commission believes that the scope of section 572.404 should be enlarged to provide for a waiver, under appropriate circumstances, from the agreement organization and content requirements of sections 572.501 and 572.502. There is a direct connection between section 572.402, on the one hand, and sections 572.501 and 572.502, on the other. Any waiver associated, in particular, with section 572.402(e)(2) would almost certainly require relief from all or portions of sections 572.501 and 572.502. This broadening of the waiver provision should not be interpreted as a lessening of the importance of these form and manner requirements. The purpose of expanding the waiver provision is to provide for the exceptional situation where some relief may be justified. Accordingly, section 572.404(a) is amended to include sections 572.501 and 572.502 within the matters for which a waiver may be sought.

Section 572.405—Information Form

Section 572.405 requires that a completed Information Form accompany certain agreements at the time of their filing. Complete responses are required for each item on the Information Form. Section 572.405(b) and the instructions to the Information Form require that, where the party is unable to provide a complete response, the party should provide either estimated data (with an explanation of why precise data are not available) or a detailed statement of reasons for noncompliance and the efforts made to obtain such information.

Because certain parts of the Information Form have been made voluntary or are only required to be completed for certain types of agreements, section 572.405(b) is amended to indicate that a complete response to the Information Form shall be supplied in accordance with the Instructions. In addition, in order to relieve any paperwork burden on the parties and to enhance the ability of the Commission to protect the confidentiality of the Information Form, only an original and two copies of the Information Form are required to be filed.

Several comments object to the required explanation for noncompliance, including the use of estimates, as a basis for rejection of the agreement under section 572.601. Comment 37 questioned whether the Commission would use the explanation to reject the agreement on the basis of, for example, the accuracy of estimates or the adequacy of sources. Comment 39 suggests that, where explanations are "meritorious", they should be accepted.

In order to effectively and efficiently utilize the data provided on the Information Form, it is necessary for the Commission to assess the accuracy

of such data. The identification of the sources of estimates allows the Commission to determine the extent to which such data should be incorporated in the analysis of the agreement. An explanation of why precise data are not available is required for certain parts of the Information Form in order to ensure that the parties make a reasonable attempt to provide data that is available to them. Available data, as addressed later in the discussions of Parts III and IV of the Information Form, are derived from data that the parties already have available, or would ordinarily acquire in the course of making the commercial decisions underlying the proposed agreement. The Commission has, however, deleted the requirement that an explanation of why precise data are not available accompany estimates in Parts III and IV, and the change is indicated in the relevant sections of the Final Rule. Reasonable explanations for the lack of availability of precise data will continue to be required for the remaining parts of the Information Form which require data and which are not voluntary. Where estimates are not provided, a statement of reasons for not providing estimates and the efforts made to obtain such information is required.

Six comments on section 572.405 address the issue of the Commission's authority to require the Information Form. Four comments took the position that the Commission does not have such authority under the Act. These Comments are addressed in the discussion of sections 572.401(c) and 572.601 and in the discussion of Appendix A—Information Form and Instructions.

Section 572.406—Complete and Definite Agreements

Section 572.406 provides that any agreement filed under the Act and Part 572 shall be the complete agreement among the parties and shall specify in detail the substance of the understanding of the parties. This section provides that open-ended provisions will be permitted only if the enabling agreement indicates that any further agreement cannot go into effect unless filed and effective under the Act. Finally, this section describes matters which are interstitial to the basic agreement authority. Ten comments were filed in Docket No. 84–32 addressing this section.

The Supplementary Information to Docket No. 84–32 stated:

> The rule does not state how the Commission will treat an agreement that is not sufficiently specific, complete and definite. In most cases, such deficiencies could probably be corrected through informal discussions between the Commission's staff and the parties. An agreement which is severely deficient, however, may be rejected, investigated or subject to a formal request for additional information or to challenge in the court under section 11(h) of the Act.

A number of comments (Comments 101, 105, 106, 107, 108) objected to the discussion insofar as it suggested that an agreement which was severely deficient under the criteria of section 572.406 could be rejected.

These Comments argue that the Commission does not have the authority to reject an agreement because it is unclear or indefinite. Such agreements allegedly may only be investigated, subjected to a request for additional information or challenged in court under section 11(h) of the Act. Comments 107 and 110 propose the addition of a new paragraph which would expressly limit the Commission's action on deficient agreements to such an investigation, an information request or an injunction.

As the Supplementary Information in the Interim Rule indicated, the Commission would in most cases seek to resolve deficiencies through informal negotiations and discussions between its staff and parties. Rejection of an agreement would only occur in a rare case where an agreement is so severely deficient that, on its face, it could not be construed as complete and where even the most basic analysis under the general standard would not be possible. Moreover, in such a case, it would not be possible to determine whether sections 10(a)(2) and 10(a)(3) were complied with. Finally, agreements should be sufficiently precise and definite to determine whether a particular activity is within the scope of the antitrust immunity conferred upon them by section 7 of the Act. The fact that there are other avenues available for dealing with deficient agreements, as suggested, does not preclude the use of rejection. Clearly, an informal resolution of such deficiencies is preferred. In other cases, requests for additional information, investigation, or court challenge under section 11(h) of the Act may be appropriate. However, where even the most minimal requirements with regard to definiteness and completeness are not met, rejection may be appropriate. The Commission does not believe that it is necessary to formally state the actions which might be available within the text of section 572.406.

Section 572.406(a)

Section 572.406(a) states that a filed agreement shall be the complete agreement among the parties and shall specify in detail the substance of their understanding. Comment 102 supported this section as it appeared in the Interim Rule. Comment 105 urges that this section be eliminated or alternatively amended.

The Commission believes that section 572.406(a) adequately states the general rule that agreements must be complete and definite and this section remains unchanged in the Final Rule.

Section 572.406(b)

Section 572.406(b) establishes guidelines concerning open-ended authority in agreements. Comment 102 supports this section in the Interim Rule. Comment 104 favors the elimination of this section but alternatively proposes certain modifications assuming that section 572.406(c) is not eliminated. Comment 105 considers sections 572.406(b) and (c) to be intertwined and proposes modifications to both sections.

Section 572.406(b) provides that agreement clauses which contain enabling authority expressly state that such authority may not be implemented unless the more specific implementing understanding or agreement is filed and effective under the Act. To that extent, this section merely states what the Act otherwise requires. Accordingly, section 572.406(b) is retained in the Final Rule. However, the phrase "open-ended or vague" is deleted.

Section 572.406(c)

Section 572.406(c) is intended to provide a guideline regarding interstitial agreement authority. The comments were unanimous in expressing concern with this provision. A majority of comments favor the elimination of paragraph (c) from the Final Rule. Others, as an alternative, propose modification to eliminate phrases such as "routine and ordinary", "anticompetitive effect" and "routine operational". Some comments suggest that this paragraph would revive certain antitrust issues which were intended to be put to rest by the 1984 Act. Other comments suggest that it would erode the "reasonable basis to conclude" defense under section 7(a)(2) of the Act.

Section 572.406(c) is retained in the Final Rule but is amended along the lines suggested in several of the comments. The standard of this section is one that will be applied on an *ad hoc* basis and is not intended to preclude parties from taking interstitial action.

SUBPART E—CONTENT AND ORGANIZATION OF AGREEMENTS

Subpart E provides for the standardization of the organization of an agreement, specifying the name, number, and order of particular agreement articles.

Comment 38 argues that the requirements of Subpart E exceed the Commission's authority and should be deleted. Comment 34 urges that a period of at least six months subsequent to the adoption of the Final Rule be permitted to conform agreements to the requirements of Subpart E. Comment 28 suggests that the requirements of Subpart E may not be suitable for all agreements and that alternative formats should be permitted. Comment 39 urges that the Commission continue its policy of not specifying the language of agreement provisions. It also urges the Commission to reconsider making the requirements of Subpart E applicable to agreements which were approved prior to June 18, 1984. However, two conferences subscribing to Comment 39 did not object to Subpart E requirements provided that republication is not required prior to June 17, 1985.

The objectives of Subpart E are to: (1) ensure that the text of an agreement contains the essential articles which are likely to appear in all agreements in a prescribed order; and (2) further support the standardization of agreement format and its associated goals and objectives as discussed above in connection with section 572.402. Nothing in the Act or its legisla-

tive history prohibits the Commission from establishing an orderly, minimum structure or organization for agreements filed with the Commission.

Upon consideration of the various proposed compliance schedules and available resources and obligations, the Commission has determined that a phased implementation schedule, both for sections 572.402 and 572.403 and sections 572.501 and 572.502, would minimize any burden by allowing up to ten months to achieve compliance. The elements required by section 572.501 are generally found in most agreements and provide the minimum information necessary for a general understanding of an agreement. These requirements, as revised below, shall continue for all agreements except cancellations, marine terminal agreements and assessment agreements. In the event that a waiver from these requirements is deemed necessary, section 572.404 has been expanded to permit application to be made for a waiver from the requirements of sections 572.501 and 572.502.

Section 572.501—Agreement Provisions—Organization

Section 572.501 provides a uniform organization for all agreements, except marine terminal agreements and assessment agreements.

Section 572.501(a)

Section 572.501(a) imposes a minimum organization and subject matter outline on filed agreements (except for those which are exempted) and reserves the use of certain article numbers. Comment 29 contends that section 572.501(a) should be modified to provide that the content of a specified article is not required to be published unless that content has been commercially agreed to, contending that some of the articles do not otherwise ordinarily exist in some forms of agreements.

Section 572.501(a) states that article numbers are reserved for the particular provision or authority as indicated in this section. Experience with agreements filed pursuant to the Interim Rule indicates that this statement has not clearly communicated its intended meaning. Some filing parties who perceive that they have no need for a particular article have simply omitted the subject matter of the article and assigned its number to another subject. Each of the articles enumerated in section 572.501 is generally found in nearly all types of agreements. The enumerated Articles 1 through 13 are reserved for the specified subject matter shown in sections 572.501 and 572.502 and may not be used for any other subject or purpose, regardless of the type of agreement. Where an article is legitimately not applicable, as for example, a charter agreement which is not likely to have a neutral body policing provision, the article number and name is to either be omitted altogether or, to preserve the sense of the article numbering in the agreement, to be included in the text of the agreement followed by the word "None". Accordingly, appropriate revisions have been made in section 572.501(a) to clarify the use of the reserved article numbering system.

Section 572.501(b)

Section 572.501(b) sets forth the specific order and describes generally the subject matter of the articles of an agreement.

Certain inquiries received by the Commission's staff suggest that some parties interpret the enumeration of Articles 1 through 13 in sections 572.501 and 572.502 to mean that these articles are the only articles or subject matter which may be included in an agreement. Section 572.402(e)(2) clearly states that "any additional material provisions shall be set forth as consecutively numbered articles." Moreover, an agreement that contained only Articles 1 through 13 would in most instances not contain the full understanding between the agreement parties expressed in the filed agreement. In order to eliminate any further confusion, section 572.501(b) has been amended to state that additional articles required to express the complete understanding between the parties to the agreement and not otherwise incorporated in appendices to the agreement shall immediately follow the enumerated articles. Such articles shall be numbered consecutively commencing with Article 14.

Section 572.501(b)(1)

Section 572.501(b)(1) requires the publication of the "full name of the agreement" in Article 1 of the agreement. Comment 34 suggests that the parties to an agreement be permitted to use an abbreviation, acronym, or "doing business as" name. We are not adopting this suggestion. Article 1 is the appropriate place in an agreement to identify that agreement by its complete legal name. We find this requirement to be administratively necessary and not to impose any particular burden on the agreement parties. It therefore shall be retained.

Section 572.501(b)(2)

Section 572.501(b)(2) requires a statement of the "Purpose of the Agreement" in Article 2. Comment 34 contends that the elaboration on the meaning of the term "purpose" is unnecessary. While paragraph (b)(2) will be retained, because section 5(b)(1) of the Act requires an agreement to state its "purpose", the elaboration objected to is deleted.

Section 572.501(b)(3)

Section 572.501(b)(3) requires the statement of the name, address and corporate/domicile nationality of each party to the agreement in Article 3.

Five comments (Comments 22, 24, 26, 34, 38) question the need for this requirement. Comments 26 and 38 contend that the requirement is burdensome and contrary to the Act and should be deleted. Comment 24 states that this section should be amended to avoid delays in the admission or resignation of agreement members. Comment 22 questions the relevance of stating the parties' nationality.

The purpose of section 572.501(b)(3) is to ensure that the Commission has accurate and current information with respect to the agreement's mem-

bership. The lack of such information has been a long-standing problem. It is not the purpose of this section, however, to unreasonably delay the effectiveness of changes in membership, to unnecessarily burden the agreement document itself, or to collect unneeded information. Therefore, appropriate changes have been made to section 572.501(b)(3) and to section 572.605 to provide for expedited review of modifications effecting change in conference membership.

Section 572.501(b)(4)

Section 572.501(b)(4) requires a statement of the geographic scope in Article 4. Comment 34 states that agreement members do not necessarily serve their respective trades pursuant to the authority of an agreement and that the implication that they do so serve should be eliminated. It is not the purpose of section 572.501(b)(4) to capture any more than the geographic breadth of the basic agreement. Certain changes have therefore been made in this section.

Comment 28 states that section 572.501(b)(4), as well as 572.501(b)(5), should expressly require consortium agreements to specify the level and scope of service; otherwise, such agreements may contain "open-ended" or "blank check" authority. The fundamental concern of this Comment, *i.e.* "open-ended authority", has been addressed in section 572.103(g) and section 572.406. As this concern would appear to be met by these sections of the Final Rule, the suggested modifications to section 572.501(b)(4) or 572.501(b)(5) do not appear necessary.

Section 572.501(b)(5)

Section 572.501(b)(5) requires in Article 5 a statement of the authorities permitted by the Act and intended to be exercised by the parties to the agreement. Comment 24 states that this requirement creates a risk that persons opposing an action taken pursuant to an agreement may argue that the only authority of the agreement is that stated in Article 5. This Comment suggests the addition of a statement that the parties' authority is to be derived from the entire agreement.

The purpose of Article 5 is to provide a general statement of the activities which the parties are authorized to engage in. Section 572.501(b)(5) has been revised to make this clear and that, except for the specification of fundamental matters, it will require that additional articles be provided which are more specific as to the authority to be exercised and the mechanics of that exercise. Finally, this section is revised to state that the parties may rely on the contents of the entire agreement as authority for their activities.

Section 572.501(b)(6)

Section 572.501(b)(6) requires the titles and respective authorities of any agreement officials designated by the agreement parties be provided in Article 6.

Comment 38 contends that the requirements of section 572.501(b)(6) improperly prescribe substantive agreement content, exceed the authority of the Act and should be deleted. Comment 34 requests the clarification of the language and intent of the section with respect to the specification of agreement officials and their duties.

The purpose of section 572.501(b)(6) is to ensure that the Commission, the agreement parties and any other interested parties be informed as to who, by organizational title, is empowered to act on behalf of the agreement parties and in what capacity. This information is necessary to the effective and efficient administration of the Commission's agreement program, both with respect to the pre-effectiveness review of an agreement and the post-effectiveness monitoring of the activities of an agreement. It is not the purpose of this section, however, to unnecessarily delay the effectiveness of changes in such provisions or complicate the agreement document. Therefore, section 572.605 has been amended to provide for expedited review of modifications to Article 6.

Section 572.501(b)(7)

Section 572.501(b)(7) requires that the terms and conditions of membership to the agreement be provided in Article 7. Comment 26 contends that this requirement is overly detailed and, in some cases, too trivial to be included in the basic agreement.

Section 572.501(b)(7) is an extension of the requirements of section 5(b)(2) of the Act which mandates that conference agreements provide reasonable and equal terms and conditions for conference membership. Of the nine required articles in section 572.501, it is the least likely to apply to all agreements. The requirements of section 572.501 would only apply to certain rate agreements and would not have application to transshipment, equipment interchange or charter agreements. Section 572.501(b)(7), therefore, has been revised to indicate that its provisions do not apply to certain agreements.

Section 572.502—Organization of Conference and Interconference Agreements

Section 572.502 implements section 5(b) of the Act by requiring the inclusion of neutral body policing, prohibited acts, consultation, shippers' requests and complaints, and independent action provisions in conference and interconference agreements.

Section 572.502(a)

Section 572.502(a) specifies the scope and application of the section with respect to conference agreements. Certain clarifying editorial changes have been made to the section. In addition the section has been revised to provide for the inclusion in agreements of provisions in addition to those prescribed in sections 572.501 and 572.502.

Section 572.502(a)(1)

Section 572.502(a)(1) requires a statement that at the request of an agreement member the conference shall engage the services of an independent neutral body. The section further requires the inclusion of any neutral body procedures established.

Seven comments (Comments 22, 25, 26, 27, 34, 35, 39) were received on this section. None of the comments take exception to the requirement for an agreement to provide an affirmative statement that a single agreement member may request neutral body policing. However, some contend that there is no statutory authority for requiring that, once implemented, the neutral body policing procedures have to be incorporated into the text of the agreement. Of those, three propose that, if the procedures are required, they should be included in an appendix. It is also suggested this section use the term "self-policing" rather than the term "independent neutral body" policing.

Section 572.502(a)(1) implements section 5(b)(4) of the Act which provides for "an independent neutral body" to police the obligations of a conference and its members, if requested by a member line. The section will therefore continue to refer to an "independent neutral body." The requirement that any neutral body policing procedures be included in the agreement derives from the general requirement that an agreement contain the full understanding of the parties. To the extent that these procedures reflect concerted action by the parties, they are part of the agreement and must be filed.

Section 572.605 is amended, however, to provide for expedited review of neutral body policing procedures, excluding any modification of the triggering provision stemming directly from section 5(b)(4) of the Act. Section 572.502(a)(1) is also modified to allow neutral body procedures to be included in a designated appendix to the agreement, which is cross-referenced in Article 10.

Section 572.502(a)(2)

Section 572.502(a)(2) requires an affirmative statement that a conference will not engage in conduct prohibited by section 10(c)(1) or 10(c)(3) of the Act. Comment 33 requests that section 572.502(a)(2) be expanded to incorporate the prohibition on refusals to negotiate with shippers' associations contained in section 10(b)(13) of the Act.

Section 572.502(a)(2) implements section 5(b)(5) of the Act which, insofar as section 10 prohibited acts are concerned, requires conference agreements to expressly reference only those prohibitions specified in sections 10(c)(1) and 10(c)(3) of the Act. We note, however, that section 10(c)(1) of the Act prohibits a conference from boycotting or taking any other concerted action resulting in an unreasonable refusal to deal. While not addressing itself directly to shippers' associations, the prohibition against boycotting

and other concerted actions may encompass the concern of Comment 33. No change has been made to section 572.502(a)(2).

Section 572.502(a)(3)

Section 572.502(a)(3) requires that conference agreements provide procedures for consultation with shippers and for handling of shippers' requests and complaints. Comment 33 suggests that section 572.502(a)(3) should prescribe minimum time frames and other procedures for the consideration of shippers' complaints and requests in a manner similar to that of the mandatory provisions of Subpart H.

Section 572.502(a)(3) implements sections 5(b) (6) and (7) of the Act which require conference agreements to contain consultation and request/complaint handling procedures. The mandatory provisions of Subpart H, including sections 572.801 (c) and (d), served the purpose of bringing agreements into compliance with section 5(b) of the Act during the transition period. As discussed more fully below in connection with the disposition of Subpart H, that purpose has been served and the Commission is removing the mandatory provisions of Subpart H from the Final Rule. At this time there does not appear to be a need to require parties to agreements to adopt Commission prescribed provisions. Provisions drafted by parties to agreements are carefully reviewed to ensure that they contain sufficient specificity and detail. Accordingly, the changes to this section suggested in Comment 33 are not adopted.

Section 572.502(a)(4)

Section 572.(a)(4) requires that conference agreements specify its independent action procedures. Comment 34 proposes that this section be revised to permit: (1) independent action procedures which allow for the exercise of such action on less than 10 calendar days' notice; and (2) a conference member to independently elect to provide more than 10 calendar days' notice of its intention to exercise independent action.

Section 572.502(a)(4) tracks the language of section 5(b)(8) of the Act which, in relevant part, provides that conference agreement independent action provisions may not impose a notice period of ". . . more than 10 calendar days . . ." for the exercise of independent action. The revisions suggested by Comment 34 are unnecessary because their intended purpose is presently being served by section 572.502(a)(4). Therefore, no change to this section has been made.

Section 572.502(b)

Section 572.502(b) requires every interconference agreement to contain independent action procedures (in addition to the enumerated Articles 1 through 12). Comment 24 contends that interconference agreements should not be required to contain the provisions of Articles 10, 11 and 12 specified in section 572.502(a).

Interconference agreements are generally types of conference agreements and, as such, should be subject to the same requirements. Therefore, the argument that the requirements of section 572.502(a) should not apply to interconference agreements is not persuasive and is rejected. However, a waiver of this requirement may be applied for pursuant to the new provisions of section 572.404. Such a waiver would be available where any or all of Articles 1 through 12 would not be applicable or appropriate given the particular interconference agreement. Finally, it should be noted that provisions which appeared in section 572.802 have been relocated in this section.

SUBPART F—ACTION ON AGREEMENTS

Subpart F implements section 6 of the Act which establishes procedures under which agreements are reviewed and acted upon by the Commission. The statutory model for review of agreements is the premerger clearance procedures set forth in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Pub. L. 94–435, 90 Stat. 1390). The procedures of Subpart F are intended to facilitate the expeditious review of agreements based on necessary and relevant information within the time allowed by the Act.

Section 572.601—Preliminary Review—Rejection of Agreements

Section 572.601(b) provides for the rejection of any agreement that fails to comply with the filing and information requirements of the Act and Part 572. Comments 13, 17, 38, and 39 question the Commission's authority to reject an agreement for failure to meet filing and format requirements. Comments 29, 34, and 38 specifically challenge the authority to reject an agreement after preliminary review, pursuant to section 572.601(a), on the ground that the Information Form is not submitted, or is incomplete and an adequate explanation is not provided. They argue that only a deficiency in the agreement itself provides the basis for rejection. According to these Comments, an incomplete Information Form lacking an adequate explanation should be remedied by a request for additional information.

Section 5(a) of the Act authorizes the Commission to prescribe the additional information that should accompany an agreement. These requirements are contained in section 572.405 pertaining to the Information Form. Section 6(b) of the Act provides for rejection of a submission which does not meet the requirements of section 5(a) of the Act. Section 572.601 implements this rejection authority. An agreement which is submitted with an incomplete Information Form, lacking an adequate explanation where required by section 572.405, fails to comply with section 572.405 and may be rejected. Moreover, the purpose of a request for additional information is not to obtain information which all parties are required to submit with an agreement in the first instance, but to acquire, in special circumstances, further information.

Comment 39 suggests that, before an agreement is rejected, the filing party should have an opportunity to correct any deficiencies within a specified time without suspending the 45-day waiting period. It is further proposed that this section be clarified to explain that agreements may only be rejected for nonconformance with technical filing requirements rather than for substantive deficiencies. Comment 39 also suggests that section 572.601(b) be amended to provide that rejection must occur within 20 days of filing and that, prior to rejection, the filing parties should be notified and given an opportunity to correct any deficiency. Finally, Comment 39 proposes that this section be amended to expressly provide for appeal to the Commission itself when an agreement is rejected.

Most of these concerns expressed in these comments are, as a practical matter, met under the existing Bureau of Agreements and Trade Monitoring procedures for processing agreements. Filing parties presently are given the opportunity to make minor corrections without suspending the 45-day waiting period. These corrections are usually speedily made because of their technical nature.

Every effort is made to review an agreement and accompanying Information Form for deficiencies as expeditiously as possible. In most situations this preliminary review is completed within a few days after the agreement's receipt at the Commission. In the case of particularly complex agreements, slightly more review time may be needed. A specific time period for rejection therefore does not appear to be necessary or appropriate and could under certain circumstances, deny the Commission and the filing parties necessary flexibility.

As to Comment 39's concern about rejection for other than filing deficiencies, the nature of the preliminary review provided for in section 6(b) of the Act and section 572.601(a) makes clear that this rejection is not based on a substantive review of the agreement.

Decisions on rejection of agreements are presently made by the Commission and not the staff. There is, therefore, no need to provide for an appeal procedure to the Commission because they have already considered the matter. If, in the future, this procedure is changed, then, at that time, it would be appropriate to consider an appeal mechanism to provide for Commission review.

Section 572.602—Federal Register Notice

Section 572.602 implements section 6(a) of the Act which requires the Commission to transmit notice of the filing of an agreement to the *Federal Register* within seven days of receipt.

Section 572.602(a)

Comment 38 suggests that the words "A notice of" be added at the beginning of section 572.602(a). This clarifying change is made in the Final Rule.

Section 572.602(b)

Section 572.602(b) describes the contents of the notice to appear in the *Federal Register*. Comment 19 suggests the use of a standardized form of notice which would be completed and filed by the parties with the agreement. Present procedures appear to be adequate and little or no savings in time would appear to result from the suggested change. Accordingly, a standardized form for notice is not adopted.

Comments 24 and 28 suggest that the notice in the *Federal Register* identify the filing party. This suggestion has merit. This information is submitted with the agreement and its publication in the *Federal Register* would facilitate the effort of interested persons to communicate with the filing party. This section is amended accordingly.

Section 572.603—Comment

Section 572.603 provides for comment by any interested person to an agreement and addresses the status and confidentiality of such comments.

Section 572.603(a)

Section 572.603(a) allows third parties to submit comments to filed agreements. No limitations, except the response period indicated in the *Federal Register* notice, attach to the filing of such comments. Confidential treatment will be afforded comments where the commenter so requests and there exists a proper legal basis for nondisclosure.

This provision attracted a number of comments (Comments 19, 20, 24, 25, 26, 30, 34, 39) both supporting and opposing confidential treatment of third party comments. The majority of these (Comments 19, 20, 24, 25, 26, 34, 39) believe that confidentiality, where appropriate, for third party comments is contrary to the provisions of the Act. It is asserted that the disclosure exemptions of the Freedom of Information Act (FOIA), 5 USC 552, are the exclusive avenue for withholding third party comments. Some comments (Comments 19, 20, 24, 34, 39) suggest that the filing parties be provided with copies of third party comments. This would allegedly ensure administrative efficiencies, avoid the filing and processing of FOIA requests, and allow the filing party the opportunity to confront adverse information. On the other hand, Comment 30 submits that all information filed with an agreement, either by a filing party or third parties, is protected under section 6(j) of the Act. It is asserted that confidentiality for third party comments will encourage submission of more complete comments.

Comment 28 suggests that persons commenting on agreements be allowed to waive confidentiality and Comment 20 proposes that claims of confidentiality be supported by precise statutory grounds. Comment 20 further suggests that the parties be provided with all non-confidential comments. It is suggested that if complete confidentiality is claimed for all parts of a comment, notice of the filing and claimed exemptions be provided to the parties. Comment 20 requests that non-confidential oral communications

with Commission staff by persons in opposition to an agreement be made publicly available.

Many of these comments misconstrue both this section and the Act. First, third party comments are not protected by the confidentiality provisions of section 6(j) of the Act. Only information and documentary material filed with the Commission under section 5 or 6 is exempt from disclosure." 46 U.S.C. app. 1705(j). This information is solely provided by the filing parties. No mention is made in sections 5 and 6 of the Act of "information" to be submitted by third parties. Comments on agreements, however, may in appropriate circumstances be protected under the disclosure exemptions of FOIA (5 U.S.C. 552(b)(C) (1–7)), the Trade Secrets Act (18 U.S.C. 1905), or other similar statutes. Although third party comments are not protected under section 6(j) of the Act, it would be inappropriate and improper, particularly where a request for confidentiality has been received, to routinely make them available to the agreement parties, without prior Commission review.

Requiring commenting parties to provide the agreement parties with the non-confidential portions of comments, or notice (where the whole comment is claimed to be confidential), appears unnecessary. This information would be available from the Commission upon request. Nor do we believe this procedure, whereby non-privileged comments will be available from the Commission upon request, will lead to unnecessary FOIA requests. A FOIA request is not required to obtain clearly non-confidential information. It is properly used in close situations where the Commission and requester may differ on the confidentiality of certain information, and it accords the requesting party certain procedural and legal rights. Finally, it is both administratively burdensome and not required by law, to incorporate all oral comments into a publicly available written record.

As to the suggestion that agreement parties should be allowed to rebut comments, the Commission will provide the opportunity for rebuttal only where the comments become part of the record in a Commission or court proceeding. Prior to the institution of a proceeding no right of rebuttal is provided.

The Commission is adopting the recommendations of Comment 20 that all requests for confidentiality be accompanied by citation and explanation of relevant legal authority for witholding. In the event the Commission determines that it is proper to release information for which confidentiality has been claimed it will notify the submitter prior to such release.

Comment 38 suggests that the words "a written statement" in the first sentence of section 572.603(a) be changed to "written comments." This modification is also made in the Final Rule.

Section 572.603(b)

Section 572.603(b) provides that filing of comments does not entitle a party to a Commission reply, institution of a proceeding, discussion

of the comment in any Commission or court proceeding, or participation in a proceeding.

Comment 34, while not taking issue with the substance of this paragraph, suggests that the Commission further limit all substantive communications regarding pending agreements between any third person and any Commission employee.

The body of law pertaining to *ex parte* communications only applies when a formal proceeding has been instituted and the Commission is acting as decisionmaker (5 U.S.C. 557(a)). The waiting period prior to the effective date of an agreement is not such a legal proceeding and no *ex parte* rights attach. In any formal proceeding involving an agreement the present Commission rules embodied at 46 CFR 502.11 and 502.61 appear sufficient. It therefore is unnecessary to further provide for *ex parte* restrictions in this section.

Comment 28 states that the provisions of section 572.603(b), when read in conjunction with the rules on negotiations in section 572.609, flatly bar commenters from participating in negotiations. While Comment 28 recognizes that commenters have no *right* to participate in negotiations, it requests that the section be amended to allow such participation where appropriate. Comment 28 also proposes that the section be clarified to permit a commenter to engage in follow-up communications with the Commission at the Commission's discretion.

No change to section 572.603(b) will be made. The legislative history indicates that the role of third parties should be limited to submitting comments. Conf. Rept. No. 600, 98th Cong., 2d Sess. 31 (1984). Moreover, the involvement of third parties could complicate and delay the negotiation process by introducing irrelevant or parochial interests. However, the information provided in a comment may be considered by the Commission in the negotiations process. The Commission, however, does interpret the present language of section 572.603(b) and section 572.609 to permit follow-up communications between Commission staff and third party commenters.

Section 572.604—Waiting Period

Section 572.604 sets forth technical provisions governing the statutory waiting period.

Section 572.604(b)

Section 572.604(b) provides that, unless a request for additional information is made or a court order obtained, an agreement becomes effective 45 days after filing with the Commission or on the 30th day after publication in the *Federal Register*. Comment 28 proposes that the Commission publish a notice when it reaches a final determination on a filed agreement and that any commenters receive a copy of the determination.

Currently, the Commission issues a notice of an agreement becoming effective pursuant to section 6(c) of the Act. This notice is not published

in the *Federal Register* but is available to the public in the Office of the Secretary. This procedure appears to be sufficient with respect to informing the public of the Commission's action. Accordingly, the suggested change is not adopted.

Section 572.604(c)

Section 572.604(c) provides that the waiting period before an agreement becomes effective is suspended when the Commission makes an oral or written request for additional information. The waiting period resumes at the time of the receipt of the requested additional material or an adequate statement of the reasons for noncompliance.

Comment 38 urges the deletion of section 572.604(c) on the grounds that it is duplicative and less clear than similar provisions in section 572.606. A request for additional information is pertinent to this section because it has an effect on the waiting period before an agreement becomes effective. Paragraph (c) therefore is retained.

Comment 19 suggests that parties be notified within 15 days of receipt of an agreement if additional information will be needed. While the goal is to review all agreements expeditiously and, where necessary, notify parties as soon as possible of the need for additional information, a 15-day limit on requests would not allow sufficient flexibility in reviewing complex agreements.

Comment 39 proposes that the parties be allowed to request an extension or suspension of the waiting period. This procedure would be utilized where an agreement was particularly complex and additional time was needed for review or where negotiations were continuing between the parties and the Commission. Alternatively, Comment 39 proposes that the parties be allowed to postpone the waiting period by submitting amendments delaying the agreement's implementation date to a date beyond the 45-day statutory period.

We believe that it would be contrary to the provisions of the Act to extend the waiting period for other than a request for additional information or court order. The parties are also always free to include within the terms of the agreement a date for implementation subsequent to the expiration of the 45-day waiting period to defer implementation of the agreement, or to withdraw the agreement altogether without prejudice to refiling.

Several comments (Comments 22, 27, 34, 39) urge that the procedures for requests for additional information be clarified. Comments 27 and 39 are concerned that routine communications between Commission staff and the agreement parties may be misconstrued as a request for additional information. Similarly, Comment 34 suggests that confusion could be avoided by having one Commission official, preferably the Secretary, responsible for issuing requests for additional information. The Comment also proposes that this section be amended to require a specific authorization statement from an appropriate Commission official to accompany each request which

would expressly identify the communication as a request for additional information.

Comments 22, 27 and 34 maintain that oral requests for additional information may be problematic. It is argued that the seven-day period for written confirmation of oral requests is too long. The concern is that the parties might not receive written confirmation of an oral request for additional information made after the 38th day of the waiting period until after they had begun to implement the agreement. Comments 22 and 27 suggest abandonment of the use of oral requests and Comment 34 proposes that an oral request be made only simultaneously or subsequent to the mailing of the written request.

The present procedures contained in section 572.604(c) governing requests for additional information appear adequate. When either an oral or written request for additional information is made, it will be unambiguously identified. There is no need either to have only one official make the requests or to include a specific authorization statement. In any situation where an oral request is intended to suspend the effective date of an agreement, that fact will be made clear to the filing parties.

Comment 24 argues that the resumption of the waiting period begins automatically after filing of the response to the request, or submission of the statement of noncompliance. This Comment argues that the Commission has no authority to evaluate the adequacy of the response and only the United States District Court for the District of Columbia can further suspend the waiting period. The Commission did not intend the language "*adequate*" statement of reasons for noncompliance to affect the resumption of the running of the waiting period. We have adopted the suggested change and the word "adequate" has been deleted.

Section 572.605—Request for Expedited Approval

Section 572.605 implements section 6 of the Act and sets forth grounds and procedures for applying for and granting expedited approval.

Comment 39 proposes that section 572.605 be amended to permit parties to request expedited approval after filing a response to a request for additional information under the same procedures for expedited approval otherwise applying.

The Commission concurs with this suggestion. It is clearly proper under section 6(e) of the Act to consider expedited approval for agreements whose effective date is suspended by the filing of a requests for additional information. An appropriate modification has been made in section 572.605 of the Final Rule.

The Commission is also adding a new paragraph (c) to this section to provide for expedited approval of cancellations of agreements and modifications which reflect changes in conference membership, officials of the agreement, and neutral body authority and procedures. This addresses the desire expressed in comments that these matters be effectuated without

unnecessary delay. The Commission will consider the institution of a separate proceeding to exempt these categories of agreements from the waiting period requirements of section 5 of the Act and allow them to become effective upon filing. However, given the notice requirements of section 16 of the Act, that relief cannot be granted within the scope of this proceeding.

Section 572.606—Requests for Additional Information

Section 572.606 implements section 6(d) of the Act which authorizes requests for additional information.

Section 572.606 (a) and (c)

Section 572.606(a) provides that the Commission may request additional information, prior to the expiration of the waiting period. When a full response is not supplied, the filing party must submit a statement of reasons for noncompliance.

Section 572.606(c) provides that a request for additional information may be made orally or in writing, but when made orally, written confirmation will be mailed within seven days of the request.

Comment 26 proposes that this section be amended to provide a statement that the Commission will attempt to make requests for additional information early in the waiting period. Only in exceptional circumstances would requests be made in the final days prior to the effective date.

There is no need to amend paragraph (a) as suggested. All requests for additional information will be made as promptly as possible. Of course, the timing of such requests will necessarily vary with the complexity of the agreement.

Several comments (Comments 22, 24, 27, 38) objected to the use of oral requests for supplementary information. The comments express concern with the ambiguities associated with oral requests, particularly when the request is made in the last days prior to the effective date and the parties are making plans to implement the agreement. Comments 22 and 24 submit that the parties are entitled to the certainty of a written request which would be addressed to specific, relevant and readily available material and be specifically identified. Comment 24 suggests that an oral request for additional information only be permitted if written confirmation is received prior to the 45th day of the waiting period.

Section 6(c) of the Act does not require requests for additional information or documentary matter under section 6(c)(2) to be made in writing. It only requires that they are made within the 45-day period. The Commission therefore retains the option to use oral requests followed by written confirmation for further information. When an oral request for additional information is issued the Commission will, as a matter of course, advise the parties of the consequences of this procedure. In the unlikely event parties are unsure of the nature of an oral request for further information,

prior to receipt of written confirmation, they may contact the Director, Bureau of Agreements and Trade Monitoring for clarification.

Section 572.606(d)

Section 572.606(d) provides that the Commission will specify a reasonable period for a party to reply to a request for additional information.

Comments 24 and 27 assert that the Commission does not have the authority to set a time limit for response. They submit that there is no burden on the Commission until the information is supplied and, therefore, the Commission should not be concerned when, if ever, the information is supplied. They propose that section 572.606(d) be deleted.

The purpose of providing for a reasonable period to respond is to conserve the Commission's resources. Once the Commission undertakes the review of a filed agreement it is beneficial to complete the review process and not have filed agreements pending indefinitely while awaiting responses to requests. This provision is necessary to maintain the orderly management of the agreement review process. In all cases, parties will be provided ample time in which to respond. Parties may always petition for more time, if necessary.

Section 572.606(e)

Section 572.606(e) is added to the Final Rule to provide for notice to commenting parties of a request for additional information. The purpose of this provision is to allow for further comment.

Section 572.607—Failure to Comply With Requests for Additional Information

Section 572.607 implements section 6(i) of the Act which authorizes the Commission to seek court enforcement of its information requests.

Section 572.607(a)

Section 572.607(a) of the Interim Rule provides that a failure to comply results "when the party responsible for filing the request" fails to substantially respond. Comment 34 suggests that the reference should be to "a person filing an agreement, or an officer, director, partner, agent or an employee thereof." This suggestion would clarify this section and has been adopted.

Comment 24 suggests that the word "satisfactory" be deleted on the ground that if a statement of reason for noncompliance is submitted only a court can evaluate its acceptability.

When the Commission believes a statement of reasons for noncompliance is inadequate it may bring an action in court pursuant to section 6(c)(2)(B) of the Act. The court's function will be to evaluate the sufficiency of the statement of reasons for noncompliance and take appropriate remedial action. This section is not intended to supplant the court's function. This suggested change, however, is not necessary.

Comments 27 and 34 assert that the Commission is not authorized to prescribe a period of time for reply to requests for additional information and thus cannot, pursuant to section 572.607(a), deem that a failure to reply has resulted when a response is not received within that time period. Comment 34 maintains that the only applicable time period is that provided for in section 6(c) of the Act.

These arguments are not convincing. The time periods provided for in section 6(c) of the Act only apply after a response has been received. They do not pertain to the period between the request and the response. As indicated with respect to section 572.606(d) above, the establishment of a time period for response to a request for additional information is necessary to the orderly administration of the agreements program. This does not mean, however, that the Commission will bring a court action pursuant to section 6(i) of the Act when no information has been filed, thereby compelling the parties to file a response and start the running of the waiting period on an agreement they may prefer to withdraw. Finally, where the parties have filed a response to a request for information which is inadequate, the Commission may bring an action pursuant to section 6(i) to compel a more responsive reply and extend the waiting period.

Section 572.607(b)

Section 572.607(b) implements the provisions of section 6(i) of the Act which permits the Commission to bring an action in District Court where there has been a failure to substantially comply with a request for additional information.

Comment 24 would remove the word "where" from the first sentence of this section and substitute the words "when it considers that". Comment 24 seeks a clarification that the Commission is not asserting authority reserved for a court under section 6(i) of the Act.

Before the Commission brings an action pursuant to section 6(i) of the Act it must first reach its own finding on the substantiality of a reply to a request for additional information. This finding does not substitute for the court's determination of the adequacy of the reply. To clarify the Commission's function, the recommended change in language has been made.

Section 572.608—Confidentiality of Submitted Material

Section 572.608 implements section 6(j) of the Act which provides that all information submitted by a filing party other than the agreement itself shall be exempt from disclosure under the FOIA.

Section 572.608(a)

Section 572.608(a) provides a general grant of confidentiality to the filing parties for all information submitted to the Commission and lists particular categories of protected information including the Information

Form, voluntary submissions of additional information, reasons for noncompliance, and replies to requests for additional information.

Comment 30, consistent with its recommendations concerning section 572.603 pertaining to comments from third parties, suggests that confidentiality be extended to third parties who submit information. Comment 30 submits that nondisclosure will encourage better quality and more detailed comment.

As indicated above, the Commission does not have authority under the 1984 Act to exempt third party comments from disclosure except in conformance with FOIA and the Trade Secrets Act.

Section 572.608(b)

Section 572.608(b) provides for the statutory exception to the overall policy of nondisclosure of information submitted by parties filing an agreement. Such information may be disclosed in an administrative or judicial proceeding or in response to a proper request from Congress.

Comment 24 suggests a change in section 572.608(b)(1) by adding the phrase "but only if disclosure takes place in the course of such proceedings" after the words "relevant to". The purpose of the change is to allow information to be released only in the course of a proceeding and not just where that information may be "relevant" to that proceeding.

The language which Comment 24 objects to, "relevant to . . . administrative or judicial proceeding", is adopted verbatim from section 6(j) of the Act. In order to preserve the full scope of this statutory provision, no change in section 572.608(b) is made.

Section 572.608(c)

Comment 28 suggests that this section be amended to allow a filing party to waive nondisclosure. Although the Commission itself may not disclose information filed by the parties to an agreement, the parties themselves are not bound by the provisions of section 6(j) of the Act. This section therefore has been amended to add a new paragraph (c) which expressly recognizes the parties' right to make a voluntary disclosure. The rule requires, however, that parties making such a disclosure promptly inform the Commission of their action.

Section 572.609—Negotiations

Section 572.609 makes clear that the negotiation process may take place at any time after the filing of an agreement up to the conclusion of an injunctive proceeding. The negotiation process will thus be available throughout the pendency of an agreement to resolve differences over an agreement. The negotiation process is limited to the filing party and Commission personnel. Shippers, other government departments or agencies, and other third parties may not participate in negotiations.

The most significant issues concerning this section focus on whether a modification which is the result of negotiations must be published in

the *Federal Register,* and the proper role of third parties in the negotiation process. Comment 28 submits that modifications which expand the parties' authority must be published in the *Federal Register.* Comment 26 takes the opposite view and further asserts that the waiting period should not be suspended.

It is unlikely that, as a result of negotiations, an agreement's authority would be expanded. However, in the event that expansion of authority does result from the negotiations, the agreement would be subject to filing as a new agreement pursuant to section 5 of the Act and the provisions of this part. Notice of the filing of the new agreement would therefore be published in the *Federal Register,* pursuant to section 572.602, provided it was not rejected for filing or technical deficiencies.

Comment 39 supports the present version of section 572.609 and notes that third parties are properly excluded from negotiations. Conversely, Comment 28 maintains that third parties should not be flatly barred from involvement in negotiations. The issue of involvement of third parties in negotiations has already been discussed in connection with section 572.603(b). No changes are warranted.

Finally, Comment 24 suggests a change in section 572.609 to clarify that negotiations concerning injunctive proceedings pertain exclusively to injunctions brought pursuant to section 6(h) of the Act.

Because negotiations pursuant to section 572.609 are not intended to be limited to section 6(h) injunctions, the suggested change has not been made. The Commission is not only authorized to seek injunctive relief pursuant to section 6(h) of the Act for violation of the general standard but also pursuant to section 6(i) for failure to substantially comply with a request for additional information and section 11(h) for actions in violation of the Act.

SUBPART G OF THE RULES—REPORTING AND RECORD RETENTION REQUIREMENTS

Subpart G contains rules which implement the reporting and record retention provisions of the Act. Its purpose is to ensure that the Commission has sufficient information to adequately monitor the concerted activities of regulated parties.

A number of comments object to the reporting and recordkeeping requirements of Subpart G. They object to the broadened definition of "meeting" for which minutes are required, the identification of documents circulated to the members in connection with meetings and the filing of an index on a quarterly basis of all documents distributed to the members and not otherwise filed with the Commission. These comments contend that, in many instances, the list of documents would be massive, and that to require their filing would be an unwarranted intrusion on due process rights. These requirements are said to be an undue and unreasonable burden

upon the industry and to be contrary to the legislative intent of the 1984 Act.

It is clear that Congress intended a law which would enable the ocean shipping industry to fashion agreements in a manner which meets their commercial needs and to have such agreements become effective within a relatively short period, unless there is an indication that such agreements might be contrary to the standard set forth in section 6(g) of the Act. However, it is also clear that Congress intended that the Commission maintain a degree of surveillance over the concerted activities of ocean common carriers and marine terminal operators, adequate to ensure that they do not violate the standards and prohibitions set forth in the Act and that they comply with the mandatory provisions expressly set forth therein. This imposes a greater rather than a lesser surveillance responsibility on the Commission, when compared with the provisions of the 1916 Act.

Upon consideration of the comments submitted and reevaluation of its information needs, the Commission has made several revisions to its Final Rule which relax the record reporting and retention requirements. The Final Rule requires the filing of minutes on the same basis as minutes were required under 46 CFR 537.3 of the former regulations, namely for meetings where the parties are authorized to take final action as opposed to being authorized to take any action. The requirement that the minutes specify any documents distributed to inform or assist the members is deleted. In addition, the index of documents requirement is being modified to include only those documents which are circulated to members and used to reach a final decision on specified matters.

These amendments strike a balance between the enhanced freedom the ocean shipping industry enjoys and the need to ensure that the Commission has the information needed to fulfill its responsibilities under the 1984 Act.

Several comments (Comments 16, 17, 22, 34) allege that the information collection requirements of Subpart G violate the Paperwork Reduction Act of 1980 (44 U.S.C. 3501). The United States Office of Management and Budget (OMB) is charged with the responsibility of reviewing agency regulations for compliance with the Paperwork Reduction Act. The Commission has followed the proper procedures for clearance of Part 572 by OMB. The collection of information requirements contained in this part have been submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act and have been assigned an OMB control number. *See* section 572.991.

Comment 28 contends that consortium agreements should be included within the coverage of Subpart G and subjected to reporting and indexing requirements. Many consortia and joint service agreements are by their own terms required to submit reports. The addition of such agreements within the coverage of Subpart G would appear to be beyond the scope of this rulemaking proceeding. Should there develop a need to obtain such

information in order to effectively monitor consortia, then the Commission will consider an appropriate amendment to this subpart at that time.

Section 572.701—General Requirements

Section 572.701 contains certain general requirements which apply to all reports required by this subpart.

Section 572.701(b)—Serial Numbers of Reports

Section 572.701(b) provides that each filed report should be assigned a serial number. Comments 13 and 34 state that the serial numbering system should be made optional and that conferences should be allowed to continue to use their established numbered minute systems. It was not the purpose of this requirement to impose a precise numbering system but rather to establish a system for identifying minutes which might be missing. Accordingly, this section is being amended to add a provision which allows any conference or rate agreement which has its own sequential numbering system to continue to use that system in lieu of the system set forth in this section.

Section 572.701(c)—Retention of Records

Section 572.701(c) provides that a copy of each document referenced in the index of documents submitted pursuant to section 572.704 must be retained by the parties for as period of three years and be made available to the Commission upon request. As indicated below, the volume of documents required to be indexed has been substantially reduced. However, the retention of documents is of such importance for surveillance purposes that this requirement shall be retained without change in the Final Rule.

Three comments (Comments 13, 34, 39) object to the provision in this section which states that the Commission may obtain documents upon written request. This objection similarly pertains to section 572.701(d) which also states that documents shall be made available upon request. The comments maintain that the judicial precedent pertaining to section 21(a) of the 1916 Act (46 U.S.C. app. 820), which is similar to section 15(a) of the 1984 Act (46 U.S.C. app. 814), and forms the basis for this subpart, should be followed.

The procedures used for requests for documents under the 1916 Act will be continued and, in situations pertaining to issuance of a request for documents pursuant to section 572.701(c) and section 572.701(d), the Commission will state its basis for seeking the documents.

Section 572.701(d)

Section 572.701(d) provides that the Director, Bureau of Agreements and Trade Monitoring may request that documents be furnished within a specified time. These documents will be received in confidence.

Comments 13, 22, and 34 maintain that the requirement that documents must be produced upon request is contrary to due process of law. They

submit that parties should be permitted an opportunity to oppose the request. Comment 39 maintains that this record production requirement constitutes an unreasonable search and seizure. This objection is without merit. Notice and opportunity for hearing are not a prerequisite to issuance of a request for documents pursuant to section 572.701(d). *Montship Lines, Ltd.* v. *Federal Maritime Board,* 295 F.2d 147 (D.C. Cir. 1961).

Comment 26 objects to the fact that the Director, Bureau of Agreements and Trade Monitoring issues a request for documents. It is urged that the former procedures, applying to section 21(a) of the 1916 Act, under which the Commission itself issued the request for documents, be continued. No modification to this section is necessary. Requests for documents made by the Director may be appealed to the Commission.

Finally, Comment 34 points out that privileged documents such as attorney-client communications are not exempted from the scope of a request for documents. There is, however, no need to amend this section to specifically exclude information which may already be protected by law.

Section 572.701(e)

Section 572.701(e) specifies times when documents must be filed, one of which is after the issuance of a request for documents. Comment 34 refers to its objections pertaining to sections 572.701(c) and 572.701(d) and asserts that this section should be deleted. These concerns have already been addressed above and no change is required in this section.

Section 572.702—Filing of Reports Related to Shippers' Requests and Complaints and Consultations

Section 572.702 further implements section 5(b) of the Act which requires conferences to provide for a consultation process and to establish procedures for considering shippers' requests and complaints.

Section 572.702(a)—Shippers' Requests and Complaints

Section 572.702(a) provides that conferences shall annually file with the Commission a statistical report summarizing activity in several areas pertaining to shippers' requests and complaints. Comment 33 suggests that these reports should identify shippers' associations requests separately from those of individual shipper requests. This change is said to be necessary so that the Commission may carry out its responsibilities to administer and enforce section 10(b)(13) of the Act, which prohibits common carriers from refusing to negotiate with a shippers' association. Comment 27, on the other hand, contends that reports on the number of shipper complaints is unnecessary.

The contents of reports required under this section has been kept to a minimum. Only statistical totals without specific details are required. However, these statistics are important to determine the degree of conference responsiveness to sections 5(b), 6 and 7 as well as to section 10(b)(13) of the Act. With regard to section 10(b)(13) it would be useful to have

the statistical reports separately indicate shippers' associations or groups and section 572.702(a) has been amended accordingly in the Final Rule.

Section 572.702(b)—Consultations

Section 572.702(b) requires each conference to file an annual report setting forth a statistical summary of the number of consultations requested and conducted during the calendar year. Several of the comments already discussed in connection with section 572.702(a) make similar arguments with regard to this section. Comment 33 believes that this section also should provide for the separate compilation of statistics on consultations with shippers' associations. Comment 27 argues that this section is unnecessary. Comment 24 contends that the requirement to report on consultations should be eliminated because it will not produce any meaningful information and because it is contrary to the statutory goal of minimizing government intervention.

The reports required by section 572.702(a) are necessary and useful statistical information on the responsiveness of conferences to shippers concerns which would enable the Commission to determine whether a closer scrutiny of conference consultation activities might be warranted. This section is, however, modified in the Final Rule as was section 572.702(a) to require that reports separately identify shippers' associations and shippers' groups.

Section 572.703—Filing of Minutes

Section 572.703 defines the term "meeting" and requires certain types of agreements to file minutes of meetings. Certain matters, such as purely administrative discussion, are exempt from the filing requirements of this section.

Section 572.703(a)—Meetings

Section 572.703(a) defines "meetings" within the meaning of this section. It was initially considered desirable to have minutes of all meetings regardless of whether final action was contemplated. Upon further consideration and in light of the comments received, there would appear to be no need to require the submission of minutes of meetings which do not contemplate the taking of final action.

Therefore, this section is amended to provide that minutes need only be provided for meetings which authorize the taking of final action. This modification, in effect, continues the previous requirements under the 1916 Act. This amendment should satisfy the concerns of those comments (Comments 13, 25, 26, 34, 38, 39) which argued that the proposed definition of a "meeting" was too broad.

Section 572.703(b)—Content of Minutes

Section 572.703(b) of the Interim Rule required that the minutes identify all documents distributed at the meeting to inform or assist the members. This requirement is deleted from the Final Rule and the Commission will

rely primarily on the index of documents required by section 572.704. This change should meet the concern of those comments (Comments 17, 24, 25, 26, 29, 34, 38, 39) objecting to the minutes content requirement in the Interim Rule.

Comment 29 states that the minutes requirement should not apply to meetings of pooling and equal access agreements in this section. This would have the effect of eliminating not only the minute filing requirements for such agreements but all reporting and record keeping requirements under Subpart G. Comment 38 states that the reference to pooling, equal access and discussion agreements should be deleted.

Adequate surveillance under the 1984 Act is of particular importance with respect to pooling and equal access agreements. Therefore, it is necessary to obtain minutes from the parties to such agreements as part of that surveillance program. Final action taken by members of discussion agreements may also have significance for a particular trade. Therefore, the reference to pooling, equal access and discussion agreements is retained in the Final Rule.

Section 572.704—Index of Documents

Section 572.704 requires that agreements covered in section 572.703(a) index all documents which are distributed. Section 572.704(b) further requires this index to be filed with the Commission on a quarterly basis.

This section evoked considerable comment. Nine comments were received in objection (Comments 13, 16, 17, 25, 26, 29, 34, 38, 39). Seven of these comments (Comments 13, 16, 17, 26, 34, 38, 39) urge that the indexing requirement be deleted because it is unduly burdensome, unclear in its application, and contrary to one of the purposes of the Act, namely minimizing of government regulation. Comment 25 objected to the index but in the alternative suggested that, if retained, the Commission eliminate the double reporting of documents which must be identified in conference minutes and which also must be indexed.

The index requirement is modified to include only documents leading to final decision on specified matters. This should reduce the volume of materials to be indexed and limit the indexed documents to those which have substantial regulatory significance. The concern about double reporting expressed by Comment 25 has been addressed by eliminating the requirement in section 572.703(b) that minutes identify documents which are distributed.

Comment 29 requests that pooling and equal access agreements be permitted to submit, in lieu of the index, periodic and final accounting statements.

The requirement that pooling and equal access agreements must, where applicable, submit an index of documents distributed to members is retained. Accounting statements are not the equivalent of, or a substitute for, indexing of documents. The specificity of a document index is necessary to fulfill

monitoring responsibilities under the Act. Parties need only identify the documents, not furnish the documents themselves, unless specifically requested.

Section 572.705—Waiver of Reporting and Record Retention

Section 572.705 provides for a waiver of any provision of Subpart G upon a showing of good cause. No comments were received on this section and no substantive changes have been made to this section in the Final Rule.

SUBPART H—TRANSITIONAL RULES

Subpart H of the Interim Rule prescribes mandatory provisions in existing conference and interconference agreements and addresses expiration dates in existing agreements. As discussed more fully below, the mandatory provisions in section 572.801 are deleted from the Final Rule. Those portions of sections 572.802 and 572.803 which have a continuing purpose are transferred to other subparts of Part 572. All of the sections of Subpart H are therefore either deleted or relocated and the Subpart H designation shall be reserved for possible future use.

Section 572.801—Mandatory Provisions in Existing Conference Agreements

The purpose of section 572.801 was to facilitate the transition from regulation of agreements under the 1916 Act to the regulatory regime of the 1984 Act. In particular, it was important during the transitional phase to establish a mechanism to achieve compliance with section 5(b) of the Act on or before June 18, 1984, the effective date of the Act. To this end, the Commission required that conferences indicate their adoption of certain mandatory provisions set forth in section 572.801. This procedure worked to assure that conference agreements achieve compliance with section 5(b) of the Act.[4] Because the purpose of this section has been achieved, there is no need to retain it in the Final Rule.

Conferences have been permitted to draft their own amendments to supersede the Commission prescribed provisions and to comply with the statutorily mandated requirements. This procedure is continued in the Final Rule. Because this section is being deleted, there is generally no need to address the comments (Comments 22, 30, 31, 38) which proposed specific changes to this section. One comment, however, does merit further discussion at this time.

The U.S. Department of Justice (DOJ) submitted an extensive comment which focused on the right of independent action under section 5(b)(8) of the Act. DOJ contends that the model independent action provision

[4] A number of persons filed emergency comments (Comments 3, 4, 5, 6, 7, 11, 14, and 18) which either in whole or in part sought modifications of these mandatory provisions. On June 12, 1984 the Commission made certain amendments to the mandatory provisions in the Interim Rule in response to the concerns expressed in the emergency comments.

contained in section 572.801(e) of the Interim Rule should be strengthened and made mandatory for all conference agreements in order to ensure that independent action fulfills its purpose under the 1984 Act. Moreover, DOJ urges the Commission, by rule, to expressly prohibit: (1) all collusion among carriers concerning any carrier's decision to exercise or not exercise its right of independent action; (2) the imposition of procedural barriers on the right of independent action; and (3) acts of retaliation against carriers who exercise their right of independent action. To that end, DOJ's comment includes a proposed model conference agreement independent action clause which contains extensive safeguards for the exercise of independent action.

DOJ's proposal is not adopted in the Final Rule. First, this proposal is so far reaching as to be clearly beyond the scope of the current rulemaking proceeding. A separate rulemaking proceeding would be necessary with full opportunity for comment before such a comprehensive rule could be adopted. Second, there is no factual record to provide a basis for the DOJ proposal. Unlike the situation in the motor carrier industry cited by DOJ, where the Interstate Commerce Commission imposed procedures for independent action after it found that the statute was being frustrated, the Commission has only limited experience with independent action under the 1984 Act. At this time, the Commission believes that conferences should be free to draft their own independent action provisions and that such freedom is consistent with the deregulatory spirit of the Act. The Commission is aware of the critical role that independent action plays under the statutory scheme as a counterbalance to conference economic power. Therefore, such provisions receive close scrutiny in the review process.

Where it appears that a particular independent action provision may inhibit independent action, the Commission has sought and obtained modification of the provision by the parties through the negotiation process. These negotiations have led to the deletion from agreements of independent action provisions which mandate that a member taking independent action attend a meeting and explain the independent action before the action may go into effect and also provisions which provide for mandatory compromise of independent action. The negotiation process has worked thus far to remove objectionable independent action procedures from agreements. At this time it therefore does not appear necessary to undertake a rulemaking proceeding regarding independent action. However, should there be any indication that the right of independent action is being interfered with in any way, such a rulemaking proceeding will be considered.

Section 572.802—Mandatory Provisions in Existing Interconference Agreements

Section 572.802 in the Interim Rule provided that existing interconference agreements and agreements between carriers not members of the same conference must provide for independent action. Comment 38 suggests that

section 572.802 be transferred to section 572.502(b). This suggestion has been adopted.

Section 572.803—Expiration Dates in Existing Agreements

Section 572.803 provides that expiration dates in existing agreements remain in effect on and after June 18, 1984. The section further provides that parties to agreements with expiration dates must file any modification seeking renewal for a specific term, or elimination of the expiration date, in sufficient time to accommodate the waiting period required under the Act. Comment 38 suggests that section 572.803(b) should be transferred to section 572.401. This suggestion is adopted.

SUBPART I—PENALTIES

Subpart I prescribes penalties for violations of Part 572 as provided for in section 13(a) of the Act.

Section 572.901—Failure to File

Sections 4 and 5(a) of the Act provide for the filing of certain agreements with the Commission. Failure to file such an agreement is a violation of section 5(a) of the Act and Subpart D. This failure to file is subject to the penalties of section 13(a) of the Act (46 U.S.C. app. 1712(a)). Maximum penalties are $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the maximum penalty is $25,000 for each violation.

Section 572.901 is amended to add the phrase "pursuant to sections 4 and 5(a) of the Act and this part and not exempted pursuant to section 16 or excluded from filing by the Act." This change clarifies that only agreements subject to the Act and requiring filing can be penalized for failure to file, as opposed to agreements subject to the Act but which do not require filing. This responds to Comments 34 and 38 which suggested these changes.

Section 572.902—Falsification of Reports

Falsification of any report required by the Act and Part 572, including falsification of any item on the Information Form, is made subject to the civil penalties set forth in section 13(a) of the Act. Such violations may also be subject to criminal sanctions under 18 U.S.C. 1001.

Comment 29 challenges the Commission's authority to provide by rule for penalties for falsification of reports when the Act does not specifically proscribe such activity.

Section 17(a) authorizes the Commission to prescribe rules necessary to carry out the Act and section 13(a), in turn, establishes penalties for violations of the Act and regulations issued thereunder. It is essential that information submitted to the Commission be truthful information if it is

to adequately administer the Act. The penalty provision furthers this fundamental purpose.

Comment 29 further asserts that this section is unnecessary because 18 U.S.C. 1001 already makes it a violation of the criminal code of the United States to intentionally make false statements within the context of any matter arising within the jurisdiction of a federal agency.

Section 572.902 is not superfluous. To supplement the criminal penalties under 18 U.S.C. 1001, it provides for civil penalties pursuant to section 13(a). Not all situations involving falsification of reports might merit the imposition of criminal penalties. In some situations civil penalties may be appropriate. Moreover, the reference to 18 U.S.C. 1001 in section 572.902 is a useful reminder of possible criminal liability.

Finally, Comment 29 maintains that the choice of the word "falsification" makes section 572.902 overbroad. It is submitted that unintentional misstatements could be construed as "falsifications" and thereby made subject to penalties.

Section 572.902 is amended by adding the word "knowing" before the word "falsification" where it appears. This modification clarifies that only parties who intentionally, and not mistakenly, submit false information will be subject to penalties.

Comment 22 submits that the penalties provided for in section 572.902 are excessive when considered in light of the difficulty of ascertaining some of the data required on the Information Form.

This Comment appears to be primarily addressed to the content of the Information Form. There should be no misunderstanding, however, of the application of the penalties provisions except in cases where parties knowingly falsify information. Parties will not be subject to penalty under Subpart I where they are unable to supply data required on the Information Form.

APPENDIX A TO PART 572—INFORMATION FORM AND INSTRUCTIONS

Commission Authority to Require Filing of the Information Form

Section 572.405 requires the party filing certain agreements to provide with the agreement information that is necessary under the Act to review the agreement. The required information is to be provided in the Information Form set forth in Appendix A. Where the filing party is unable to supply a complete response, the party should submit either estimated data with an explanation as to why the precise data are not available or a detailed statement of the reasons for noncompliance and the efforts made to obtain the required information.

Six comments address the issue of the Commission's authority to require the filing of the Information Form. Four comments disagree that the Commission has the authority to require the Information Form to accompany the filing of certain agreements. These comments make two related argu-

ments in support of their position: one, there is no explicit obligation for parties filing agreements under section 5(a) of the Act to submit supplemental detailed information concerning competitive factors with every agreement at the time of its filing; and two, the Information Form, which requests information relevant to the general standard, cannot be the basis for rejection of an agreement under section 5(a) of the Act, which contains no reference to the general standard.

Authority to require the Information Form is manifest for three main reasons. First, the statute clearly and explicitly authorizes the Commission to require that information accompany the filing of agreements and that agreements that do not meet this requirement may be rejected. Specifically, section 5(a) of the Act authorizes the Commission to "prescribe . . . the additional information and documents necessary to evaluate the agreement" (46 U.S.C. app. 1704(a)). The legislative history to section 5 of the Act specifies that the filing requirements are intended "only for information relevant to the Commission evaluation of an agreement rather than for information based on broad standards unrelated to that agreement." (H.R. Report 98–600, 98th Cong., 2d Sess. 28 (1984)). Section 6(b) of the Act authorizes rejection of any agreement filed under section 5(a) of the Act that does not meet the requirements of section 5 of the Act.

Congressional intent concerning the evaluation of an agreement prior to the agreement's effective date is interpreted to require not only a review pursuant to the section 6(b) standard (for compliance with section 5 requirements), but also an analysis based on the section 6(g) general standard for substantially anticompetitive agreements. Moreover, the authority under section 5(a)—to prescribe information to be filed *with* the agreement—differs from the authority under section 6(d)—to require *additional* information to be submitted after the agreement has been filed but prior to its effective date. The initial information filing requirements are designed to provide only the information needed to determine whether or not the agreement raises substantial issues of unreasonable and anticompetitive effects under the section 6(g) general standard. Where such anticompetitive effects are likely, additional information that is necessary in order to make a determination under section 6(g) whether or not to seek to enjoin the agreement may be requested under section 6(d).

Second, Congress has specifically cited in legislative history relevant portions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 as the model for the Commission's agreement review procedures. Pursuant to the Hart-Scott-Rodino Act, the Federal Trade Commission (FTC) developed a report form for information to aid the FTC in its preclearance review of proposed acquisitions and mergers ("Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions").

Third, Congressional policy pronouncements in the Act and the legislative history indicate that one of the purposes of the Act was to end the delay in the processing of agreements and to provide a streamlined regulatory

process. Submission of relevant information at the time an agreement is filed that is not available to the Commission but is readily available to the filing party will expedite the processing of agreements.

Two comments specifically refer to the Commission's authority to require an initial Information Form related to the general standard. Comment 23 states that if an information filing requirement is prescribed, it must be limited to those instances where the agreement or modification raises a question under the general standard. Comment 34 accepts the premise that useful information not available to the Commission, but readily available to the parties filing substantially anticompetitive agreements, may be required in conjunction with such filings. Such requirements, according to Comment 34, will significantly reduce the need to request additional information from the filing parties, thereby aiding the review process.

In consideration of the above, it is concluded that the 1984 Act does confer the authority to require the submission of the Information Form in conjunction with the filing of certain agreements.

General Discussion of the Information Form

A number of comments argue that the Information Form is "excessive and irrelevant", "burdensome and unnecessary", seeks information not "readily available", or "resuscitates" the *Svenska* standard. Specific comments will be addressed in the discussion of the particular part of the Information Form. However, it should generally be stated that the requirements outlined in the Information Form are within the statutory limits on information gathering powers granted the Commission under sections 5 and 6 of the Act. The data requirements in the Information Form conform to the complicated decision calculus, described in the legislative history, that is required in order to render a determination that an agreement is or is not violative of the section 6(g) general standard. In the Interim Rule, the Commission stated,

> The Commission recognizes that the amount of information requested on the Information Form is significant. These information needs may be refined as the Commission gains experience under the general standard and determines what is relevant and essential to that review. In addition, the Commission plans to develop its own internal sources of trade information and as this information becomes available may be able to reduce the amount of information requested on the Form.

Since the publication of the Interim Rule, valuable experience has been gained in applying the Information Form to the analysis of agreements under the general standard. Moreover, the Commission has acquired and begun to utilize Journal of Commerce and Bureau of Census data sources which, when used in conjunction with its trade monitoring capabilities, provide a better picture of the competitive implications of ocean carrier agreements.

Moreover, the Information Form, as promulgated in the Final Rule, is not set in concrete, but will in all probability continue to evolve in order to appropriately reflect the Commission's regulatory needs in light of its data resources and changes in the regulated industry. Therefore, in the Final Rule there has been a general reduction in the amount of information required in the Form. Specific changes to the Information Form are indicated in the particular Part together with a discussion of the comments and the amendments to the Information Form.

PART-BY-PART DISCUSSION

Part I—Agreement Name

Part I requires the filing party to provide the full name of the agreement. One comment addressed this part simply to indicate that this requirement (along with Part II) was not objectionable as a quick identifier of the agreement. Accordingly, Part I will remain unchanged in the Final Rule.

Part II—Agreement Type

Part II requires the filing party to indicate whether or not the agreement authorizes the parties to collectively fix rates (Part II(A)), to pool cargoes or revenues (Part II(B)), or to establish a joint service or consortium (Part II(C)).

In the Interim Rule, the instructions to the Information Form state that the nature of the agreement determines the extent of information required. Specifically, the instructions require only those agreements that provide for rate-fixing, pooling or joint services/consortia to complete Parts III and IV, which seek information on market share and market competition. Such requirements are justified in the instructions on the basis that "these three types of agreements of all agreements historically filed with the Commission are the most likely to trigger the 6(g) standard because of their potential to create excessive market power."

Part II and the Instructions have been amended to clarify and conform Part II with the intention that only those agreements that provide for rate-fixing, pooling or joint services/consortia *or* significant modifications to such agreements are required to complete Parts III and IV. Parties filing amendments to agreements should refer to section 572.403(a) for guidance as to which amendments require the Information Form. Furthermore, the requirement that a completed Information Form include Part VIII (Reports, Studies of Other Research) for all filing parties has been limited to only those parties that have answered "yes" to any question in Part II (see the discussion under Part VIII).

Comment 23 states that only those types of agreements mentioned in Part II that could raise questions under the general standard should be required to file the Information Form. In particular, the comment argues that the Information Form should only be required for those agreements

or modifications that authorize or directly increase the authority of the parties to: (1) fix ocean rates; (2) allocate cargo or revenue between or among them; or, (3) reduce service at United States ports; and, which may also result in a significant reduction in competition.

The Commission generally agrees with the comment. The Information Form, as formulated in the Final Rule essentially conforms to the comment's suggestion. Part II identifies three types of agreements, the first two of which are identical to the first two agreement categories cited by the comment. Part V requires those agreements with service authority to specify any reduction in service that is likely to occur as a result of the agreement. Thus, Part V addresses those agreements in the comment's third agreement category.

Moreover, for all other agreements, the requirements imposed by the Information Form are minimal. In particular, the only parts of the Information Form required under the Final Rule for parties filing agreements, other than rate-fixing, pooling and joint service agreements, or agreements with service authority, or those agreements exempted from the filing requirement, are Parts I, II, VI and IX. For most agreements, all that these parts require is checking a box or entering name, address and signature. Other than those "Part II agreements" discussed above, the only other substantive requirement would be imposed upon those agreements that are required to complete Part VI. Because restrictions imposed by governments are the most effective limitations on competition in the ocean liner trades, Part VI captures important information for analysis under the general standard. For example, certain agreements that facilitate access to cargoes subject to foreign cargo preference laws or decrees which are not otherwise required to indicate any market information on the Form would be required to complete Part VI.

Five comments address the requirement that certain types of agreements must complete Parts III and IV of the Information Form.

Two comments refer specifically to the inclusion of joint service agreements in Part II. Comment 18 argues that the implication that joint service agreements are likely to be violative of the general standard should be rejected. Comment 30 supports the requirement that joint service/consortium agreements complete Parts III and IV, citing the potential for this type of agreement to reduce competition especially if the cooperating carriers dominate the relevant trade.

There are two major concerns with joint services under the general standard. The first, which was mentioned in Comment 30, involves a situation where two or more of the parties to the proposed joint service currently have an *existing* service in the trade. Thus, the formation of the joint service eliminates the existing competition between or among the parties in the relevant trade(s). The second concern involves the entry into a trade of a new joint service which is so large as to be able to exercise market dominance in the trade it plans to *enter*.

In order to assess the competitive impact of a new joint service agreement, the filing of an Information Form with such agreements will continue to be required. Therefore, no change is made in the Final Rule in this regard.

Comments 26, 28 and 38 argue that conference agreements are less likely to raise issues under the general standard than service coordination, pooling and joint service agreements. They also argue that the information required for conference agreements is excessive and should be deleted or reduced.

The Commission concurs in part with these comments that conference agreements "apart from extraordinary circumstances" are not likely to be violative of the general standard and that the specific statutory restrictions on conference activities diminish the ability of a conference to abuse its position of dominance in a trade. However, such a view, which appears to comport with Congressional intent, does not remove the Commission's responsibility under the Act to review conference agreements for possible violations of the Act. Such a review must consider accepted economic principles which hold that explicit collusion in the form of price-fixing agreements may result in prices that are higher than competitive levels.

There is, however, no presumption that conference agreements will violate the general standard. In setting out the requirements for completing the Information Form, in particular Parts III and IV concerning market share and market competition, the Commission considered those agreements among all the types of agreements with which it was familiar that had the greatest potential to reduce competition and create market power in such a manner as to raise concerns under the general standard. The Commission adheres to its belief that in the unusual and severe cases where the general standard may be violated, either one or a combination of rate-fixing, pooling or joint service agreements will be involved. Consequently, the Commission will continue to apply the more rigorous data requirements contained in Parts III, IV and VIII for conference agreements.

Two comments argue that certain classes of agreements should be added to those having potential substantial anticompetitive implications and that further information filing requirements should be imposed. Comment 28 specifically criticizes the failure to subject service coordination agreements (i.e., "cross chartering combined with joint control over sailings and itineraries") to greater scrutiny than conference agreements. The comment urges that service coordination agreements be required to complete Parts III and IV, and Part VII (Benefits of the Agreement), the completion of which is now voluntary for all types of agreements. Comment 30 proposes the addition of all equal access agreements to those agreements required to complete Parts III and IV.

In partial response to Comment 30, it should be noted that equal access agreements invariably arise in response to the actions of a government and, therefore, require the completion of Part VI. However, in considering

these and other recommendations for inclusion in the Final Rule, care must be taken to ensure that all parties affected by the Final Rule have the opportunity to comment. The Commission cannot create new filing requirements for a class of agreements without first availing the affected parties with the opportunity to comment. The Commission may in a separate rulemaking procedure consider and propose rules that would address the issues raised in Comments 28 and 30. Accordingly, the Commission here withholds any further discussion of these aspects of Comments 28 and 30.

Comment 39 recommends that the requirement to submit an Information Form together with the required information contained therein should be "tailored to the type of agreement filed."

The Commission concurs with this comment. The Commission has, consistent with its agreement review responsibilities under the Act, required the Information Form only for new agreements (excluding marine terminal agreements, assessment agreements and exempted agreements) and modifications of agreements that may present substantial issues of competitive harm under the general standard. Moreover, the requirement to complete certain parts of the Form (e.g., Parts III, IV, V and VIII) is, in fact, tailored to the type of agreement involved.

Part III—Market Share Information

Part III requires those parties answering "yes" to Part II (A), (B) or (C) to provide the combined market share of all parties to the agreement (Part III(C)) by providing the amount of liner cargo carried by all parties to the agreement in each sub-trade (Part III(A)) and dividing this amount by the total amount of cargo carried on all liner vessels operating in each sub-trade (Part III(B)). Background Information to Parts III and IV indicates that the amount of cargo is to be given in both weight tons and on a dollar value basis. Sub-trade is defined as liner movements between each foreign country and each U.S. port range within the scope of the agreement, where a port range is identical to the Bureau of Census' U.S. Coastal District. Liner service refers to a definite, advertised schedule, giving relatively frequent sailings at regular intervals between specific U.S. ports or port ranges and designated foreign ports or port ranges.

A number of comments address this part. They express a common concern that the information required in Part III is irrelevant, excessive, burdensome, and meaningless. The earlier discussion of the authority to require filing parties to submit an Information Form with certain agreements addressed the question of the relevancy of the Information Form.

A number of comments generally recommend that carriers be allowed to submit data in the form in which they actually keep it and use it. Several comments urge that market share should be requested as a good faith estimate based on available data and an explanation of the estimating process. Comments on specific data filing requirements in Part III are

summarized below. The discussion of the comments and the Commission's statement of its course of action will not allow the summary of each topic, but will pertain to all comments to Part III at the end of this section.

Sub-trade

Comments referring to the requirements that data be given by sub-trade generally object to it on the grounds that trade data is not kept by carriers on a sub-trade basis, and, therefore, such data is not readily available or within the parties' grasp. Cargo data, according to several comments, is kept by carriers on a port, or port range or rate group basis. Moreover, according to two comments (23, 26), the separation of foreign port ranges into foreign countries and the division of U.S. port ranges along the lines of Customs districts does not reflect the markets or trade routes over which carriers actually compete. With intermodalism, Comment 26 argues, the U.S. West Coast should be one port range, not two, because of the ease with which interior point and minilandbridge traffic can shift from one state to another.

Amount of Cargo on a Weight Ton and Dollar Value Basis

Six comments object to the requirement that cargo data be given in dollar value, two of which also object to a weight ton basis requirement. These comments generally argue that the dollar value of the cargo is not a significant statistic to the carriers so they do not ordinarily keep records of the cargo's dollar value. The dollar value is available through the Bureau of Census, but it is not within the parties' grasp. Comment 36 states that because cargo data compiling methods differ from trade to trade, parties should be permitted to specify the unit of measurement in submitting cargo data if weight ton and dollar value measures are unavailable.

Non-Party Cargo Data (Part III(B))

Comments generally argue that the cargo data collection problems for parties are increased when they are applied to nonparties to the agreement. Several comments maintained that the carriers do not have ready access to cargo information relating to their competitors in a trade. The most reliable information on carrier cargo statistics is Bureau of Census, which should, according to Comment 34, be purchased by the Commission directly instead of being purchased by the parties and then submitted to the Commission. This comment urges that Part III(B) be eliminated along with Part III(C).

Liner Service

Comment 30 recommends that the Commission specify in the Instructions to the Form where it defines liner terms that these definitions and descriptions apply only in the context of the Information Form. Such a clarification

would preclude any confusion as to what persons are subject to the Act. For example, bulk parcel tankers may meet the definition of a liner service but, according to the comment, are not subject to the Act.

The Commission generally agrees with the comments to Part III. The Commission does not wish to impose excessive burdens on the filing parties or to require the submission of data not within the parties' grasp. Moreover, the data submitted should be meaningful, that is, the data should not be an artificial manipulation of disparate data (e.g., a combination of parties' business records and Census data in order to derive market share). More importantly, the Commission, which now has access to both the Bureau of Census and Journal of Commerce data bases, is aware, as several comments argued, that these data bases contain weight and dollar value data which are not perfect indicators of market share. More relevant and preferable as a measure of market shares are revenue tons, which may include measurement tons or weight tons, or containers statistics measured in TEU's. Such data, where provided, can augment internal data sources.

Accordingly, the Final Rule will indicate that market share data provided in Parts III (A), (B), and (C) may be estimated based on data available to the filing party. All estimates should be accompanied by an explanation indicating how the estimates were derived (an explanation of why precise data are not available is no longer required for Parts III or IV; see discussion of section 572.405). "Available" data is data within the parties' grasp, that is, data that the parties have already acquired, or would ordinarily acquire in the course of undertaking such commercial decisions embodied in their proposed agreement. The Instructions and Explanation and the Information Form will be amended to require that market share data be provided for such sub-trade within the scope of the agreement only where such data is available to the parties of where sub-trades represent the relevant market for liner service. Where the relevant market for liner service is more accurately represented by the entire geographic scope of the agreement, or by certain foreign port ranges (rather than foreign country), or by combinations of U.S. port ranges, the parties may provided market share on that basis. The geographic scope for which market share information is provided should be clearly defined.

Market share data may be provided in units that are ordinarily kept and used by the parties. The data is to be provided for the most recent twelve-month period for which data are available. Where estimates have been made, the filing party should so specify and indicate the basis of their derivation. Units of measurement should be clearly indicated for all data provided.

The Instructions and Explanation will also indicate that the definition of liner service and other liner terms is relevant only to the Information Form and does not affect the determination of persons subject to the Act based on the Act itself or the Final Rule.

Part IV—Market Competition

Part IV requires the filing party to provide the names of all non-party liner operators currently serving each sub-trade (Part IV(A)(1)), the names of all liner operators serving alternative liner routings competing for cargoes carried in each sub-trade (Part IV(A)(2)), and a description of the extent of competition offered by such liner operators (e.g., estimates of market share or underutilized capacity in alternative liner routings, Part IV(A)(3)). This part also requires the identification of all nonliner competitive substitutes (e.g., bulk or air freight, Part IV(B)(1)) and estimates of the percentage of liner cargo that is currently carried by nonliner operators (Part IV(B)(2)).

Eight comments address this part. Five comments argue that much of the data required in this part is not known and not readily obtainable, or if provided by the parties is not meaningful or accurate. These comments generally indicate that data provided in this part would be only an educated guess or a matter of judgment.

Several comments address the relevance of the information required. Comment 28 argues that non-party liner market share adds nothing to market share analysis. Comments 28 and 39 state that data on non-liner competition are not meaningful or helpful to the review of the agreement. However, Comment 38 maintains that such data for liner and non-liner competition would only be relevant to a market share analysis. Comment 34 contends that the need for such data is specified in the legislative history to the Shipping Act of 1984, but the Congressional intent is that such information would be better provided by third-party sources. Comment 27, in arguing that the required information is not readily available to carriers, states that the Commission should recognize the fact that liner and nonliner competition make liner freight rates reasonable.

Comments 23 and 34 recommend that Parts IV(A)(2), (3) and IV(B) should be optional because the data provided serve the parties' interests. Comments 27 and 36 recommend that Parts IV(A) and IV(A)(1) be deleted. Comment 36 requires the addition of certain qualifying terms that would make the data requirements less precise and more at the discretion of the parties.

The Commission recognizes the difficulty of providing precise data in response to the requirements of Part IV. The instructions to this part in the Interim Rule allow the use of estimates in the determination of percentages indicating the extent of liner and non-liner competition in Parts IV(A) and (B), respectively. Parties are expected to have some knowledge of the identity of their competitors and, at least approximately, the degree to which non-party liner operators and certain non-liner operators are competitive with the parties.

The Commission agrees with one comment that the presence of liner and non-liner competition should militate against unreasonably high rate levels. Moreover, the need and relevance of such information to the review

of agreements under the general standard is clearly indicated in the legislative history. The extent of liner and non-liner competition aids in the determination of the relevant market share and is necessary in order to determine the potential market power of parties to an agreement operating in that market. The specification of such liner and non-liner competition may tend to decrease the market share of the parties to their benefit in the analysis under the general standard.

The Commission is developing or acquiring data sources that should enable it to supplement the parties' data on the competitive conditions in most ocean trades. However, the Commission, in order to assist and expedite its preliminary review of agreements under the general standard, requires information that the parties could be expected to have concerning their competitors that would complete or support the Commission's data.

Because of the relevance of this information to the preliminary review of an agreement, the Commission continues to require in the Final Rule, parties with affirmative answers to Part II (A), (B) or (C) to complete Part IV. The Final Rule will indicate that the data required can be estimated. Parties should continue to identify the sources for such estimates. The units of measurement to be used in providing cargo data are at the discretion of the parties. However, all units of measurement must be clearly identified. The parties need not, for their responses to Part III or Part IV, utilize any data sources that they have not already acquired, or would not ordinarily acquire in the course of undertaking such commercial decisions embodied in their proposed agreement.

Part V—Service to the Shipping Public Under the Agreement

Part V requires the filing party to identify all U.S. ports expected to be served under the agreement (Part V(A)), to specify each party's reduction in frequency to each port within the scope of the agreement (Part V(B)), and to specify any elimination of service to any U.S. port within the scope of the agreement which occurs as a result of the implementation of the agreement (Part V(C)).

Six comments address Part V. The consensus of the comments is that information concerning the reduction or elimination of service should be required only of agreements that have the authority to reduce service. Ratemaking agreements that do not, according to Comment 32, "seek to control the fact or frequency of any member line's service" should not be required to complete Part V.

The intent of Part V is to obtain information, not otherwise available, that is essential to an analysis under the general standard of reductions in service resulting from the agreement. Clearly, agreements with no service authority cannot be construed as having the potential, through a reduction in competition, to unreasonably reduce service levels. Consequently, the completion of Part V will be required only for those agreements that have service authority. Service authority is defined as including either or

both of the following authorities allowing parties to agree between or among themselves: to allocate (or otherwise provide) tonnage or capacity between or among carriers serving the trade(s); to establish a schedule of ports or otherwise allocate ports which each carrier will serve and/or the frequency of each carrier's calls at those ports.

Comment 27 indicates that Part V is relevant, but Part V's emphasis on service to ports is contrary to the Act's intent, which is "to permit carriers to structure their own affairs and thereby provide more efficient service to shippers." Because it does not follow that a reduction in service to ports is a reduction in service to shippers, the Commission should, according to this comment, readjust its focus on ports to address the issue of service to shippers.

The frequency of port calls is used because it is a readily available index of service to shippers. There are, of course, other indices that indicate the service to shippers (including, for example, capacity, type of vessel, transit time, number of handlings). However, to require such data would likely present filing parties with an unduly burdensome data collection task. Moreover, such data would likely be of marginal use for the analysis of most agreements under the general standard. If reductions in frequency or the elimination of service to ports are indicated in Part V, which, when combined with the Commission's general knowledge of trade conditions, are sufficient enough to present questions under the general standard, the Commission may at that time seek additional information either informally or under the authority of section 6(d) of the Act in order to more specifically address the impact of the agreement on service to shippers. Consequently, in lieu of any specific suggestions in the comment as to how service to shippers could be more accurately and practicably determined and obtained, the Commission will continue to utilize port calls as one initial proxy for service to shippers.

Comment 23 maintains that the reference to indirect port calls via surface carriage in the instructions to Part V(A) implies that, for the purposes of responding to Part V(A), a "port" could include inland points and that port calls could include pick-up or delivery at such inland points by railcars and trucks. Comment 23 also recommends that port calls required by Part V(B) refer only to direct or indirect calls by vessels under the direct operational control of the parties.

The Commission is persuaded that potential problems may exist involving excessive data required in Part V for indirect intermodal service and for service by vessels not under the operational control of the parties. Consequently, the use of the term "port calls" in the Information Form and Instructions is changed to delete reference to surface carriage and to account only for port calls by vessels under the direct operational control of one or more parties to the agreement. For the purpose of the Information Form, the term "port" means the place with a harbor that an ocean carrier serves, either directly by oceangoing vessel or indirectly by feeder

service. The use of this information is applicable only to the Information Form and in no way changes the meaning of "port" as referenced elsewhere in the Final Rule. The identification of other forms of indirect service such as intermodal service (e.g., interior point or minilandbridge service) or transshipment may be provided on a voluntary basis by the parties where such data may assist and expedite the analysis of the agreement's impact on service, but it will not be required with the initial filing. The Commission may, however, request such data pursuant to its authority under section 6(d) of the Act where substantial reductions in service are indicated both by the agreement and by the analysis under the general standard of the agreement and the relevant trade(s).

Comment 36 recommends that Part V(A) be changed to require only the identification of those ports "expected" to be served, and that Part V(B) be amended to require an estimate of any change in the frequency of port calls, rather than reduced sailings.

With regard to the comment's concerns with Part V(B), the analysis of services under the general standard pertains to unreasonable reductions in the level of service. The Commission need only, therefore, require parties to provide reductions in service that will occur as a result of the implementation of the agreement. With regard to the suggestion that Part V(A) indicates those ports expected to be served, the instructions to Part V(A) already so state. Consequently, Part V(A) will be changed to conform to the instructions.

Comment 26 refers to Part V(B)(2) which specifies that the elimination of service to any port need only be indicated where it occurred "as a result of the implementation of the agreement." This comment urges that similar restrictive language be applied to Part V(B)(1) as well.

Part V(B) seeks information concerning the reduction or elimination of service at any port within the scope of the agreement for the purpose of analyzing the impact of an agreement under the general standard. Consequently, the Commission is only interested in Part V(B)(1), as it is in Part V(B)(2), insofar as the specified reduction of service is likely to occur as a result of the implementation of the agreement. The Final Rule will, therefore, reflect the change in language urged by Comment 26.

Part VI—Foreign Government Involvement in the Liner Market

Part VI requires the filing party to indicate whether or not the agreement was entered into as a direct or indirect response to any law, decree or other action promulgated or otherwise implemented by a foreign government (Part VI(A)). Where the filing party has so indicated, then all such governmental actions that have led to the agreement should be specified (Part VI(B)). The filing party is also required to indicate whether or not the governmental action limits access to the carriage of liner cargoes (Part VI(C)) and, if so, to explain how access is limited (Part VI(D)) and to

provide the percentage of liner cargo carried within the scope of the agreement to which access is limited (Part VI(E)).

Four comments address Part VI. Comment 22 has "no quarrel" with this part. Comment 26 states that the instructions to this Part should be clarified so that Parts VI(C), (D) and (E) are required only where Part VI(A) is answered in the affirmative. The concerns of Comment 26 can be alleviated by reference in the Information Form to Part VI(C) which clearly refers to Part VI(A), and to Parts VI(D) and (E), which clearly refer to Part VI(C).

Comment 34 argues that Part VI is not relevant with respect to ratemaking agreements and, therefore, should not be applicable. The Commission concurs that most conference agreements have not usually been established in direct or indirect response to government laws, decrees, etc. Nonetheless, certain laws of foreign governments do require that a carrier, in order to carry cargo in that country's oceanborne foreign commerce, be a conference member. The Commission will retain the requirement that parties filing conference agreements or significant amendments to such agreements answer the pertinent portions of Part VI.

Comment 38 states that government laws are not relevant to any standard pertaining to the rejection of an agreement under sections 6(b) or 6(g) of the Act. Moreover, even if such laws were relevant, no reason is given, according to this comment, as to why Part VI should apply to foreign government and not U.S. laws.

The inclusion of Part VI, as explained in the Interim Rule, is based on the premise that, given the contestability of the liner shipping industry, in all but the rarest cases, only the actions of governments can effectively restrict entry to a trade. In such cases where entry is so restricted, excessive market power is most likely to arise and present significant issues of potential competitive harm under the general standard. Thus, the Commission rejects the claim made by Comment 38 that information concerning foreign government involvement in the liner trades is not relevant to the preliminary review of an agreement under the general standard. The general authority to reject agreements under section 6(b) is addressed earlier in the discussion of Appendix A.

It may be helpful to reiterate and further clarify what is meant by an agreement that is a direct or indirect response to a governmental law, decree or other action. Where, for example, laws of a foreign government require that a carrier, in order to carry cargo in that country's oceanborne foreign commerce, must be a conference member, then an agreement that establishes a conference in order for the parties to enter that trade would be a direct response to such governmental laws and, thus, would be required to answer Part VI. Moreover, a commercial agreement that was in response to a governmental action that was itself in response to the concerted actions of other governments would also be required to complete Part VI. For example, any commercial space charter agreement that was filed in response

to laws promulgated by a government that sought to impose cargo sharing schemes through such space chartering agreements and, in such a fashion, implement the UNCTAD Code of Liner Conduct, would be required to complete Part VI.

In addition, the treatment of equal access agreements should be clarified in light of Comment 30, which states that equal access agreements may not be in response to the actions of governments. Such agreements, which facilitate access by certain carriers to cargoes subjected to government preference laws, decrees or other practices necessarily interject a foreign government into liner shipping and, therefore, require the completion of Part VI, which the instructions to the Information Form in the Final Rule will state.

An agreement that was an indirect response to a governmental action would be any agreement that facilitated the implementation of government laws, decrees, etc., or an agreement that flowed from such governmental action. An indirect response to the example stated above would be the creation of a pool that facilitates cargo sharing within the conference even though the pool was not *per se* required by such governmental action.

Only foreign government laws have been addressed in Part VI because the Commission is either familiar with or can easily obtain the information it requires concerning U.S. cargo preference laws. The involvement of foreign governments in liner markets is not necessarily so easily determined.

Part VII—Benefits of the Agreement

Part VII requests the filing party to indicate the benefits of the agreement that will accrue to the parties to the agreement (Part VII(A)) and to shippers and U.S. commerce generally (Part VII(B)). In response to emergency comments, the Information Form was amended to make the completion of Part VII voluntary.

Seven comments address this part. Three comments are generally supportive of this part's inclusion in the Form. Comments 22 and 34 assert that the provision of the agreements' benefits will generally bolster the parties' case. Comment 26 concurs with the amendment to the Interim Rule that makes the completion of Part VII voluntary.

The three comments that oppose Part VII (Comments 27, 32, 37) generally take the position that a statement of benefits and substantiating data is a request for an advance justification of the agreement, placing the burden of proof on the parties to an agreement. These comments believe that Part VII reinstitutes the *Svenska* standard and subverts the intent of the Act.

The Commission included Part VII in the Information Form in order to allow the parties to provide any information concerning increases in efficiency that may offset any reduction in competition resulting from the agreement. Such information would assist the Commission in its review of an agreement under the general standard, which, as outlined in the

legislative history, compels the consideration of efficiency benefits. Such benefits may offset any negative effects of an agreement that are found likely to result in a substantial reduction in competition. Part VII allows those persons filing the agreement who are likely to be most knowledgeable about the agreement's resulting efficiencies to demonstrate those benefits. The completion of Part VII should be to the advantage of the filing parties. Moreover, it is not a mandatory requirement.

The Commission will make no *a priori* judgments concerning the benefits of an agreement based on the completion or lack of completion of Part VII. In the absence of the completion of Part VII the Commission, where it is deemed necessary, will on its own undertake the determination of the agreement's benefits. Where Part VII has been completed, the Commission will determine the validity of the efficiencies claimed and enter, again where necessary, its assessment of the agreement's benefits into its analysis of the agreement under the general standard. The Commission does not, therefore, view Part VII as a reinstitution of any aspect of the Commission's agreement approval standards under the Shipping Act, 1916. Part VII will remain unchanged in the Final Rule.

Part VIII—Reports, Studies or Other Research

Part VIII requires the filing party to identify any reports, studies or other research that were prepared in order to determine the need for the proposed agreement.

Nine comments address this part. All oppose the requirement. These comments contend that it is: an unnecessary regulatory requirement; irrelevant to the general standard; so broad as to be incomprehensible; an invasion of confidential business information; a reinstitution of the *Svenska* test; the first leg of a fishing expedition that is arbitrary and capricious because of the absence of any exploration in the public record; an unnecessary processing delay; discoverable under 6(f) but not 6(b); and, finally, a return to existing law requiring the parties to show that less anticompetitive alternatives exist.

The Commission believes that a clarification of Part VIII may adequately respond to these comments' objections. The Commission's goal in requiring parties to identify any reports made in conjunction with the proposed agreement is to avail the Commission staff of information within the parties' grasp that would assist and expedite the preliminary review of the agreement under the general standard. The use of the word "need" in the phrase ". . . for the purpose of analyzing, formulating or assessing the *need* for the proposed agreement. . ." is perhaps unfortunate. The Commission does not desire nor does it view as a proper burden to be placed on filing parties an *a priori* justification for the agreement on the basis of the commercial need for the agreement, or on the basis that no less anticompetitive alternatives to the agreement exist. The Commission is interested in any data the parties have gathered relevant to the competitive conditions

in the relevant trade(s) and the competitive implications of the agreement. Specifically, this part is intended to solicit information on any studies commissioned or carried out by the parties pursuant to the agreement that examine rates, service levels and number and strength of competition in the relevant trades, or that forecast the effect of the agreement on such parameters.

In light of the comments and in order to clarify Commission intent with respect to Part VIII, the Commission is amending Part VIII and all references to this Part in the Instructions and Explanations to the Form to conform to the amended language. In order to minimize the burden on filing parties, only where the filing party has answered "yes" to Part II (A), (B), or (C) will Part VIII be required to be completed. The instructions to Part VIII will now read as follows:

> Part VIII requires a filing party that has answered "YES" to Part II (A), (B) or (C) to identify any reports, studies or other research that were prepared by or for any or all of the parties for the purpose of analyzing, formulating or assessing the competitive conditions in the relevant trade(s) affected by the agreement, or the competitive impact of the agreement on the relevant trade(s) affected by the agreement.

Part IX—Identification of Person(s) to Contact Regarding the Information Form and Certification of Authenticity

Part IX solicits the name(s) of the person(s) that the Commission may contact regarding any questions concerning the Information Form or a request for additional information. This part also requires a certification of the authenticity by the filing party of the information provided in the Form.

Three comments address Part IX. These comments generally oppose the certification requirement in Part IX(C) as burdensome and redundant. Comment 23 claims that the specific instructions for certification in Part IX(C) require an unreasonable confirmation of factual and legal conclusions regarding the accuracy and completeness of the Form. All comments refer to 18 U.S.C. § 1001, which is itself specifically referenced in section 572.902 of the Rules. These comments urge the elimination of Part IX or the modification of its text to allow the filing parties to draft the certifications.

The Commission is persuaded that the text of Part IX(C) may present the parties with burdensome certification requirements. The Commission views, however, that a separate certification of the accuracy and completeness of the Information Form is important to the enforcement of the general standard. In order to relieve the filing parties of burdensome requirements, the Commission is simplifying the certification oath and eliminating the notarization requirement. The certification oath will read as follows:

> This Information Form, together with any and all appendices and attachments thereto, was prepared and assembled in accordance

with the instructions issued by the Federal Maritime Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made, the information is, to the best of my knowledge, true, correct and complete.

Name (please print or type) _____

Title _____

Relationship with parties to agreement _____

Signature _____

Date _____

III. *Conclusion*

This Final Rule, and the accompanying Information Form, are intended to implement the various agreements provisions of the Act in accordance with the 1984 Act's guiding policies. The changes made to the Interim Rule in response to the comments filed in Dockets Nos. 84–26 and 84–32 are intended further to facilitate the filing of agreements by parties and the review and monitoring of agreements by the Commission. These changes generally have reduced the regulatory burden on the ocean shipping industry and have retained only those requirements which are essential to the fulfillment of the Commission's regulatory responsibilities. The Commission believes that the Final Rule establishes a nondiscriminatory regulatory process with a minimum of government intervention and regulatory costs.

The Chairman of the Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that these rules will not have a significant economic impact on a substantial number of small entities, within the meaning of that Act. The primary economic impact of these rules would be on ocean common carriers which generally are not small entities. A secondary impact may fall on shippers, some of whom may be small entities, but that impact is not considered to be significant.

List of Comments and Pleadings Filed in Docket No. 84–26.

1. Hoppel, Mayer & Coleman. May 30, 1984.
2. Philadelphia Port Corporation. May 31, 1984.
3. Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea Atlantic and Gulf Freight Conference. June 4, 1984.
4. Associated Latin American Freight Conferences; United States Atlantic & Gulf/Panama Freight Conference; Atlantic & Gulf/West Coast of South America Conference; East Coast Colombia Conference; United States Atlantic & Gulf/Southeastern Caribbean Conference; United States Atlantic & Gulf/Jamaica and Hispaniola Steamship Freight Association; United States Atlantic & Gulf/Ecuador Freight Conference; United States Florida/Ecuador

Steamship Conference; South Atlantic & Gulf/Panama & Costa Rica Rate Agreement; South Atlantic & Gulf/Guatemala El Salvador & Honduras Rate Agreement. June 1, 1984.

5. Inter-American Freight Conference; Inter-American Freight Conference River Plate/Puerto Rico and U.S. Virgin Islands/River Plate; Pacific Coast/ River Plate Brazil Conference. June 1, 1984.

6. Australia/Eastern U.S.A. Freight Conference; The "8900" Lines; Greece/U.S. Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Israel/U.S. North Atlantic Ports Westbound Freight Conference; Med-Gulf Conference; Mediterranean-North Pacific Coast Freight Conference; North Atlantic Israel/Eastbound Freight Conference; North Atlantic Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; United States Atlantic Ports/Italy, France and Spain Freight Conference; West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference. June 4, 1984.

7. Thailand Pacific Freight Conference. June 5, 1984.

8. Pacific Westbound Conference; Pacific Straits Conferences; Pacific/ Indonesian Conference. June 1, 1984.

9. Graham & James. June 4, 1984.

10. Inter-American Freight Conference, Puerto Rico and U.S. Virgin Islands. June 5, 1984.

11. Chemical Manufacturers Association. June 6, 1984.

12. U.S.-Flag Far East Discussion Agreement. June 8, 1984.

13. 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. June 11, 1984.

14. U.S. Department of Justice. June 15, 1984.

15. National Maritime Council. July 24, 1984.

16. Australia/Eastern U.S.A. Freight Conference; The "8900" Lines; 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; New Zealand Rate Agreement; North Atlantic/Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; U.S. South Atlantic/Portuguese, Moroccan and Mediterranean Rate Agreement; United States Atlantic Ports/Italy, France and Spain Freight Conference; West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC). August 6, 1984.

17. 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; North Europe-South Atlantic Rate Agreement; U.S. South Atlantic-Europe Rate Agreement. August 10, 1984.

18. Johnson Scanstar. August 15, 1984.

19. City of Los Angeles Harbor Department. August 20, 1984.

20. Trans Freight Lines, Inc. August 23, 1984.

21. Port of Sacramento. August 24, 1984.

22. North Europe/U.S. Pacific Freight Conference; Pacific Coast European Conference; Latin America/Pacific Coast Steamship Conference; Pacific Coast River Plate Brazil Conference; Pacific/Australia-New Zealand Conference; and their respective member lines. August 27, 1984.

23. Australia/Eastern U.S.A. Freight Conference; The "8900" Lines; 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/Australia-New Zealand Conference; U.S. South Atlantic/Portuguese, Moroccan and Mediterranean Rate Agreement; United States Atlantic Ports/Italy, France and Spain Freight Conference; West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC). [Comment on Information Form]. August 27, 1984.

24. Australia/Eastern U.S.A. Freight Conference; The "8900" Lines; 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/Australia-New Zealand Conference; U.S. South Atlantic/Portuguese, Moroccan and Mediterranean Rate Agreement; United States Atlantic Ports/Italy, France and Spain Freight Conference; West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC). [Comment on Proposed Rule]. August 27, 1984.

25. U.S.-Flag Far East Discussion Agreement. August 27, 1984.

26. Malaysia/Pacific Rate Agreement; Pacific/Indonesian Conference; Pacific Straits Conference; Pacific Westbound Conference. August 27, 1984.

27. Council of European & Japanese National Shipowners' Associations. August 27, 1984.

28. American President Lines, Ltd. August 27, 1984.

29. U.S. Gulf/Brazil Pooling Agreement; U.S. Pacific/Brazil Pooling Agreement; Brazil/U.S. Pacific Pooling Agreement; U.S. Gulf/Argentina Pooling Agreement. August 27, 1984.

30. Chemical Manufacturers Association. August 27, 1984.

31. U.S. Department of Justice. August 27, 1984.

32. U.S. Department of Transportation. August 27, 1984.

33. American Institute For Shippers' Associations, Inc. August 28, 1984.

34. 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; North Europe-U.S. South Atlantic Rate Agreement; U.S. South Atlantic-Europe Rate Agreement. August 28, 1984.

35. Agreement No. 10305. August 29, 1984.

36. Sea-Land Service, Inc. August 27, 1984.

37. American West African Freight Conference. August 30, 1984.

38. Inter-American Freight Conference; Inter-American Freight Conference-Puerto Rico and U.S. Virgin Islands; Inter-American Freight Conference River Plate/Puerto Rico and U.S. Virgin Island/River Plate. August 30, 1984.

39. Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; TransPacific Freight Conference (Hong Kong); New York Freight Bureau; Philippines/North America Conference; and their member lines. August 30, 1984.

List of Comments and Pleadings Filed in Docket No. 84–32.

101. The "8900" Lines; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Italy, South France, South Spain, Portugal/U.S. Gulf and the Island of Puerto Rico (Med-Gulf) Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; U.S. Atlantic Ports/Italy, France, and Spain Conference; The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC). October 17, 1984.

102. American President Lines, Ltd. October 17, 1984.

103. Council of European & Japanese National Shipowners Associations. October 17, 1984.

104. Far East Conference; Malaysia Pacific Rate Agreement; Pacific/Indonesia Conference; Pacific-Straits Conference. October 18, 1984.

105. The North European Conferences. October 18, 1984.

106. Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; Trans Pacific Freight Conference (Hong Kong); New York Freight Bureau; Philippines/North America Conference. October 22, 1984.

107. Sea-Land Service, Inc. October 22, 1984.

108. Inter-American Freight Conference. October 22, 1984.

109. Atlantic & Gulf/West Coast South American Conference; East Coast/Colombia Conference; West Coast of South America Northbound Conference; United States Atlantic & Gulf/Ecuador Freight Conference; United States Florida/Ecuador Steamship Freight Association; United States Atlantic & Gulf/Venezuela Freight Association. October 22, 1984.

110. United States Atlantic & Gulf/Southeastern Caribbean Conference; United States Atlantic & Gulf/Jamaica and Hispaniola Steamship Freight Association; United States South Atlantic & Gulf/Panama & Costa Rica Rate Agreement; United States Atlantic Gulf/Guatemala, Honduras & El Salvador Rate Agreement. October 22, 1984.

List of Subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

THEREFORE, pursuant 5 U.S.C. 553; and sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17, and 18 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1709, 1710, 1712, 1714, 1715, 1716, and 1717) Part 572 of Title 46, Code of Federal Regulations, is revised to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

SUBPART A—GENERAL PROVISIONS

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572.101 Authority.
572.102 Purpose.
572.103 Policies.
572.104 Definitions.

SUBPART B—SCOPE

572.201 Subject agreements.
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SUBPART C—EXEMPTIONS

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SUBPART D—FILING AND FORM OF AGREEMENTS

572.401 Filing of agreements.
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572.403 Modification of agreements.
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SUBPART E—CONTENT AND ORGANIZATION OF AGREEMENTS

572.501 Agreement provisions—organization.
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SUBPART F—ACTION ON AGREEMENTS

572.601 Preliminary review—rejection of agreements.

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572.602 *Federal Register* notice.
572.603 Comment.
572.604 Waiting period.
572.605 Requests for expedited approval.
572.606 Requests for additional information.
572.607 Failure to comply with requests for additional information.
572.608 Confidentiality of submitted material.
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SUBPART G—REPORTING AND RECORD RETENTION REQUIREMENTS

572.701 General requirements.
572.702 Filing of reports related to shippers' requests and complaints and consultations.
572.703 Filing of minutes.
572.704 Index of documents.
572.705 Waiver of reporting and record retention.

SUBPART H—[RESERVED]

SUBPART I—PENALTIES

572.901 Failure to file.
572.902 Falsification of reports.

SUBPART J—PAPERWORK REDUCTION

572.991 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

Appendix A to Part 572—Information Form and Instructions

AUTHORITY: Sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 18 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1709, 1710, 1712, 1714, 1715, 1716 and 1717).

SUBPART A—GENERAL PROVISIONS

§ 572.101 Authority.

The rules in this part are issued pursuant to the authority of section 4 of the Administrative Procedure Act (5 U.S.C. 553), and sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 18 of the Shipping Act of 1984 ("the Act").

§ 572.102 Purpose.

This part implements those provisions of the Act which govern agreements by or among ocean common carriers and agreements (to the extent

the agreements involve ocean transportation in the foreign commerce of the United States) among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers. This part also sets forth more specifically certain procedures provided for in the Act.

§ 572.103 Policies.

(a) The Act requires that agreements be processed and reviewed according to strict statutory deadlines. This part is intended to establish procedures for the orderly and expeditious review of filed agreements in accordance with the statutory requirements.

(b) The Act requires that agreements be reviewed in accordance with a general standard as set forth in section 6(g) of the Act and empowers the Commission to obtain certain information to conduct that review. This part sets forth the kind of information for particular types of agreements which the Commission believes relevant to that review. Only that information which is relevant to such a review is requested. It is the policy of the Commission to keep the costs of regulation to a minimum and at the same time obtain information needed to fulfill its statutory responsibility.

(c) In order to further the goal of expedited processing and review, agreements are required to meet certain minimum requirements as to form. These requirements are intended to ensure expedited review and should assist parties in preparing agreements. These requirements as to form do not affect the substance of an agreement and are intended to allow parties the freedom to develop innovative commercial relationships and provide efficient and economic transportation systems.

(d) The Act itself excludes certain agreements from filing requirements and authorizes the Commission to exempt other classes of agreements from any requirement of the Act or this part. In order to minimize delay in implementation of routine agreements and to avoid the private and public cost of unnecessary regulation, the Commission is exempting certain classes of agreements from the filing or information requirements of this part.

(e) Under the new regulatory framework established by the Act, the role of the Commission as a monitoring and surveillance agency has been enhanced. The Act favors greater freedom in allowing parties to form their commercial arrangements. This, however, requires greater monitoring of agreements after they have become effective. The Act empowers the Commission to impose certain recordkeeping and reporting requirements. This part identifies those classes of agreements which require specific record retention and reporting to the Commission and prescribes the applicable period of record retention, the form and content of such reporting, and the applicable time periods for filing with the Commission. These requirements assure that Commission monitoring responsibilities will be fulfilled.

(f) The Act requires that conference agreements must contain certain mandatory provisions. Each such agreement must: (1) state its purpose;

(2) provide reasonable and equal terms and conditions for admission and readmission to membership; (3) allow for withdrawal from membership upon reasonable notice without penalty; (4) require an independent neutral body to police the conference, if requested by a member; (5) prohibit conduct specified in section 10(c)(1) or 10(c)(3) of the Act; (6) provide for a consultation process; (7) establish procedures for considering shippers' requests and complaints; and (8) provide for independent action. Parties to conference agreements are free to develop their own mandatory provisions in accordance with the requirements of section 5(b) of the Act.

(g) An agreement filed under the Act must be clear and definite in its terms, must embody the complete understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will conduct their present operations and regulate the relationships among the agreement members.

§ 572.104 Definitions.

When used in this part:

(a) "*Agreement*" means an understanding, arrangement or association, written or oral (including any modification, cancellation or appendix) entered into by or among ocean common carriers and/or marine terminal operators, but does not include a maritime labor agreement.

(b) "*Antitrust Laws*" means the Act of July 2, 1890 (ch. 647, 26 Stat. 209), 15 U.S.C. 1, as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), 15 U.S.C. 12, as amended; the Federal Trade Commission Act (38 Stat. 717), 15 U.S.C. 41, as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), 15 U.S.C. 8, 9, as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), 15 U.S.C. 13, as amended; the Antitrust Civil Process Act (76 Stat. 548), 15 U.S.C. 1311, note as amended; and amendments and Acts supplementary thereto.

(c) "*Appendix*" means a document containing additional material of limited application and appended to an agreement, distinctly differentiated from the main body of the basic agreement.

(d) "*Assessment agreement*" means an agreement, whether part of a collective bargaining agreement or negotiated separately, to the extent that it provides for the 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.

(e) "*Common carrier*" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that: (1) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (2) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

(f) "*Conference agreement*" means an agreement between or among two or more ocean common carriers or between or among two or more

marine terminal operators for the conduct or facilitation of ocean common carriage and which provides for: (1) the fixing of and adherence to uniform rates, charges, practices and conditions of service relating to the receipt, carriage, handling and/or delivery of passengers or cargo for all members; (2) the conduct of the collective administrative affairs of the group; and (3) may include the filing of a common tariff in the name of the group and in which all the members participate, or, in the event of multiple tariffs, each member must participate in at least one such tariff. The term does not include consortium, joint service, pooling, sailing or transshipment agreements.

(g) "*Consultation*" means a process whereby a conference and a shipper confer for the purpose of promoting the commercial resolution of disputes and/or the prevention and elimination of the occurrence of malpractices.

(h) "*Cooperative working agreement*" means an agreement which establishes exclusive, preferential, or cooperative working relationships which are subject to the Shipping Act of 1984, but which do not fall precisely within the arrangements of any specifically defined agreement.

(i) "*Effective agreement*" means an agreement approved pursuant to section 15 of the Shipping Act, 1916 or effective pursuant to an exemption under that act, or filed and/or effective under the Act.

(j) "*Equal access agreement*" means an agreement between ocean common carriers of different nationalities, as determined by the incorporation or domicile of the carriers' operating companies, whereby such common carriers associate for the purpose of gaining reciprocal access to cargo which is otherwise reserved by national decree, legislation, statute or regulation to carriage by the merchant marine of the carriers' respective nations.

(k) "*Independent neutral body*" means a disinterested third party, authorized by a conference and its members to review, examine and investigate alleged breaches or violations by any member of the conference agreement and/or the agreement's properly promulgated tariffs, rules or regulations.

(l) "*Information Form*" means the form containing economic information which must accompany the filing of certain kinds of agreements.

(m) "*Interconference agreement*" means an agreement between conferences.

(n) "*Joint service/consortium agreement*" means an agreement between ocean common carriers operating as a joint venture whereby a separate service is established which: (1) holds itself out in its own distinct operating name; (2) independently fixes its own rates, charges, practices and conditions of service or chooses to participate in its operating name in another agreement which is duly authorized to determine and implement such activities; (3) independently publishes its own tariff or chooses to participate in its operating name in an otherwise established tariff; (4) issues its own bills of lading; and (5) acts generally as a single carrier. The common use of facilities may occur and there is no competition between members for

traffic in the agreement trade; but they otherwise maintain their separate identities.

(o) "*Marine terminal facilites*" means one or more structures (and services connected therewith) comprising a terminal unit, including, but not limited to docks, berths, piers, aprons, wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers or the interchange of same between land and ocean common carriers or between two ocean common carriers. This term is not limited to waterfront or port facilities and includes so-called off-dock container freight stations at inland locations and any other facility from which inbound waterborne cargo may be tendered to the consignee or outbound cargo may be received from shippers for vessel or container loading.

(p) "*Marine terminal operator*" means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier. This term does not include shippers or consignees who exclusively furnish marine terminal facilities or services in connection with tendering or receiving proprietary cargo from a common carrier by water.

(q) "*Maritime labor agreement*" means a collective-bargaining agreement between an employer subject to the Act or group of such employers, and a labor organization representing employees in the maritime or stevedoring industry, or an agreement preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing or administration of a multipemployer bargaining group; but the term does not include an assessment agreement.

(r) "*Modification*" means any change, alteration, correction, addition, deletion, or revision of an existing effective agreement or to any appendix to such an agreement.

(s) "*Non-vessel-operating common carrier*" means a common carrier that does not operate the vessels by which the ocean transportation portion is provided and is a "shipper" in its relationship with an ocean common carrier.

(t) "*Ocean common carrier*" means a vessel-operating common carrier, but the term does not include one engaged in ocean transportation by ferry boat or an ocean tramp.

(u) "*Ocean freight forwarder*" means a person in the United States that (1) dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers, and (2) processes the documentation or performs related activities incident to those shipments.

(v) "*Person*" means individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

(w) "*Pooling agreement*" means an agreement between ocean common carriers which provides for the division of cargo carryings, earnings, or revenue and/or losses between the members in accordance with an established formula or scheme.

(x) "*Port*" means the place at which an ocean common carrier originates or terminates (and/or transships) its actual ocean carriage of cargo or passengers as to any particular transportation movement.

(y) "*Sailing agreement*" means an agreement between ocean common carriers which provides for the rationalization of service by establishing a schedule of ports which each carrier will serve and/or the frequency of each carrier's calls at those ports.

(z) "*Service contract*" means a contract between a shipper or shippers' association and an ocean common carrier or conference in which the shipper or shippers' association makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of nonperformance on the part of either party.

(aa) "*Shipper*" means an owner or other person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(bb) "*Shippers' association*" means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(cc) "*Shippers' requests and complaints*" means a communication from a shipper to a conference requesting a change in tariff rates, rules, regulations, or service; protesting or objecting to existing rates, rules, regulations or service; objecting to rate increases or other tariff changes; protesting allegedly erroneous service contract or tariff implementation or application, and/or requesting to enter into a service contract. Routine information requests are not included in the term.

(dd) "*Space charter agreement*" means an agreement between ocean common carriers whereby a carrier (or carriers) agrees to provide vessel capacity for the use of another carrier (or carriers) in exchange for compensation or services. The arrangement may include arrangements for equipment interchange and receipt/delivery of cargo.

(ee) "*Through transportation*" means continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which

is an ocean common carrier, between a United States point or port and a foreign point or port.

(ff) *"Transshipment agreement"* means an agreement between an ocean common carrier serving a port or point of origin and another such carrier serving a port or point of destination, whereby cargo is transferred from one carrier to another carrier at an intermediate port served by direct vessel call of both such carriers in the conduct of through transportation. Such an agreement does not provide for the concerted discussion, publication or otherwise fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the transshipment service offered, the port of transshipment and the participation of the nonpublishing carrier.

SUBPART B—SCOPE

§ 572.201 Subject agreements.

(a) *Ocean common carrier agreements.* This part applies to agreements by or among ocean common carriers to:

(1) Discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(2) Pool or apportion traffic, revenues, earnings, or losses;

(3) Allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) Limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) Engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel-operating common carriers;

(6) Control, regulate, or prevent competition in international ocean transportation; and

(7) Regulate or prohibit their use of service contracts.

(b) *Marine terminal operator agreements involving foreign commerce.* This part applies to agreements (to the extent the agreements involve ocean transportation in the foreign commerce of the United States) among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to:

(1) Discuss, fix, or regulate rates or other conditions of service; and

(2) Engage in exclusive, preferential, or cooperative working arrangements.

§ 572.202 Non-subject agreements.

This part does not apply to the following agreements:

(a) Any acquisition by any person, directly or indirectly, of any voting security or assets of any other person;

(b) Any maritime labor agreement;

(c) Any agreement related to transportation to be performed within or between foreign countries;

(d) Any agreement among common carriers to establish, operate, or maintain a marine terminal in the United States;

(e) Any agreement among marine terminal operators which exclusively and solely involves transportation in the interstate commerce of the United States;

(f) Any agreement exclusively and solely among non-vessel-operating common carriers;

(g) Any agreement exclusively and solely among ocean freight forwarders.

SUBPART C—EXEMPTIONS

§ 572.301 Exemption procedures.

(a) *Authority.* 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 from any requirement of the Act if it finds that the exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in substantial reduction in competition, or be detrimental to commerce.

(b) *Optional filing.* Notwithstanding any exemption from filing, Information Form, or other requirements of the Act and this part, any party to an exempt agreement may file such an agreement with the Commission.

(c) *Application for exemption.* Any person may apply for an exemption or revocation of an exemption of any class of agreements or an individual agreement pursuant to section 16 of the Act and this subpart. An application for exemption shall state the particular requirement of the Act for which exemption is sought. The application shall also include a statement of the reasons why an exemption should be granted or revoked and shall provide information relevant to any finding required by the Act. Where an application for exemption of an individual agreement is made, the application shall include a copy of the agreement.

(d) *Participation by interested persons.* No order or rule of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States.

(e) *Federal Register notice.* Notice of any proposed exemption or revocation of exemption, whether upon application or upon the Commission's own motion, shall be published in the *Federal Register.* The notice shall include:

(1) A short title for the proposed exemption or the title of the existing exemption;

(2) The identity of the party proposing the exemption or seeking revocation;

(3) A concise summary of the agreement or class of agreements for which exemption is sought, or the exemption which is to be revoked;

(4) A statement that the application and any accompanying information are available for inspection in the Commission's offices in Washington, D.C.; and

(5) The final date for filing comments regarding the application.

(f) *Retention of agreement by parties.* Any agreement which has been exempted by the Commission pursuant to section 16 of the Act shall be retained by the parties and shall be available upon request by the Bureau of Agreements and Trade Monitoring for inspection during the term of the agreement and for a period of three years after its termination.

§ 572.302 Non-substantive agreements and non-substantive modifications to existing agreements—exemption.

(a) A non-substantive agreement or a non-substantive modification to an existing agreement is an agreement between ocean common carriers and/or marine terminal operators, acting individually or through approved agreements, which:

(1) Concerns the procurement, maintenance, or sharing of office facilities, furnishings, equipment and supplies, the allocation and assessment of the costs thereof, or the provisions for the administration and management of such agreements by duly appointed individuals.

(2) 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 4 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; or renumbers or reletters articles or subarticles of agreements and references thereto in the text.

(3) Reflects changes in the titles or 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.

(b) A copy of the non-substantive modification shall be submitted for information purposes in the proper format but is otherwise exempt from the Information Form, notice and waiting period requirements of this part.

(c) Parties to agreements may seek a determination from the Director, Bureau of Agreements and Trade Monitoring as to whether a particular modification is non-substantive.

§ 572.303 Husbanding agreements—exemption.

(a) A husbanding agreement is an agreement between a principal and an agent both of which are subject to the Act and which provides for the agent's handling of routine vessel operating activities in port, such as notifying port officials of vessel arrivals and departures; ordering pilots, tugs, and linehandlers; delivering mail; transmitting reports and requests from the Master to the owner/operator; dealing with passenger and crew matters; and providing similar services related to the above activities. The

term does *not* include an agreement which provides for the solicitation or booking of cargoes, signing contracts or bills of lading and other related matters, nor does it include an agreement that prohibits the agent from entering into similar agreements with other carriers.

(b) A husbanding agreement is exempt from the filing and Information Form requirements of the Act and of this part.

§ 572.304 Agency agreements—exemption.

(a) An agency agreement is an agreement between a principal and an agent both of which are subject to the Act, which provides for the agent's solicitation and booking of cargoes and signing contracts of affreightment and bills of lading on behalf of an ocean common carrier. Such an agreement 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.

(b) An agency agreement between persons subject to the Act is exempt from the filing and Information Form requirements of the Act and of this part, except those: (1) where a common carrier is to be the 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.

§ 572.305 Equipment interchange agreements—exemption.

(a) An equipment interchange agreement is an agreement between two or more ocean common carriers for (1) the exchange of empty containers, chassis, empty LASH/SEABEE barges, and related equipment; and (2) 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.

(b) An equipment interchange agreement is exempt from the filing and Information Form requirements of the Act and of this part.

§ 572.306 Nonexclusive transshipment agreements—exemption.

(a) A nonexclusive transshipment agreement is an agreement by which one ocean common carrier serving a port of origin by direct vessel call and another such carrier serving a port of destination by direct vessel call provide transportation between such ports via an intermediate port served by direct vessel call of both such carriers and at which cargo will be transferred from one to the other and which agreement does not: (1) prohibit either carrier from entering into similar agreements with other carriers; (2) guarantee any particular volume of traffic or available capacity; or (3) provide for the discussion or fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the service offered as being by means of transshipment, the port of transshipment and the participation of the nonpublishing carrier.

(b) A nonexclusive transshipment agreement is exempt from the filing and Information Form requirements of the Act and of this part, provided that the tariff provisions set forth in paragraph (c) of this section and the content requirements of paragraph (d) of this section are met.

(c) The applicable tariff or tariffs shall provide:

(1) The through rate;

(2) The routings (origin, transshipment and destination ports); additional charges, if any (*i.e.* port arbitrary and/or additional transshipment charges); and participating carriers; and

(3) A tariff provisions substantially as follows:

> The rules, regulations, and rates in this tariff apply to all transshipment arrangements between the publishing carrier or carriers and the participating, connecting or feeder carrier. Every participating, connecting or feeder carrier which is a party to transshipment arrangements has agreed to observe the rules, regulations, rates, and routings established herein as evidenced by a connecting carrier agreement between the parties.

(d) Nonexclusive transshipment agreements must contain the entire arrangement between the parties, must contain a declaration of the nonexclusive character of the arrangement and may provide for:

(1) The identification of the parties and the specification of their respective roles in the arrangement;

(2) A specification of the governed cargo;

(3) The specification of responsibility for the issuance of bills of lading (and the assumption of common carriage-associated liabilities) to the cargo interests;

(4) The specification of the origin, transshipment and destination ports;

(5) The specification of the governing tariff(s) and provision for their succession;

(6) The specification of the particulars of the nonpublishing carrier's concurrence/participation in the tariff of the publishing carrier;

(7) The division of revenues earned as a consequence of the described carriage;

(8) The division of expenses incurred as a consequence of the described carriage;

(9) Termination and/or duration of the agreement;

(10) Intercarrier indemnification or provision for intercarrier liabilities consequential to the contemplated carriage and such documentation as may be necessary to evidence the involved obligations;

(11) The care, handling and liabilities for the interchange of such carrier equipment as may be consequential to the involved carriage;

(12) Such rationalization of services as may be necessary to ensure the cost effective performance of the contemplated carriage; and

(13) Such agency relationships as may be necessary to provide for the pickup and/or delivery of the cargo.

(e) No subject other than as listed in paragraph (d) of this section may be included in exempted nonexclusive transshipment agreements.

SUBPART D—FILING AND FORM OF AGREEMENTS

§ 572.401 Filing of Agreements.

(a) All agreements (including oral agreements reduced to writing in accordance with the Act) subject to this part and filed with the Commission for review and disposition pursuant to section 6 of the Act, shall be submitted during regular business hours to the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Such filing shall consist of:

(1) A true copy and 15 additional copies of the filed agreement;

(2) Where required by these regulations, an original and two copies of the completed Information Form referenced at §§ 572.403(a) and 572.405 and Appendix A of this part; and

(3) A letter of transmittal as described in paragraph (b) of this section.

(b)(1) A filed agreement, to include such supporting documents as are submitted, shall be forwarded to the Commission via a letter of transmittal.

(2) The letter of transmittal shall: (i) identify all of the documents being transmitted including, in the instance of a modification to an effective agreement, the full name of the effective agreement, the Commission-assigned agreement number of the effective agreement and the revision, page and/or appendix number of the modification being filed; (ii) provide a concise, succinct summary of the filed agreement or modification separate and apart from any narrative intended to provide support for the acceptability of the agreement or modification; (iii) clearly provide the typewritten or otherwise imprinted name, position, business address and telephone number of the forwarding party; and, (iv) be signed in the original by the forwarding party or on the forwarding party's behalf by an authorized employee of agent of the forwarding party.

(3) To facilitate the timely and accurate publication of the *Federal Register* Notice, the letter of transmittal shall also provide a current list of the agreement's participants where such information is not provided elsewhere in the transmitted documents.

(c) Any agreement and accompanying Information Form which does not meet the filing requirements of this section shall be rejected in accordance with § 572.601.

(d) Assessment agreements shall be filed and shall become effective upon filing. Assessment agreements need not be accompanied by an Information Form.

(e)(1) Expiration dates to existing agreements or specific provisions thereof, shall remain in effect on and after June 18, 1984.

(2) Parties to agreements with expiration dates shall file any modification seeking renewal for a specific term or elimination of a termination date in sufficient time to accommodate the waiting period required under the Act.

§ 572.402 Form of Agreements.

The requirements of this section apply to all agreements except for cancellations, marine terminal agreements, and assessment agreements.

(a) Agreements shall be clearly and legibly typewritten on one side only of 8½ inch by 11 inch durable white loose-leaf paper, providing a margin of not less than three-quarters of an inch on all edges.

(b) The first page of every agreement or appendix shall be the Title Page and shall include:

(1) The name in which the agreement holds out service, or, in the absence of such a holding out, the full name of the agreement;

(2) Once assigned, the Commission-assigned agreement number;

(3) The generic classification of the agreement in conformity with the definitions in § 572.104;

(4) The date on which the entire agreement was last republished in accordance with § 572.403(g); and

(5) If applicable, the currently effective expiration date of the agreement and/or any specific provision thereof.

(c) Each agreement page (including modifications and appendices) shall be identified by printing the agreement name (as shown on the agreement Title Page) and, once assigned, the applicable Commission-assigned agreement number at the top of each page.

(d) Each agreement, appendix and/or modification filed will be accompanied by a separate signature page, appended as the last page of the item, which is signed in the original by each of the parties personally or by an authorized representative, indicating immediately below each such signature, the typewritten full name of the signing party and his or her position, including organizational affiliation.

(e) The body of the agreement shall contain:

(1) Immediately following the Title Page, a Table of Contents providing for the location of all agreement provisions.

(2) Following the Table of Contents, the body of the agreement setting forth the operative provisions of the agreement in the order prescribed by §§ 572.501 and 572.502. Any additional material/provisions shall be set forth as consecutively numbered articles.

(f) Any nonsubstantive provisions, as defined in § 572.302, may be separated from the main body of the agreement text by the inclusion of an Appendix to the agreement. Additional provisions which are permitted to be included in an Appendix are referred to in §§ 572.501(b)(3), 572.501(b)(6) and 572.502(a)(1). Such appendices must comply with the format requirements of paragraphs (a) and (c) of this section. Such appendices are to be serialized alphabetically with the first such Appendix being designated on its first page as "Appendix A."

(g) All pages subsequent to the Title Page shall be numbered in the upper right-hand corner. At the option of the parties, the numbering of the pages may start with the first page following the Title Page as Page

No. 1 and continue consecutively thereafter; or, in the alternative, the pages containing the Table of Contents may be discretely numbered using consecutive Roman numerals with all pages subsequent to the Table of Contents being consecutively numbered beginning with Page No. 1. In either event, the first edition of any one page shall be designated in the upper right-hand corner as "Original Page No. _____."

(h) All agreements shall conform to the format requirements of this section and § 572.403 and the organization and content requirements of §§ 572.501 and 572.502 according to the following schedule.

(1) Any new agreement shall conform when initially filed.

(2) Any restatement of a previously effective agreement filed subsequent to December 15, 1984, shall conform to the requirements.

(3) Any effective agreement which is modified subsequent to December 15, 1984, shall be restated in its entirety, including the modification, and shall conform to the requirements.

(4) Any other agreement not otherwise brought into conformity with these requirements shall be conformed and filed no later than October 1, 1985.

§ 572.403 Modification of agreements.

The requirements of this section apply to all agreements except for marine terminal agreements and assessment agreements.

(a)(1) Agreement modifications shall be: filed in accordance with the provisions of § 572.401; in the format specified in § 572.402 and this section; and accompanied by an Information Form.

(2) The Information Form shall be completed as it pertains to significant modifications of the agreement.

(3) Significant modifications, for the purposes of this section, are those that may result in a significant reduction in competition. Such modifications include but are not limited to: significant changes in the geographic scope of conference or pooling agreements which expand the scope to cover additional foreign countries or U.S. port ranges, including initial conference intermodal authority, or the extension of the scope of a joint service agreement to ports outside the scope of the existing joint service agreement currently served by two or more of the parties; additions to the number of parties in pooling or joint service agreements; significant reductions in service levels; significant changes in pool penalty provisions or carrying charges; and changes in cargo categories or descriptions that result in a significant increase in the amount of cargo subject to the pool, or changes in the allocation of cargo or revenue that significantly change the cargo or revenue shares of national or non-national flag lines.

(b) Agreement modifications shall be made by reprinting the entire page on which the matter being changed is published. Such modified pages shall be designated as "revised pages" and shall publish in the upper right-hand corner of the new page the consecutive denomination of the revision, e.g., "1st Revised Page 5."

(c) If a modification exceeds the page being modified and the parties do not wish to modify the entire agreement, the additional material may be published on an original page, designated with the same number as the page being modified and with an alphabetical suffix, i.e. "Original Page 5a."

(d) The language being modified shall be indicated on the page filed as follows:

(1) Language being deleted or superseded shall be struck through; and,

(2) New and initial or replacement language shall immediately follow the language being superseded and be underlined.

(3) As an alternative to publishing such indications of change on the filed page, the filed page may be submitted devoid of such indications if the filing is accompanied by a page, submitted for information/illustration only, setting forth the proposed modifications in accordance with the format prescribed in paragraphs (d) (1) and (2) of this section.

(e) When a revised or new page is revised, or the entire agreement is reissued, the change indications in paragraphs (d)(1) and (d)(2) of this section are to be deleted from the republished pages.

(f) If a modification requires the relocation of the provisions of the agreement, such modification shall be accompanied by a revised Table of Contents page which shall report the new location of the agreement's provisions.

(g) (1) In the instance of an agreement which publishes the indications of modifications, specified in paragraph (d) of this section on the filed agreement page itself, then, not later than two years after the last modification to the agreement, the entire agreement shall be republished incorporating such modifications as have been made and shall supersede the previous edition of the agreement.

(2) Such republished agreement will be filed with the Commission in accordance with the filing (except as provided in paragraph (g)(3) of this section), format and content requirements of this part and shall contain nothing other than the previously effective language and such nonsubstantive modifications as are necessary to accomplish the republication.

(3) It is not required that the filing of a republished agreement as described in paragraph (g)(2) of this section, be accompanied by the Information Form or that it be filed in more than an executed original true copy.

§ 572.404 Application for waiver.

(a) Upon a showing of good cause, the Commission may waive the form, organization and content requirements of §§ 572.401, 572.402, 572.403, 572.501 and 572.502.

(b) Requests for permission to depart from the form requirements of this subpart shall be submitted in advance of the filing or submission of the materials to which the requested waiver would apply and shall state: (1) the specific regulations from which relief is sought; (2) the

special circumstances requiring the requested relief; and, (3) the beneficial results anticipated to be obtained from the requested waiver.

§ 572.405 Information Form.

(a)(1) Except for marine terminal agreements and assessment agreements, the information required by the Commission for review of an agreement shall be provided in the Information Form set forth in Appendix A to this part.

(2) The filing party to an agreement subject to the Act shall complete and submit an original and two copies of the Information Form at the time that an agreement is filed. The Information Form shall be completed in accordance with this subpart, including the Instructions set forth in Appendix A. Copies of the form may be obtained in person at the Office of the Secretary or by writing to the Secretary of the Commission.

(b) A complete response in accordance with the instructions to the Information Form shall be supplied to each item on the Information Form that is required to be answered. Whenever the party answering a required part of the Information Form (other than Parts III and IV) is unable to supply a complete response, that party shall provide, for each item for which less than a complete response has been supplied, either estimated data (with an explanation of why precise data are not available) or a detailed statement of reasons for noncompliance and the efforts made to obtain the required information. Use of estimated data with Parts III and IV requires no explanation of why precise data are not available.

(c) Any party filing the Information Form may supplement that Form with any other information or documentary material.

(d) The Information Form and any additional information submitted by a filing party under this section shall not be disclosed except as provided in § 572.608.

§ 572.406 Complete and definite agreements.

(a) Any agreement required to be filed by the Act and this part shall be the complete agreement among the parties and shall specify in detail the substance of the understanding of the parties.

(b) Except as provided in paragraph (c) of this section, agreement clauses which contemplate a further agreement or give the parties authority to discuss and/or negotiate a further agreement, the terms of which are not fully set forth in the enabling agreement, will be permitted only if the enabling agreement indicates that any such further agreement cannot go into effect unless filed and effective under the Act.

(c) Further specific agreements or understandings which are established pursuant to express enabling authority in an agreement are considered interstitial implementation and are permitted without further filing under section 5 of the Act only if the further agreement concerns routine operational or administrative matters, including the establishment of tariff rates, rules, and regulations.

SUBPART E—CONTENT AND ORGANIZATION OF AGREEMENTS

§ 572.501 Agreement provisions—organization.

(a) All agreements, except for cancellations, marine terminal agreements, and assessment agreements, shall be organized and shall include the content as provided by this section. The "article" numbers hereinafter enumerated are reserved for their particular respective provision or authority as indicated in this section and § 572.502 and may not be used for any other subject or purpose nor may the specified subject matter appear elsewhere in the agreement except as herein provided. In the instance of a legitimately inapplicable provision, the article number and title are to be included in the text followed by the word, "None".

(b) All agreements shall organize and number the following articles in the following order and shall observe the guidelines as to content as provided in this section. Additional articles required to definitively express the complete understanding between the parties to the agreement and not otherwise incorporated in appendices to the agreement shall immediately follow the articles enumerated in this subpart (and, where applicable, in § 572.502) and shall be numbered consecutively, commencing with Article 14.

(1) *Article 1—Full name of the agreement.*

(2) *Article 2—Purpose of the agreement.*

(3) *Article 3—Parties to the agreement.* List the current parties to the agreement to include for each participant: (i) the full legal name of the party to include any FMC-assigned agreement number associated with that name; and (ii) the address of its principal office (to the exclusion of the address of any agent or representative not an employee of the participating carrier or association). In the alternative to publishing the membership of the agreement in Article 3, the membership may be published in a designated appendix to the agreement and the designated appendix indicated by cross reference in Article 3.

(4) *Article 4—Geographic scope of the agreement.* State the ports or port ranges to which the agreement applies and any inland points or areas to which it also applies with respect to the exercise of the collective activities contemplated and authorized in the agreement.

(5) *Article 5—Overview of Agreement Authority.* State the authorities, as set forth in § 572.201 of this part, intended to be collectively exercised under the auspices of the agreement. To the extent that the summary provided does not represent the full arrangement between the parties, additional articles or appendices of the parties' own designation and subsequent to these enumerated articles will be required to provide the specification of the authority to be exercised and the mechanics of that exercise.

Article 5 is not necessarily definitive of the authority that the parties may collectively exercise pursuant to the agreement and parties may rely on the contents of the entire agreement as authority for their activities.

(6) *Article 6—Officials of the agreement and delegations of authority.* Specify, by organizational title, the administrative and executive officials determined by the parties to the agreement to be responsible for designated affairs of the agreement and the respective duties and authorities delegated to those officials. At a minimum, specify: (i) the officials with authority to file agreements and agreement modifications and to submit associated supporting materials or with authority to delegate such authority; and, (ii) a statement as to any designated U.S. representative of the agreement required by this chapter. Where convenient, the contents of this article may be published in a designated appendix to the agreement and the designated appendix indicated by cross reference in Article 6.

(7) *Article 7—Membership, withdrawal, readmission and expulsion.* Specify the terms and conditions for admission, withdrawal, readmission, and expulsion to or from membership in the agreement, including membership fees, refundable deposits and other fees or charges associated with membership. Two-party agreements which do not involve any form of rate, charge or tariff determination or publication authority and which do not otherwise have any conditions of agreement participation other than the commitment of the physical resources of the respective parties are relieved of the requirements of this subparagraph. In such a case, the article number and name shall be designated as provided in paragraphs (a) and (b)(1) of this section.

(8) *Article 8—Voting.* Specify the procedures, including quorum requirements, by which the agreement membership exercises its collective authority to choose, endorse, decide the disposition of, defeat, or authorize any particular matter, issue or activity.

(9) *Article 9—Duration and termination of the agreement.* Specify, where applicable, the date on which the agreement terminates and describe the procedures to be followed to terminate the agreement.

§ 572.502 Organization of conference and interconference agreements.

(a) Each conference agreement in addition to Articles 1 through 9 contained in § 572.501, and such other matters as may be necessary to express the full understanding of the parties, shall include the following articles organized and including the content as provided in this section:

(1) *Article 10—Neutral body policing.* State that, at the request of any member, the conference shall engage the services of an independent neutral body to fully police the obligations of the conference and its members. Include a description of any such neutral body authority and procedures related thereto. In the alternative to publishing the neutral body and procedures description in Article 10, the description may be published in a designated appendix to the agreement and the designated appendix indicated by cross reference in Article 10.

(2) *Article 11—Prohibited acts.* State affirmatively that the conference shall not engage in conduct prohibited by section 10(c)(1) or 10(c)(3) of the Act.

(3) *Article 12—Consultation: Shippers' requests and complaints.* Specify the procedures for consultation with shippers and for handling shippers' requests and complaints.

(4) *Article 13—Independent action.* Specify the independent action procedures of the conference. Such procedures shall provide that any conference member may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of the Act upon not more than 10 calendar days' notice to the conference and shall otherwise be in conformance with section 5(b)(8) of the Act.

(b)(1) Each interconference agreement, in addition to Articles 1 through 9 contained in § 572.501, and Articles 10, 11, and 12 contained in paragraph (a) of this section, shall include the following article: *"Article 13—Independent Action"* which specifies the independent action procedures of the agreement.

(2) Each agreement between carriers not members of the same conference must provide the right of independent action for each carrier.

(3) Each agreement between conferences must provide the right of independent action for each conference.

Subpart F—Action on Agreements

§ 572.601 Preliminary review—rejection of agreements.

(a) The Commission shall make a preliminary review of each filed agreement to determine whether the agreement is in compliance with the filing requirements of the Act and this part and whether the Information Form is complete or where not complete, the deficiency is adequately explained.

(b)(1) The Commission shall reject any agreement that fails to comply with the filing and information requirements under the Act and of this part. The Commission shall notify in writing the person filing the agreement of the reason for rejection of the agreement. The entire filing, including the agreement, the Information Form and any other information or documents submitted, shall be returned to the filing party.

(2) Should the agreement be refiled, the full waiting period must be observed.

§ 572.602 *Federal Register* notice.

(a) A notice of any filed agreement which is not rejected pursuant to § 572.601 will be transmitted to the *Federal Register* within seven days of the date of filing.

(b) The notice will include:

(1) A short title for the agreement;

(2) The identity of the parties to the agreement and the filing party;

(3) The Federal Maritime Commission agreement number;

(4) A concise summary of the agreement's contents;

(5) A statement that the Agreement is available for inspection at the Commission's offices; and

(6) The final date for filing comments regarding the agreement.

§ 572.603 Comment.

(a) Persons may file with the Secretary written comments regarding a filed agreement. Such comments will be submitted in an original and fifteen (15) copies and are not subject to any limitations except the time limits provided in the *Federal Register* notice. Late-filed comments will be received only by leave of the Commission and only upon a showing of good cause. If requested, comments and any accompanying material shall be accorded confidential treatment to the fullest extent permitted by law. Such requests must include a statement of legal basis for confidential treatment including the citation of appropriate statutory authority. Where a determination is made to disclose all or a portion of a comment, notwithstanding a request for confidentiality, the party requesting confidentiality will be notified prior to disclosures.

(b) The filing of a comment does not entitle a person to: (1) reply to the comment by the Commission; (2) the institution of any Commission or court proceeding; (3) discussion of the comment in any Commission or court proceeding concerning the filed agreement; or (4) participation in any proceeding which may be instituted.

§ 572.604 Waiting period.

(a) The waiting period before an agreement becomes effective shall commence on the date that an agreement is filed with the Commission.

(b) Unless suspended by a request for additional information or extended by court order, the waiting period terminates and an agreement becomes effective on the latter of the 45th day after the filing of the agreement with the Commission or on the 30th day after publication of notice of the filing in the *Federal Register*.

(c) The waiting period is suspended on the date when the Commission, either orally or in writing, requests additional information or documentary materials pursuant to section 6(d) of the Act. The waiting period resumes on the date of receipt of the additional material or of a statement of the reasons for noncompliance, and the agreement becomes effective in 45 days unless the waiting period is further extended by court order.

§ 572.605 Requests for expedited approval.

(a) Upon written request of the filing party, the Commission may shorten the review period. Accompanying the request, the filing party should provide a full explanation, with reference to specific facts and circumstances, of the necessity for a shortened waiting period. If the Commission decides to approve an abbreviated waiting period, the term will be decided after consideration of the parties' needs and the Commission's ability to perform its review functions under a reduced time schedule. In no event, however, may the period be shortened to less than fourteen days after the publication of the notice of the filing of the agreement in the *Federal Register*. When a request for expedited approval is denied by the Commission, the normal

waiting period specified in § 572.604 will apply. Such expedition will not be granted routinely and will be granted only in exceptional circumstances which include but are not limited to: The impending expiration of the agreement; operational urgency; Federal or State imposed time limitations; or other reasons which, in the Commission's discretion, constitute grounds for granting the request.

(b) A request for expedited approval will be considered for an agreement whose waiting period has resumed after having been suspended by a request for additional information.

(c) Upon request of the filing party, cancellations of agreements and modifications to the following prescribed agreement provisions will be granted expedited approval fourteen days after publication of notice of filing in the *Federal Register*:

(1) Article 3—Parties to the agreement (limited to conference agreements).

(2) Article 6—Officials of the agreement and delegations of authority.

(3) Article 10—Neutral body policing (limited to the description of neutral body authority and procedures related thereto).

§ 572.606 Requests for additional information.

(a) The Commission may request from the filing party any additional information and documentary material necessary to complete the statutory review required by section 6 of the Act. The request shall be made prior to the expiration of the waiting period. All additional information and documentary material shall be submitted to the Director, Bureau of Agreements and Trade Monitoring, Federal Maritime Commission, Washington, DC 20573. If the request is not fully complied with, a statement of reasons for noncompliance shall be provided for each item or portion of such request which is not fully answered.

(b) Where the Commission has made a request for additional information material, the agreement's effective date is 45 days after receipt of the additional material. In the event all material is not submitted, the agreement's effective date will be 45 days after receipt of both the documents and information which are submitted, if any, and the statement indicating the reasons for noncompliance. The Commission may, upon notice to the Attorney General, and pursuant to sections 6(i) and 6(k) of the Act, request the United States District Court for the District of Columbia to further extend the agreement's effective date until there has been substantial compliance.

(c) A request for additional information may be made orally or in writing. In the case of an oral request, a written confirmation of the request shall be mailed to the filing party within seven days of the communication.

(d) The party upon whom a request for additional information is made will have a reasonable time to respond, as specified by the Commission. The test of reasonableness shall be based on the particular circumstances of the request and shall be determined on a case-by-case basis.

(e) Notice that a request for additional information has been made will be published by the Commission and served on commenting parties. Such notice will indicate only that a request has been made and will not specify what information is being sought. Within fifteen (15) days following service of the notice, further comments on the agreement may be filed.

§ 572.607 Failure to comply with requests for additional information.

(a) A failure to comply with a request for additional information results when a person filing an agreement, or an officer, director, partner, agent, or employee thereof fails to substantially respond to the request or does not file a satisfactory statement of reasons for noncompliance. An adequate response is one which directly addresses the Commission's request. When a response is not received by the Commission within a specified time, failure to comply will have occurred.

(b) The Commission may, pursuant to section 6(i) of the Act, request relief from the United States District Court for the District of Columbia when it considers that there has been a failure to substantially comply with a request for additional information. The Commission may request that the court:

(1) Order compliance with the request; and

(2) At its discretion, grant other equitable relief which under the circumstances seems necessary or appropriate.

(c) Where there has been a failure to substantially comply, section 6(i)(2) of the Act provides that the court shall extend the review period until there has been substantial compliance.

§ 572.608 Confidentiality of submitted material.

(a) Except for an agreement filed under section 5 of the Act, all information submitted to the Commission by the filing party will be exempt from disclosure under 5 U.S.C. 552. Included in this disclosure exemption is information provided in the Information Form, voluntary submission of additional information, reasons for noncompliance, and replies to requests for additional information.

(b) Information which is confidential pursuant to paragraph (a) of this section may be disclosed, however, to the extent:

(1) It is relevant to an administrative or judicial action or proceeding; or

(2) It is in response to a request from either body of Congress or to a duly authorized committee or subcommittee of Congress.

(c) Parties may voluntarily disclose or make information publicly available. If parties elect to disclose information they shall promptly inform the Commission.

§ 572.609 Negotiations.

At any time after the filing of an agreement and prior to the conclusion of judicial injunctive proceedings, the filing party or an authorized representative may submit additional factual or legal support for an agreement or

may propose modifications of an agreement. Such negotiations between Commission personnel and filing parties may continue during the pendency of injunctive proceedings. Shippers, other government departments or agencies, and other third parties may not participate in negotiations.

SUBPART G—REPORTING AND RECORD RETENTION REQUIREMENTS

§ 572.701 General requirements.

(a) *Address.* All reports required by this subpart should be addressed to the Commission as follows:

Director,
Bureau of Agreements and Trade Monitoring
Federal Maritime Commission
Washington, D.C. 20573

The lower, left-hand corner of the envelope in which each report is forwarded should indicate the subject of the report and the related agreement number. For example: "Minutes, Agreement 5000."

(b) *Serial numbers of reports.*

(1) Each report filed with the commission should be assigned a number for each subject. For example, a conference filing minutes of its first meeting upon the effective date of this rule should assign "Meeting No. 1" to its Minutes, the next meeting will be assigned "Meeting No. 2", and so on. The first Shippers' Request and Complaint report should be designated "Shippers' Request and Complaint Report No. 1", the next report would be "Shippers' Request and Complaint Report No. 2", and so on.

(2) Any conference or rate agreement which, for its own internal purposes, has a system for assigning sequential numbers to its reports in a manner which differs from that set forth in paragraph (b)(1) of this section may continue to utilize its own system in lieu thereof.

(c) *Retention of records.* Each agreement required to file an index of documents pursuant to this subpart shall retain a copy of each document listed for a minimum period of 3 years after the date the document is distributed to the members and shall make it available to the Commission upon written request.

(d) *Request for documents.* Documents may be requested by the Director, Bureau of Agreements and Trade Monitoring, in writing by reference to a specific minute or index, and shall indicate that the documents will be received in confidence. Requested documents shall be furnished by the parties within the time specified.

(e) *Time for filing.* Documents filed on an annual (calendar) year basis shall be filed by February 15 of the following year. Other documents shall be filed within 30 days of the end of a quarter-year, a meeting, or the receipt of a request for documents.

(f) *Confidentiality.* All information submitted to the Commission under this subpart shall be accorded confidential treatment to the fullest extent permitted by law.

§ 572.702 Filing of reports related to shippers' requests and complaints and consultations.

(a) *Shippers' requests and complaints.*

(1) Each conference shall file with the Commission an annual report setting forth under established shippers' request and complaint procedures and for each calendar year, a statistical summary separately showing: (i) the total number of shippers' and shippers' associations requests and complaints received; (ii) the total number which were fully granted; (iii) the total number which were partially granted; and (iv) the total number which were denied.

(2) Each report shall also show the total number of requests or complaints which were pending disposition at the start and at the end of the report period.

(3) Each of the totals which are reported to the Commission shall be divided into three categories: (i) those involving rates or charges; (ii) those involving transportation services; and (iii) those involving other matters.

(b) *Consultations.* Each conference shall file with the Commission an annual report setting forth a statistical summary showing separately the total number of shipper and shippers' associations requests for consultations and the total number of consultations during each calendar year under the established consultation procedures. Each of the totals which are reported to the Commission shall be divided into two categories: (1) consultations involving commercial disputes; and (2) consultations involving cooperation with shippers in preventing and eliminating malpractices.

§ 572.703 Filing of minutes.

(a) *Meetings.* For purposes of this subpart, the term "meeting" shall include any meeting of the parties to the agreement, including meetings of their agents, principals, owners, committees, or subcommittees of the parties authorized to take final action on behalf of the parties. Where the agreement so authorizes, this includes final action by telephonic or personal polls of the membership.

(b) *Content of minutes.* Except as provided in paragraph (c) of this section, conferences, interconference agreements, agreements between a conference and one or more ocean common carriers, pooling agreements, equal access agreements, discussion agreements, marine terminal conferences, and marine terminal rate fixing agreements shall, through a designated official, file with the Commission a report of each meeting defined in paragraph (a) of this section describing all matters within the scope of the agreement which are discussed or considered at any such meeting, and shall indicate the action taken. These reports need not disclose the identity of parties that participated in discussions or the votes taken.

(c) *Exemption.* No minutes need be filed under paragraph (b) of this section with respect to any discussion of or action taken with regard to:

(1) 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 except that this exemption does not apply to discussions limited to general rate policy, general rate changes, the opening or closing of rates, or service or time/volume contracts; or

(2) Purely administrative matters.

§ 572.704 Index of documents.

(a) Each agreement required to file minutes pursuant to § 572.703 shall maintain an index of all reports, circulars, notices, statistics, analytical studies, or other documents, not otherwise filed with the Commission pursuant to this subpart, which are distributed to the member lines and are used to reach a final decision on any of the following matters.

(1) Revenue projections and plans. (This would exclude individual rate adjustments but would include general rate adjustments, surcharges and other items affecting shipper costs.)

(2) Studies regarding proposed changes to the conference agreement or its membership.

(3) Non-conference competition.

(4) Changes in the nature and type of transportation service generally and specifically at individual ports or points.

(5) Trade tonnaging requirements, vessel utilization and vessel replacement plans.

(6) Conference participation in trade (market share).

(7) The exercise of the right of independent action.

(8) Development of transportation technology and intermodal services.

(9) Malpractices.

(10) Use of service contracts, time volume rate schemes and loyalty contracts.

(11) Conference relationship with shippers and shipper groups.

(12) Governmental and other foreign requirements affecting the conference.

(b)(1) Each index required to be maintained by paragraph (a) of this section shall be filed with the Commission on a calendar-year quarterly basis.

(2) Each index must be certified by an official of the agreement as true and correct.

§ 572.705 Waiver of reporting and record retention.

Upon a showing of good cause, the Commission may waive any of the provisions of this subpart.

SUBPART H—[RESERVED]

SUBPART I—[PENALTIES]

§ 572.901 Failure to file.

Any person operating under an agreement involving activities subject to the Act pursuant to sections 4 and 5(a) of the Act and this part and not exempted pursuant to section 16 of the Act or excluded from filing by the Act, which has not been filed and has not become effective pursuant to the Act and this part is in violation of the Act and of this part and is subject to the civil penalties set forth in section 13(a) of the Act.

§ 572.902 Falsification of reports.

Knowing falsification of any report required by the Act or this part, including knowing falsification of any item on the Information Form, is a violation of the rules of this part and is subject to the civil penalties set forth in section 13(a) of the Act and may be subject to the criminal penalties provided for in 18 U.S.C. 1001.

SUBPART J—PAPERWORK REDUCTION

§ 572.991 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control number assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
572.101 through 572.902	3072–0045

APPENDIX A TO PART 572

INFORMATION FORM AND INSTRUCTIONS

Explanation and Instructions for Information Form

The following explanation and instructions accompany the Information Form (Form) and are intended to facilitate the completion of the Form. The explanations and instructions should be read in conjunction with the Shipping Act of 1984 (Act) and with 46 CFR Part 572.

All agreements by or among ocean common carriers referenced in 46 CFR 572.201(a) (excluding assessment agreements, marine terminal agreements and those agreements exempted from the filing of the Information Form pursuant to Subpart C of Part 572) and significant modifications to agreements referenced in § 572.403 filed with the Commission must be accompanied by a completed Information Form, which in all cases necessitates the completion of Parts I, II, VI, and IX.

Part V, which requests information on proposed service and any proposed reduction or elimination of service, is required to be completed only by parties filing agreements with service authority.

Completion of Part VII is optional.

Because of their potential substantial anticompetitive implications, parties filing certain types of agreements, namely rate-fixing (including, for example, agreements authorizing conferences, interconference agreements, and agreements between a conference and one or more ocean common carriers), pooling, and joint-service and consortium agreements are required to complete Parts III, IV and VIII of the Form in addition to the above specified parts required to be completed by all filing parties.

Certain parts of the Form request information that may not be readily available to the filing party. Where precise information is not available, best estimates may be suppled. Where estimates are made, they should be identified by the use of the notation "est." Except for Parts III and IV, furnishing an estimate requires a clear explanation of why the precise information is not available. Where such an explanation is provided, the use of estimates will not ordinarily be regarded as a failure to supply a complete response as specified in 46 CFR 572.601, and does not require a separate statement of reasons for noncompliance.

In all parts of the Form where data are requested, the filing party is required to indicate all sources used to obtain such data. Sources should also be specified where estimates have been made by the filing party.

PART BY PART EXPLANATION

Part I

Part I requires the filing party to state the full name of the agreement as also provided under 46 CFR 572.501.

Part II(A)

Part II(A) requires the filing party to indicate whether or not the agreement authorizes the parties to collectively fix rates or significantly modifies an agreement with such authority. Rate-fixing may be authorized by a conference agreement, an interconference agreement, or an agreement between a conference and one or more ocean common carriers.

Part II(B)

Part II(B) requires the filing party to indicate whether or not the agreement authorizes the parties to pool cargoes or revenues, or significantly modifies an agreement with such authority.

Part II(C)

Part II(C) requires the filing party to indicate whether or not the agreement authorizes the parties to establish a new joint-service or consortium, or significantly modifies an agreement with such authority.

Background Information to Parts III and IV

If any question in Part II is answered "YES," the filing party is required to complete Parts III, IV and VIII (in addition to completing Parts I, II, VI and IX, which are required to be completed by all filing parties).

The *amount of cargo* is to be measured in appropriate units as determined by the parties (such as revenue tons, weight tons, measurement tons or TEUs). Specify the unit of measurement used.

The relevant trade(s) for the purpose of Parts III and IV is to be determined by the parties. The relevant trade(s) may encompass the entire geographic scope of the agreement, or any combination of U.S. and foreign ports or port ranges or sub-trades within the scope of the agreement as deemed appropriate by the parties. The filing party should clearly identify the relevant trade(s) used for the purposes of completing the Information Form.

Sub-trade is defined as the scope of all liner movements between *each* foreign country and *each* U.S. port range within the scope of the agreement. Each foreign country/U.S. port range pair should be shown separately. Where the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound liner movements should be shown separately.

U.S. port ranges are defined by using the Bureau of Census classification of U.S. Coastal Districts. Thus, the U.S. port ranges are defined as follows:

North Atlantic—Includes ports along the eastern seaboard from the northern boundary of Maine to the southern boundary of Virginia.

South Atlantic—Includes ports along the eastern seaboard from the northern boundary of North Carolina to, but not including Key West, Florida. Also included are all ports in Puerto Rico and the U.S. Virgin Islands.

Gulf—Includes all ports along the Gulf of Mexico from Key West, Florida to Brownsville, Texas, inclusive.

South Pacific—Includes all ports in the States of California and Hawaii.

North Pacific—Includes all ports in the States of Oregon, Washington, and Alaska.

Great Lakes—Includes all ports bordering upon the Great Lakes and their connecting waterways as well as all ports in the State of New York on the St. Lawrence River.

Liner service refers to a definite, advertised schedule, giving relatively frequent sailings at regular intervals between specific U.S. ports or port ranges and designated foreign ports or port ranges. *Liner vessels* are defined as those vessels used in a liner service. *Liner cargoes* are cargoes carried on liner vessels in a liner service. A *liner operator* is a vessel operating ocean common carrier engaged in liner service. *Liner movement* is the carriage of liner cargo by liner operators. The above liner terms, definitions and descriptions are only to be used for the purpose of the Information Form.

Market share information should be provided using data for the most recent twelve (12) month period for which data are available. State the period used. Identify all units of measurement and all sources of the data. Data may be estimated. Indicate where estimates are made and describe the basis of their derivation.

Alternative liner routing is defined as liner service between the foreign country specified in the sub-trade and any North American port(s) other than those located within the port range covered by the sub-trade. The alternative liner routing may serve the sub-trade's port(s) and interior point(s) by way of feeder service, transshipment, surface carriage (such as mini-landbridge), or some other form of substituted transport. Alternative liner routing includes only those liner services which compete for cargoes carried in the sub-trade.

Part III(A)

Part III(A) requires the filing party to provide the total amount of cargo carried on *all parties'* liner vessels in each relevant trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

Part III(B)

Part III(B) requires the filing party to provide the total amount of cargo carried on *all* liner vessels (i.e., both party and non-party carriers) operating in each trade identified in (A) within the scope of the agreement for the most recent twelve (12) month period for which data are available.

Part III(C)

Part III(C) requires the filing party to provide the combined market share of all parties operating in each relevant trade within the scope of the agreement. The market share provided in Part III(C) is the quotient (multiplied by 100) of the total derived in Part III(A) divided by the total derived in Part III(B). The *formula for calculating market share* is as follows:

> The total amount of cargo carried on all parties' liner vessels in each relevant trade within the scope of the agreement over the most recent twelve-month period for which data are available divided by the total amount of cargo carried on all liner vessels in each relevant trade within the scope of the agreement over the same twelve-month period; which quotient is multiplied by 100.

The relevant trade(s) identified in III(A) should be clearly identified. Each market share calculation should be based on cargo data for identical relevant trades. The most recent twelve-month period for which data are available is to be the same period of time used both in the calculation of the parties' total liner cargo movements [Part III(A)] and in the calculation of the total sub-trade liner cargo movements for all liner operators [Part III(B)].

Part IV(A)

Part IV(A)(1) requires the filing party to provide, for each relevant trade within the scope of the agreement, the names of all liner operators who are not parties to the agreement, and who were offering liner service in that trade at the time the agreement was filed with the Commission.

Part IV(A)(2) requires the filing party to provide, for each relevant trade, the names of all liner operators serving alternative liner routings who compete for the cargoes carried by the parties.

Part IV(A)(3) requires the filing party to describe the extent of the competition offered by all non-party liner operators, including liner operators directly serving the relevant trade(s) *and* liner operators serving alternative liner routings. A description of the extent of competition should include estimates (or precise information where available) of non-party liner operator market share (shown either for each individual operator or for all operators collectively). Any evidence of underutilized capacity in the alternative liner routings may also be provided. Explain how the non-party market share was derived. Specify the units of measurement used in the calculations. Indicate the source(s) used to provide data or estimates.

Part IV(B)

Part IV(B)(1) requires the filing party to identify to the extent known all significant non-liner competitive substitutes that are available to shippers of commodities historically transported by liner service within the scope of the agreement. Non-liner competitive substitutes may include carriage on a charter or contract basis or on an infrequent, irregular basis by bulk, mix container/bulk, breakbulk or other vessel-type operators. Such substitutes may also include carriage by air freight operators or air passenger operators with available "belly space" for air freight. Such substitutes may provide service to a trade through some form of substituted service (e.g., mini-landbridge, transshipment or feeder service) by way of ports within an alternative North American port range(s).

Part IV(B)(2) requires the filing party to estimate the percentage of the total amount of the total amount of cargo, historically carried in the trade on liner vessels, that has been carried by non-liner competitive substitutes over the most recent twelve (12) month period for which data are available. The intent of Part IV(B)(2) is to determine the amount of liner cargo historically carried in the trade that has been "lost" to non-liner operators. Identify all units of measurement and describe how the percentage was derived. Identify the sources used.

Part V

Part V is required to be completed only by filing parties whose agreements contain service authority, which is defined as including either or both of the following authorities allowing parties to agree between or among themselves: to allocate (or otherwise provide) tonnage or capacity between or among carriers in the relevant trade(s); to establish a schedule of ports which each carrier will serve and/or the frequency of each carrier's calls at those ports. For the singular purpose of the Information Form, "port" means the place with a harbor that an ocean carrier serves either directly by oceangoing vessel or indirectly by feeder service. Port calls are direct or indirect calls at a port by vessels under the direct operational control of one or more parties to the agreement.

Part V(A)

Part V(A) requires the filing party to identify all U.S. ports expected to be served under this agreement. Include all U.S. ports expected to receive direct liner service (port calls by a party) and indirect liner service (port calls by way of some form of substituted service such as feeder service) where those vessels are under the direct operational control of one or more of the parties to the agreement. The identification of other forms of indirect service under the agreement, such as intermodal service (e.g., interior point or minilandbridge) or transshipment may be provided

if the parties believe that such information will assist and expedite the Commission's analysis of the agreement's impact on service.

Part V(B)

Part V(B)(1) requires the filing party to specify any party's reduction in frequency of service to any U.S. port within the scope of the agreement where the reduction of service to that port occurs as a result of the implementation of the agreement. Reductions in frequency are determined as follows: (1) for each party and for each U.S. port within the scope of the agreement served by that party, determine total number of port calls over the most recent twelve (12) month period for which data are available (historical port call calculation); (2) for each party and for each U.S. port within the scope of the agreement served by that party, estimate the total number of port calls for the twelve (12) month period immediately following implementation of the agreement (expected port call calculation); (3) calculate the difference between the "historical port call calculation" and the "expected port call calculation." Provide, for each party and for each U.S. port, the following calculations: the "historical port call calculation"; the "expected port call calculation"; and the difference between those calculations.

Part V(B)(2) requires the filing party to specify any elimination of service to any U.S. port within the scope of the agreement that is currently (at the time the agreement is filed) receiving liner service from any party to the agreement, where the elimination of that port occurs as a result of the implementation of the agreement. The term "service to any U.S. port" includes direct service by the parties and indirect service by way of feeder service.

Part VI(A)

Part VI(A) requires the filing party to indicate whether or not the agreement was entered into as a direct or indirect response to any law, decree, rule, regulation or any other governmental action promulgated or otherwise implemented by a foreign government. The agreement may, for example, operate in a context where a foreign government has promulgated or implemented certain cargo reservation, cargo preference or other cargo sharing schemes that favor national flag lines and that require these national lines to be members of a conference. A *direct* response to such governmental action would be the creation of a conference agreement. An *indirect* response to such governmental action would be the creation of a pool that facilitates cargo sharing within a conference even though the pool was not *per se* required by such governmental action. Moreover, a commercial agreement that is in response to a governmental action that was itself in response to the concerted actions of other governments (for example, the UNCTAD Code of Liner Conduct) would be in direct response to

a governmental action and so require the completion of Part VI. In addition, an equal access agreement necessarily entails the involvement of a foreign government in liner shipping, thus requiring the completion of Part VI.

Part VI(B)

Part VI(B) requires the filing party to identify all such laws, decrees, rules, regulations or any other foreign governmental actions that have led to the agreement. All such governmental actions should be identified by the type of governmental action (e.g., a law, decree, memorandum order, etc.), the full legal title of the governmental action, the date that the governmental action became (or will become) effective, and the date (if specified) the governmental action will terminate. Part VI(B) also requires a detailed description of the purpose and the nature of the governmental action, including all requirements imposed on the parties by the governmental action, and the specification of each provision in the agreement that is a direct or indirect response to each such governmental action.

Part VI(C)

Part VI(C) requires the filing party to indicate whether or not any law, decree, rule, regulation or any other foreign governmental action identified in Part II(B) limits access to the carriage of liner cargoes within the scope of the agreement. Limited access to the carriage of liner cargoes may be effected by excluding certain liner operators or classes of liner operators (e.g., by national flag or carrier nationality) from the trade entirely, or by reserving certain cargoes for carriage by certain liner operators or classes of liner operators (e.g., by national flag or carrier nationality), or by limiting the ports at which liner operators may call, or by restricting the frequency of scheduled port calls, or by other such measures that restrict the open competition for liner cargoes within the scope of the agreement by liner operators.

Part VI(D)

Part VI(D) requires the filing party to explain how access to cargoes carried by liner operators is limited by the actions of a foreign government as identified in Part VI(B). See Part VI(C) for examples of how access to cargoes can be limited by the actions of a government.

Part VI(E)

Part VI(E) requires the filing party to provide the percentage of the total amount of cargo carried on all liner vessels in the trade to which access is limited by a foreign government. The percentage is derived by dividing the amount of cargo in the trade to which access is limited by a foreign government, by the total amount of cargo carried on all

liner vessels in the trade and multiplying the quotient by 100. The *trade* is defined as the scope of the agreement, that is, all foreign and domestic ports or port ranges served under the agreement. The amount of cargo can be measured in revenue tons, weight tons, measurement tons or TEU's. Specify which unit of measurement is used. The amount of cargo should be provided on the basis of the most recent twelve (12) month period for which data are available. Where precise information is not available, best estimates may be supplied. Identify estimates by the use of the notation "est." Indicate the sources of such estimates.

Part VII

The completion of Part VII (A) and (B) is optional.

Part VII(A)

Part VII(A) permits the filing party to indicate all benefits resulting from the agreement that will accrue principally to the parties as a result of the operation of the agreement. Such benefits may include increased operational efficiencies or other reductions in costs that result from the implementation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

Part VII(B)

Part VII(B) permits the filing party to indicate all benefits resulting from the agreement that will accrue to shippers and to U.S. commerce generally. Such benefits may include reduced rate levels or improved quality or frequency of service that result from the operation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

Part VIII

Part VIII requires a filing party that has answered "yes" to Part II (A), (B) or (C) to identify any reports, studies or other research that were prepared by or for any or all of the parties for the purpose of analyzing, formulating or assessing the competitive conditions in the relevant trade(s) affected by the agreement or the competitive impact of the agreement on the relevant trade(s) affected by the agreement.

Part IX(A)

Part IX(A) requires the filing party to provide the name, title, address, telephone number and cable address of a person the Commission may contact regarding the Information Form and any information provided therein.

Part IX(B)

Part IX(B) requires the filing party to provide the name, title, address, telephone number and cable address of a person the Commission may contact regarding a request for additional information or documents.

Part IX(C)

Part IX(C) requires generally that the filing party sign and certify that the information in the Form and all attachments and appendices are, to the best of the filing party's knowledge, true, correct and complete. The filing party is also required to indicate his or her relationship with the parties to the agreement.

FEDERAL MARITIME COMMISSION

INFORMATION FORM

For Certain Agreements By or Among Ocean Common Carriers

Agreement Number _____
(Assigned by FMC)

PART I *Agreement Name:* _____

_____

PART II *Agreement Type*

	YES	NO
(A) *Rate-Fixing Agreements*		
Does the agreement authorize the parties to collectively fix rates or significantly modify an agreement with such authority?	[ ]	[ ]
(B) *Pooling Agreements*		
Does the agreement authorize the parties to pool cargoes or revenues or significantly modify an agreement with such authority?	[ ]	[ ]
(C) *Joint Service or Consortium Agreements*		
Does the agreement authorize a joint service/consortium arrangement or significantly modify an agreement with such authority?	[ ]	[ ]

If any question in PART II is answered "YES," complete PARTS III, IV, and VIII (in addition to PARTS I, II, VI, and IX that are required to be completed by all filing parties.)

PART III *Market Share Information*

(A) Provide the total amount of cargo carried on all parties' liner vessels in each relevant trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

(B) Provide the total amount of cargo carried on all liner vessels in each relevant trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

(C) Provide the market share of all parties in each relevant trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

PART IV *Market Competition*

(A) *Liner Competition*

(1) For each relevant trade within the scope of the agreement, provide the names of all liner operators *not* parties to the agreement, currently offering service in that trade.

(2) Provide the names of all liner operators serving alternative liner routings where those operators compete for cargoes carried by the parties in the relevant trade.

(3) Describe the nature and extent of the competition from the liner operators listed in (A)(1) and (A)(2) above.

(B) *Non-Liner Competition*

(1) Identify all competitive substitute forms of transport, other than liner service, that are available to shippers of commodities historically transported by liner service in each relevant trade (including, for example, bulk carriers, charter operators, or air freight carriers).

(2) Estimate the percentage of the total amount of liner cargoes in each relevant trade, traditionally carried on liner vessels, that has been carried by non-liner substitute forms of transport over the most recent twelve (12) month period for which data are available.

PART V *Service to the Shipping Public Under the Agreement*

(To be completed only for those agreements which have service authority.)

(A) *Proposed Service*

Identity all U.S. ports expected to be served by the parties under this agreement.

(b) *Reduced Sailings*

(1) Estimate the parties' reductions in frequency of calls at each U.S. port within the scope of the agreement.

(2) Specify the parties' elimination of service to any U.S. port within the scope of the agreement currently served by any party.

PART VI *Foreign Government Involvement in the Liner Market*

	YES	NO
(A) Was this agreement entered into as a direct or indirect response to any law, decree, rule, regulation, or other governmental action promulgated or implemented by a foreign government?	[ ]	[ ]
(B) If the answer to (A) is "YES," identify all such laws, decrees, rules, regulations or other governmental actions and specify all provisions in the agreement that stem from these factors.		
(C) If the answer to (A) is "YES," do any of the above identified governmental actions limit access to the carriage of liner cargoes within the scope of the agreement?	[ ]	[ ]
(D) If the answer to (C) is "YES," explain how access to liner cargoes is limited by the foreign government.		
(E) If the answer to (C) is "YES," provide the percentage of the total liner cargo in the trade to which access is limited by a foreign government. Explain the method by which the percentage was derived.		

PART VII *Benefits of the Agreement* (Optional)

(A) Indicate any benefits (such as improved efficiencies or other reductions in transportation costs) that will accrue principally to the parties as a result of the operation of the agreement. Provide the data necessary to substantiate the above specified benefits.

(B) Indicate any benefits (such as lower rate levels or improved service levels) that will accrue to shippers and to U.S. commerce generally as a result of the operation of the agreement. Provide the data necessary to substantiate the above specified benefits.

PART VIII *Reports, Studies or Other Research*

Identify any reports, studies or other research that were prepared by or for any or all of the parties for the purpose of analyzing, formulating or assessing the competitive conditions in the relevant trade(s) affected by the agreement, or the competitive impact of the agreement on the relevant trade(s) affected by the agreement.

PART IX *Identification of Person(s) to Contact Regarding the Information Form and Certification of Authenticity*

(A) Identification of Contact Person.

(1) Name of Contact Person _____

(2) Title of Contact Person _____

(3) Firm Name and Business _____

(4) Business Telephone Number _____

(5) Cable Address _____

(B) Identification of an Individual Located in the United States Designated for the Limited Purpose of Receiving Notice of an Issuance of a Request for Additional Information or Documents (see 46 CFR 572.606).

(1) Name _____

(2) Title _____

(3) Address _____

(4) Telephone _____

(5) Cable Address _____

(C) Certification.

This Information Form, together with any and all appendices and attachments thereto, was prepared and assembled in accordance with instructions issued by the Federal Maritime Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made, the information is, to the best of my knowledge, true, correct, and complete.

Name (please print or type) _____

Title _____

Relationship with parties to agreement _____

_____

_____

_____

Signature _____

Date _____

FEDERAL MARITIME COMMISSION

[46 CFR PART 510]

DOCKET NO. 84–29

LICENSING OF OCEAN FREIGHT FORWARDERS

November 16, 1984

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding in light of the recent enactment of certain amendments to the Shipping Act, 1916, which renders the proceeding unnecessary. Freight forwarder agreements relating to the foreign commerce of the United States are no longer subject to the requirements of that Act.

DATES: Effective November 23, 1984.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* on August 29, 1984 (49 FR 34253), the Commission proposed to reinstate the requirement provided for in 46 CFR 510.36 (1983) to require ocean freight forwarders operating in the foreign commerce of the United States to file their agreements with the Commission pursuant to section 15, Shipping Act, 1916, 46 U.S.C. 814. The comment period on this proposal is scheduled to expire on December 29, 1984.

H.R. 5833, Pub. L. No. 98–595, 98 Stat. 3130 (1984) which was recently enacted into law, amends the Shipping Act, 1916 to remove such freight forwarder agreements from the filing and approval requirements of that Act. That action renders this proceeding unnecessary. Accordingly, the proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–11
INGERSOLL RAND COMPANY

v.

U.S. LINES, S.A. (FORMERLY MOORE McCORMACK LINES, INC.)

NOTICE

November 27, 1984

Notice is given that no exceptions were filed to the October 17, 1984, 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. 84–11

INGERSOLL RAND COMPANY

v.

U.S. LINES, S.A. (FORMERLY MOORE McCORMACK LINES, INC.)

Shipment of air compressor kits found properly classified. Case dismissed.

Frank J. Hathaway for Ingersoll Rand Company.

A.C. Hidalgo for U.S. Lines, S.A.

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

Finalized November 27, 1984

This case involves a shipment of portable air compressor kits which complainant say were improperly classified by respondent under Southbound Freight Tariff No. 6 of the United States/South and East Africa Conference.

On the bill of lading the shipment is described as:

> ROADBUILDING MACHINERY
>
> 3 House to House Containers Said To Contain:

Below this heading the contents of the three containers were listed as 46 Boxes air compressor kits, 3 boxes of batteries, 2 bundles of wool and 1 box of parts for air compressor kits.

The arguments of the parties revolve around two tariff items and a rule of general application. Item 4310 reads:

> ROADMAKING, EARTHMOVING OR CONSTRUCTION EQUIPMENT AND PARTS, VIZ.:
>
> (Listed under this heading are various pieces of equipment ranging from "Angle Dozers" to Wagon, Tank Motorized.)
>
> ROADMAKING, EARTHMOVING OR CONSTRUCTION EQUIPMENT AND PARTS, VIZ.:
>
> Completely boxed
>
> Unboxed (other than completely boxed must be assessed the unboxed rate)

[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).

Item 1190 reads:

COMPRESSORS, Air:

Completely boxed or completely boxed except for Traction Treads or Wheels with or without controls exposed.
Unboxed (other than boxed or completely boxed except for Traction Treads or Wheels must be assessed the unboxed rate)

The rule of general applicability, Rule 2(G) reads:

(G) RATE APPLICATION FOR PARTS

Whenever rates are provided for an article named herein, the same rate will also be applicable on named parts of such articles, when so described on ocean bills of lading, except where specific rates are provided herein for such parts.

It is complainant's contention that the shipment should have been rated under Item 4310, instead of Item 1190. Complainant says that its portable air compressor kits are "parts" for Roadbuilding Machinery because "a roadbuilding air compressor is not a self-propelled unit and, therefore, must be pulled by other motorized equipment, i.e. Equipment Highway Pavement Marking."[2] Moreover, says complainant, the air compressor kits are "less engines" and are not complete air compressors ready for use. "They are *kits* or *parts* for roadmaking (roadbuilding) equipment of which air compressors are considered a part."

Finally, complainant contends that respondent's classification of the kits was improper because Item 1190 has no provision for "parts." In other words Item 1190 does not read COMPRESSOR, AIR *and PARTS*, nor does it list beneath the heading specific parts which would take the item rate. Since the words "and Parts" do not appear in the description of the articles covered by Item 1190 and there are no parts listed in the item, it can cover only complete air compressors, according to complainant. The air compressor kits in issue are less engines. Therefore they are not complete compressors and cannot be properly classified under Item 1190. This argument follows from complainant's reading of Rule 2(G).

Complainant reads that part of Rule 2(G) which says the rate applies to "name parts of such articles" as requiring either that the tariff item itself contain specific references to the "named" parts of the articles covered by the item or that the words "and Parts" appear in the item as they do in Item 4310.

On the other hand, the respondent reads Rule 2(G) as requiring the shipper to specifically name the articles shipped as "parts" of a specific machine on the bill of lading. In the case here, respondent's position is that the complainant should have described the compressor kits as "parts" for a "specific viz.," i.e. air compressor kit, parts for Equipment Highway

[2] Item 4310 lists after the "viz." "Equipment Highway, Pavement Marking."

Pavement Marking in order to comply with the first part of Rule 2(G). However, respondent argues that rule 2(G) is clear that "where specific rates are provided [in the tariff] for such parts," those rates shall apply. Here, says the respondent, there was a specific rate for air compressors so it was the proper rate to apply to the portable air compressor kits even if it is admitted that the compressor kits were parts for the Highway Pavement, Marking Equipment.

"Where a question of tariff interpretation is in issue, any indefiniteness and ambiguity in the tariff provisions, which in reasonableness permit of misunderstanding and doubt by shippers, require interpretation of such provisions against the carrier." *The Gelfand Manufacturing Co.* v. *Bull S.S. Line, Inc.*, 1 U.S.S.B. 169, 170–171 (1929). However, shippers may not avail themselves of a strained or unnatural construction to create an ambiguity. *Buckley Dunton Overseas S.A.* v. *Blue Star Shipping Corp.*, 8 F.M.C. 137 (1964). And where two classifications are applicable to a commodity, the one which more specifically describes the article is the proper one. *Corn Products Co.* v. *Hamburg American Lines*, 10 F.M.C. 388 (1967).

The first question to be answered is whether there is an ambiguity in the tariff which must be construed against the respondent. Although the complainant does not specifically urge such an ambiguity, his argument seems to create one or at least to create the appearance of one. When Rule 2(G) says that "named parts" of an article shall take the same rate as the article itself, just where are the names of the named parts to appear? Complainant reads the rule so as to require that the parts be "named" in the tariff, or at least that the tariff item under which the parts are to be classified carry the "and Parts" designation. Respondent on the other hand reads Rule 2(G) as requiring that the parts be named in the bill of lading.

A moment's thought is all that is needed to see that complainant's interpretation would result in truly "humongous" tariffs. There are just too many parts to even relatively "simple" machines to read Rule 2(G) as requiring the individual parts to be named in the tariff if the part is to take the same rate as the machine. Moreover, the language of the rule itself seems to me reasonably clear. The rule simply requires that where a shipper is seeking to apply the rate of an article to parts for that article, then he must so designate the parts on the bill of lading. Then if the shipment consists of axles for tractors they would be described as such on the bill of lading and would take the tractor rate. If the complainant's reading of the rule were accepted there would be no need for the general rule since all of the parts on which the article rate would apply would already be listed in the same item as the article.

The question now becomes whether the compressor kits are parts for Equipment Highway Pavement Marking or Compressors or parts for Compressors. Complainant's sole ground for the conclusion that the compressor kits are parts for roadbuilding machinery is that even when the kit is

assembled, this particular compressor has no motive power of its own and must be pulled behind or by other motorized equipment, namely the Highway Pavement Marker. This clearly stretches the commonly understood meaning of the word "part" as "a constituent member of a machine or other apparatus." (*Webster's Third New International Dictionary*) or "and extra piece for replacing worn-out parts" (*The American College Dictionary*). Complainant's air compressor if towed by a Mercedes Benz would, by complainant's reasoning, be a part of that Mercedes Benz. The presence or absence of motive power does not determine whether a thing is a "part."

Finally, even if complainant's argument that its compressor kits could be considered as parts of roadbuilding machinery, Rule 2(G) would still require their classification under Item 1190 under the rule's proviso ". . . except where specific rates are provided for such parts."

For the foregoing reasons, I conclude that the shipment in question was properly classified under Item 1190. The complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–7

TARIFF COMPLIANCE INTERNATIONAL (ACTING ON BEHALF OF A & A INTERNATIONAL, A DIVISION OF TANDY CORPORATION

v.

KAWASAKI KISEN KAISHA, LTD. STEAMSHIP COMPANY

ORDER OF REMAND

November 28, 1984

This proceeding arose from a complaint filed on February 22, 1984, by Tariff Compliance International (Complainant), acting as agent for A & A International, A Division of Tandy Corporation against Kawasaki Kisen Kaisha, Ltd. Steamship Company (K Line) (Respondent). Respondent is a common carrier engaged in transportation by water from Japan and Korea to the West Coast of the United States and is a member of the Trans Pacific Freight Conference of Japan/Korea.

Complainant alleges that it was assessed rates and charges on 39 shipments (bills of lading) during the period January 12, 1982 to March 28, 1983, which were greater than those specified in Respondent's tariff in violation of section 18(b)(3) of the Shipping Act, 1916 (1916 Act) (46 U.S.C. § 817) and has been subjected to unfair, unjust and discriminatory treatment in the adjustment and settlement of claims in violation of section 14 Fourth of the 1916 Act (46 U.S.C. § 813).

Reparations in the amount of $73,863.27 are sought for the alleged tariff violations. In addition, Complainant seeks an unspecified amount as reparations for the alleged violation of section 14 Fourth.

Complainant sought to have the case heard pursuant to the shortened procedure of Subpart K, Rule 181 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.181. Respondent in its answering memorandum to the complaint consented to the shortened procedure.

On May 9, 1984, the Presiding Administrative Law Judge served a notice in which he rejected the "shortened procedure" request on the ground that Complainant had failed to comply with the requirements of Rule 182 of the Rules of Practice and Procedure (46 U.S.C. § 502.182). That notice further directed the parties to submit on or before May 21, 1984 a prehearing statement pursuant to Rule 95 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.95).

On May 21, 1984, the parties filed a Joint Prehearing Statement which identified the issues which remained in dispute. As to the following items,

the only issue in dispute is whether Complainant has met its burden of proof of showing that the alleged commodity was actually shipped:

Commodity	Amount
Printing Mechanism Parts/Accessories	$4,443.18
Thermal Paper	334.46
Disk Drives	1,861.94
Speaker Parts	581.87
Printing Mechanisms-FOB	346.90
Copy Machine Parts	91.60
P.A. Systems-Megaphones	61.70
Maximum Per-Container Rates	356.69
	$8,078.34

As to the following items, in addition to the issue of sufficiency of proof of commodity shipped, there existed disputes of tariff interpretation and application:

Commodity	Amount
Keyboards	$54,520.35
Joystick Control Assemblies	1,764.11
Programmable Calculators	708.63
Hand-Held Electronic Games/Parts	255.87
Audio Cassette Tape Cases	1,574.40
Electronic Telephone Directories	222.49
Audio Goods	6,739.08
	$65,784.93

The parties advised that they intended to call one or more expert witnesses to testify as to the nature and use of the commodities in dispute. In addition, they advised that they would introduce copies of all documents attached to the complaint, all relevant tariffs and tariff pages, all correspondence relevant to the handling of Complainant's overcharge claims, and descriptive literature relating to commodities shipped. The parties also indicated that in some cases actual physical production and demonstration of the commodity itself was contemplated.

On May 23, 1984, the Presiding Officer served a notice which stated that the proceeding would be conducted under the shortened procedure provided for in Subpart K of the Commission's Rules of Practice and Procedure. The parties were given until June 4, 1984 to submit any supplemental evidence.

In response to the notice of May 23, 1984, Complainant provided an affidavit relating to the nature and use of "keyboards" and submitted copies of payment vouchers relating to the subject shipments. The other evidence and testimony which Complainant indicated in the Joint Prehearing Statement that it would adduce at hearing was not included in Complainant's submission. In its response, Respondent noted that "the change in the

procedural schedule has not permitted Respondent the opportunity to fully explore the evidence which might have been offered." Respondent thus relied largely on its previously filed pleadings.

On July 25, 1984, the Presiding Officer issued an Initial Decision in which he concluded that Complainant had failed to prove what was actually shipped and that there was not sufficient information upon which to establish the validity of the claim. Complainant filed Exceptions to the Initial Decision which argue the merits of its case in regard to the commodities shipped and except to the procedure followed by the Presiding Officer. Respondent filed a Reply to Exceptions supporting the Initial Decision.

DISCUSSION

We believe that many of the Presiding Officer's difficulties with the material submitted could have been resolved by the testimony of an appropriate sponsoring witness. Accordingly, rather than proceeding under Subpart K, it would have been more appropriate to conduct an oral evidentiary hearing on the issues identified in the Joint Prehearing Statement. The Presiding Officer's abrupt reversal on the hearing procedure and the particularly short period allowed the parties to adjust to the change would appear to have denied the parties the opportunity to fully present their cases. The Commission is therefore remanding this proceeding to afford the parties that opportunity.

THEREFORE, IT IS ORDERED, THAT this proceeding is hereby remanded to the Office of Administrative Law Judges for an oral evidentiary hearing on the issues identified in the Joint Prehearing Statement filed May 21, 1984.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1441(I)
UNION CARBIDE CORP.—BATTERY DIVISION

v.

WATERMAN STEAMSHIP CORP.

ORDER

November 30, 1984

This proceeding was initiated upon the complaint of Union Carbide Corporation—Battery Division against Waterman Steamship Corporation pursuant to section 11 of the Shipping Act of 1984 (the Act), (46 U.S.C. app. § 1710). Carbide alleges that it was overcharged $5,205.03 on a shipment of dry cell battery bottom covers from New York, N.Y. to the Port of Sudan, Egypt. Settlement Officer Donald F. Norris dismissed the complaint, without prejudice, on the ground that Waterman is presently undergoing a reorganization under Chapter XI of the Bankruptcy Act, 11 U.S.C.A. § 1101 *et seq.* The Commission is reviewing the dismissal upon the request of Commissioner Thomas F. Moakley pursuant to Rule 304 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.304 (1983)).

Carbide's complaint was served on Waterman on August 17, 1984. In response, Waterman's Senior Vice President, George H. Hearn, advised the Settlement Officer that:

> "Waterman filed a Petition for a Reorganization under Chapter XI in the United States Bankruptcy Court . . . on December 1, 1983. . . . We are advised by Counsel that [Carbide's] claim is automatically stayed pursuant to the Bankruptcy Act. Accordingly, Waterman can neither proceed, nor consent to adjudication . . . under the Commission's informal procedure."

The Settlement Officer, therefore, dismissed Carbide's complaint without prejudice to refiling by March 19, 1985.[1] He found that after that date

[1] The Settlement Officer explained that his dismissal was consistent with the "result in two other proceedings involving a carrier involved in a bankruptcy reorganization submitted to the Informal Docket Activity in the past." *See* Informal Docket Nos. 1094(I) and 1132(I), *Keyes Fibre An Arcata Co.* v. *Seatrain International* and *Dow Corning Corp.* v. *Seatrain International.*

The Commission believes that this proceeding is distinguishable from the authorities relied upon by the settlement Officer. In Docket No. 1132(I) the complainant requested dismissal when it was advised that the respondent was in bankruptcy. Docket No. 1094(I) did not concern a claim for reparations *against* a bankrupt. Rather, the complainant shipper was attempting to avoid the carrier's civil claim for underpaying the applicable freight charges.

"all claims against common carriers . . . predicated upon alleged violations of the Shipping Act, 1916 (46 U.S.C. app. 801 *et seq.*) will be barred statutorily by section 20(e)(2)(B) of the Shipping Act of 1984, 46 U.S.C. app. § 1719".[2]

DISCUSSION

For reasons stated below, we find that the Settlement Officer improperly dismissed Carbide's complaint.

Section 362(a)(1) of the Bankruptcy Code (11 U.S.C. 362(a)(1)), provides in pertinent part, that:

> [A] petition filed under section 301, 302, or 303 of this title operates as a stay applicable to all entities of—
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, *administrative,* or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title (Emphasis added).

The language of section 362(a)(1) is clear and unequivocal. It requires an automatic stay, in the nature of an injunction,[3] of all proceedings, judicial or administrative, against the bankrupt debtor in order to avoid a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings.[4] Although the stay provisions are designed to protect the debtor,[5] these provisions were not intended to work a hardship on claimants by requiring tribunals to dismiss their claims.[6] Accordingly, the Commission will vacate the Settlement Officer's Order of Dismissal. The proceedings will be stayed, however, in accordance with section 362 of the Bankruptcy Code, until the bankruptcy proceeding is completed or until Carbide has obtained a waiver from the Bankruptcy Court.[7]

THEREFORE, IT IS ORDERED, That the Settlement Officer's October 9, 1984 Order of Dismissal in this proceeding is vacated.

---

[2] The Settlement Officer misinterpreted the limitation provided for in section 20(e)(2)(b). That section provides:

> This Act and the amendments made by it shall not affect any suit—
> * * *
> (B) with respect to claims arising out of conduct engaged in before the date of enactment of this Act, filed within 1 year after the date of enactment of this Act.

In its Notice of May 15, 1984—*Application of Shipping Act of 1984 to Formal Proceedings Pending before the Federal Maritime Commission on June 18, 1984,* the Commission advised that the term "suits" in section 20(e)(2) was intended only to preserve antitrust actions and had no application to cases pending before the Commission.

[3] *See In Re Decker,* 465 F.2d 294 (3rd Cir. 1972); *Thacker* v. *Etter,* 24 B.R. 835 (U.S. Bkrtcy Court S.D. Ohio W.D.).

[4] *Matter of Holtkamp,* 669 F.2d 505 (7th Cir., 1982).

[5] *Ibid.*

[6] *Perkins Dry Goods Co.* v. *Dennis,* 54 S.W. 2d 1078. 22 Am Bankr Rep. N.S. 291.

[7] Carbide may petition the Bankruptcy Court for relief from the stay provisions (*See* 11 U.S.C.A. § 362(d)).

IT IS FURTHER ORDERED, That this proceeding be stayed, pursuant to 11 U.S.C.A. §362, until the Waterman bankruptcy proceeding is completed or until Carbide has obtained relief of the stay provisions from the Bankruptcy Court.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–15

DR. ETHEL M. HEPNER

v.

THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY

ORDER OF ADOPTION

December 20, 1984

This proceeding arose from a complaint filed by Dr. Ethel M. Hepner against the Peninsular and Oriental Steam Navigation Company (P&O) alleging violations of sections 14, 15, 16 and 20 of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. §§813, 814, 815, 819).

In December, 1976, Dr. Hepner was a passenger aboard the P&O liner M/V SUN PRINCESS. As a result of an incident occurring on that voyage, Dr. Hepner brought suit in the Superior Court of the State of California, County of Los Angeles, alleging that she had suffered injuries due to the negligent and willful misconduct of an employee of P&O. In settlement of that suit, P&O and Dr. Hepner entered into an agreement dated February 27, 1982. P&O agreed to pay Dr. Hepner $40,000 in settlement of the claim and Dr. Hepner agreed that "at no time in the future" would she board or attempt to board any vessel owned by P&O nor would she attempt to book passage on any vessel owned by P&O. She further agreed that if she attempted to board any P&O vessel in contravention of the settlement agreement, P&O would have the right to eject her forcibly from the ship without incurring liability for any injuries which she might sustain. The agreement went on to state that it was the "entire agreement among the parties thereto." In a second agreement, P&O stated that it would not publicly disclose the terms of the settlement agreement.

In the instant proceeding, Dr. Hepner claims that the provisions of the settlement agreement which bar her from boarding or booking passage on any vessel owned by P&O are contrary to sections 14, 15 and 16 of the 1916 Act. In addition, she claims that P&O violated the provisions of the second agreement and section 20 of the 1916 Act by disclosing the contents of the settlement agreement to third parties. In this connection, it is also alleged that representatives of P&O orally represented that Dr. Hepner would only be barred from P&O ships for a period of six months.

P&O filed a Motion for Summary Disposition of the complaint on the grounds that Complainant failed to state a cause of action for which relief

can be granted by the Commission. The Commission's Bureau of Hearing Counsel, the only intervenor in the proceeding, supported dismissal. Dr. Hepner filed a reply in opposition. Chief Administrative Law Judge John E. Cograve granted the Motion and dismissed the proceeding in an order dated September 27, 1994.

The Presiding Officer's dismissal order concluded that "the complaint fails to state a cause of action for which relief may be granted by the Commission." The section 14 Third allegation was rejected on the grounds that the essential element of any violation of that section is the *retaliation* by a carrier against a *shipper* and that Dr. Hepner's only relationship with P&O prior to entering into the agreement was that of a *passenger*. The Presiding Officer noted that Dr. Hepner has never claimed that she is or ever was a "shipper." He also found that the term retaliation as used in sections 14 Third contemplates a "unilateral" act on the part of a carrier and not a contractual arrangement between carrier and shipper. He therefore concluded that section 14 Third was not intended to cover the sort of situation presented in this proceeding.

The Presiding Officer further found no agreement between two persons subject to the 1916 Act and therefore no jurisdiction under section 15 of the Act. The Presiding Officer also rejected the allegation of a violation of section 16 on the basis that it suffers from the same infirmity as does the section 14 allegation, *i.e.*, section 16 First contemplates a "unilateral act" which subjects someone to undue or unreasonable prejudice. Finally, he determined that there is nothing in section 20 of the 1916 Act that would prevent P&O from disclosing the terms of the settlement agreement.

The Complainant, Dr. Hepner, has filed an appeal from the order of dismissal to which P&O and Hearing Counsel have replied. Complainant argues that sections 14 Third and 16 First of the 1916 Act are intended to protect passengers as well as shippers. In addition, Dr. Hepner claims that she was coerced into signing the settlement agreement (Appeal at 17) and was denied an opportunity to conduct the necessary discovery to establish that fact (Appeal at 17–18). The replies of P&O and Hearing Counsel rely on the arguments originally made in support of P&O's Motion for Summary Disposition.[1]

[1] Subsequently, Complainant filed a Motion for Leave to File Closing Brief and for Delay of Decision by Commission. The grounds for the Motion are that Complainant's attorney did not receive a transcript of a prehearing conference to which P&O refers in its reply to the appeal. A transcript of the prehearing conference in question, which the Commission received on August 29, 1984, could have been obtained by Complainant upon payment to the reporting firm. Complainant's failure to obtain a transcript appears to be due to a lack of diligence. In any event, the failure to obtain the transcript of the prehearing conference does not prejudice the Complainant. The statements of counsel made in a prehearing conference are not part of the evidentiary record in this proceeding. The Presiding Officer did not base his order of dismissal on such statements and the Commission does not in any way rely on them in adopting the order of dismissal.

DISCUSSION

Upon consideration of the full record in this proceeding, we find that the Presiding Officer's dismissal of the complaint is supportable both in law and in fact. The Commission is therefore adopting the Order of Dismissal.

While Complainant's Exceptions constitute rearguments of contentions already advanced before the Presiding Officer and correctly disposed of by him, certain points raised warrant further discussion. First, Complainant contends that the Presiding Officer erred in failing to find section 14 Third can be applied for the protection of passengers as well as shippers. The preamble to section 14 states that the section applies to "the transportation by water of passengers," however, the term "passenger" does not appear anywhere else in the section.[2] Section 14 Third only refers to "any shipper." Although an argument can be made that the preamble to section 14 indicates that section 14 Third was intended to protect passengers as well as shippers, the Presiding Officer's conclusion to the contrary is consistent with the language of section 14 Third itself. However, even assuming *arguendo* that section 14 Third is intended to cover passengers as well as shippers, the Presiding Officer's dismissal of the proceeding can be supported on the grounds that neither section 14 Third nor section 16 First is intended to reach a voluntary arrangement of the type presented here.

Second, Dr. Hepner's contention that the settlement agreement was not voluntary has no merit. Complainant's appeal from the order of dismissal states that there were two settlement conferences between the attorneys and the Superior Court judges and as a result of a recommendation made by those judges, the parties entered into the settlement agreement (Appeal at 13–14). At the time Dr. Hepner entered into the settlement agreement with P&O she was represented by the same attorney that now represents her in this proceeding before the Commission. He signed the following statement at the bottom of the settlement agreement:

> I, Bruce A. Friedman, attorney for Ethel Hepner, have read and approved this release and compromise settlement effective thereby, and further represent that I have advised her to enter into said compromise settlement and to sign this release.

---

[2] Section 14 states in pertinent part:

> That no common carrier by water shall directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—
>
> * * *
>
> Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

The Commission believes that the Presiding Officer had a sound basis upon which he could conclude that Dr. Hepner was not coerced into signing the agreement.

THEREFORE, IT IS ORDERED, That the Dismissal of Proceeding order served September 27, 1984 in this proceeding is adopted and made a part hereof;

IT IS FURTHER ORDERED, That Complainant's Motion for Leave to File Closing Brief and for Delay of Decision by Commission is denied;

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–15

DR. ETHEL M. HEPNER

v.

THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY

DISMISSAL OF PROCEEDING

Adopted December 20, 1984

The respondent has filed a "Motion for Summary Disposition" of this proceeding on the grounds that the complaint fails to state a cause of action for which relief may be granted by the Commission.

In February of 1982, complainant, Dr. Ethel M. Hepner, entered into an agreement with the respondent, Peninsular and Oriental Steam Navigation Company (P&O). P&O paid Dr. Hepner $40,000 and in return, she dismissed a lawsuit then pending in the Superior Court of California, County of Los Angeles,[1] and agreed:

> (2) . . . that at no time in the future will she (a) board or attempt to board any vessel owned or operated by the Peninsular and Oriental Steam Navigation Company under its own name or any fictitious name including, but not limited to, "Princess Cruises," or (b) book or attempt to book, either directly or indirectly whether in her own or another name, passage on any vessel owned or operated by the Peninsular and Oriental Steam Navigation Company under its own name or any fictitious name including, but not limited to, "Princess Cruises";
>
> (3) Expressly consent and agree that if, in violation of her agreement herein, she boards or attempts to board any vessel hereinabove described or referred to, the Peninsular and oriental Steam Navigation Company, its officers, agents employees, officers and crew members of any such vessel may exercise any and all means to prevent her boarding, or if already aboard to cause her to leave such vessel, including, but not limited to, the use of reasonable force, if necessary (but specifically excluding the right to use deadly force or kill her), and that in such event she hereby releases, acquits, and forever discharges and agrees to hold harmless said vessel and its officers and crew, and Peninsular and Oriental Steam Navigation Company and all its officers, agents, employees of and from all claims, etc. . . .

[1] In the lawsuit complainant alleged that she had received or suffered injuries while aboard a vessel operated by respondent.

In a separate agreement respondent agreed to keep confidential the provisions of the settlement agreement and all matters pertaining to the court case mentioned above.

Although it is less than clear from the complaint itself, the position of the complainant seems to be simply that the "banishment provisions of the Settlement Agreement are void, in that they are illegal under the Shipping Act [1916]." This "banishment" is said to violate sections 14, 15, 16 and 20 of the Act.

Of the four provisions of section 14 only the Third can be argued to apply here. It provides:

> That no common carrier by water shall directly or indirectly, in respect to the transportation of passenger or property . . .
> Third, Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.[2]

The essential element of any violation of section 14 Third is the *retaliation* by a carrier against a *shipper*. Since the proscribed action by a carrier must be against a shipper the question then becomes can the complainant by any reasonable interpretation be brought within the meaning of the term "shipper." Generally a "shipper" is "The person for whom the owners of the ship agree to carry goods, called 'freight,' to a specified destination and at a specified price."[3] Complainant's only relationship with P&O prior to entering into the agreement was that of a passenger aboard respondent's cruise vessels. There is no claim by the complainant that she is or ever was a "shipper." Complainant, however, seems to be saying that the "preamble" to section 14 renders the prohibitions of section 14 Third applicable to passengers even if they lack status as shippers. Thus complainant would have the statute read that "no common carrier by water shall in respect to the transportation by water . . ." refuse or threaten to refuse space accommodations. Unfortunately for complainant, section 14 Third cannot be read that way.

The specific act prohibited is the retaliation by a common carrier against a "shipper" because that "shipper has patronized another carrier or has filed a complaint charging unfair treatment, or for any other reason." Among the acts of retaliation specifically prohibited to a carrier is the refusal or threat of refusal of "space accommodations when such are available." An example would be where a shipper is contemplating giving his business to another carrier and the carrier with whom he has been

[2] Section 14 First applies to deferred rebates, section 14 Second applies to fighting ships, and section 14 Fourth speaks only to contracts made with shippers.

[3] De Kerchove, *International Maritime Dictionary*, 2d Ed. 1961, p. 724. Similarly, *Black's Law Dictionary*, 4th Ed. 1951 at p. 1546, defines a shipper as "One who ships goods; one who puts goods on board a vessel, for carriage to another place during her voyage and for delivery there, by charter party or otherwise."

dealing says he will not give the shipper any space in the future no matter how desperate the need if he ships with anyone else. The section is clearly restricted to retaliation by a carrier against a shipper and is not applicable here where there is no shipper involved.

Here the respondent's "refusal" of passage aboard its ships is in the form of an agreement with the complainant. In return for $40,000 complainant dropped a lawsuit against the respondent and agreed that she would not at any time in the future attempt to sail aboard any of respondent's vessels. This is not, it seems to me, the kind of situation contemplated by the statute.

The language and context of section 14 Third contemplates a unilateral act on the part of the carrier. The terms "retaliate," "refusing," and "threatening" are not compatible with the concept of an agreement in which the allegedly harmed party agrees to the very conduct which is said to cause the harm and who in return for that agreement receives a sum of money.[4] Thus, even if the language of the section was less specific in its restrictions to shippers, I would have great difficulty in concluding that it applied to the kind of agreement at issue here.

Respondent argues that there is yet another reason why section 14 Third does not apply here. It maintains that the "space accommodations" referred to in the section are limited to cargo space and accommodations and do not apply to passenger accommodations. As evidence of this, respondent cites the recently enacted Shipping Act, 1984 (P.L. 98–237) in which the prohibitions of section 14 Third were carried over with the clarifying addition of the word "cargo" so that the prohibited act is the refusal of "cargo space accommodations" (P.L. 98–237 Sec. 10(b)(5)). While I might agree that no substantive change was intended, no specific reference to the legislative history of the 1984 Act has been provided. However even if we accept for the moment the idea that section 14 Third did include "passenger" space accommodations, the section does not apply to the agreement presented here because the complainant is not a shipper against whom the carrier has retaliated in any way and is thus not covered by the specific prohibitions of the section.

Without any explanation, complainant alleges that section 15 of the 1916 Act has been violated "by the conduct" of respondent. Section 15 only covers "agreements" between "common carriers by water and/or other persons" subject to the Shipping Act, 1916.[5] The Settlement Agreement, the only possible connection here with section 15, is between P&O, a common carrier, and complainant who is not and does not claim to be

[4] Counsel for the complainant at the Prehearing Conference conceded that respondent would not have executed the agreement and paid the $40,000 if the complainant had not agreed that she would stay away from respondent's vessels in the future.

[5] The Act defines other person as "any person . . . carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water."

another person subject to the Act or a common carrier by water. Therefore section 15 does not apply.

The complaint also alleges a violation of section 16 of the Shipping Act, 1916. The only portion of section 16 which could arguably apply to the complaint is section 16 First which provides:

> That it shall be unlawful for any common carrier by water . . . either alone or in conjunction with any other person, directly or indirectly:
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

Here again, as in section 14 Third the language and context of section 16 First contemplates a unilateral act which subjects someone to undue or unreasonable prejudice. It does not, in my view, extend to an agreement where, as here, the party seeking relief agreed to the very conduct which is supposed to constitute the prejudice. In return for $40,000 she dropped the lawsuit and agreed to refrain from taking cruises on respondent's vessels. So just what is the act of respondent that has prejudiced complainant? All that respondent has done was sign the agreement and pay complainant $40,000. Viewed in its proper light, the relief which complainant seeks is not the removal of "prejudice" but a declaration that she is relieved of an obligation which she freely undertook and for which she received consideration. Looked at this way, it is difficult to find "prejudice" in its commonly understood sense, i.e. a disadvantage resulting from some judgment or action of another.[6] Certainly at the time the agreement was executed no one thought that respondent had prejudiced the complainant. It was not until two years later that the complaint was filed with the Commission.[7] The complainant may now feel prejudiced but the restriction was self-imposed. Complainant is not the victim of prejudice so much as she is the dissatisfied party to a bargain she no longer wishes to honor. As such she cannot now claim unlawful prejudice under section 16.[8]

Finally complainant alleges that respondent has violated section 20 of the Shipping Act, 1916, by disclosing the terms of the Settlement Agreement to third parties. Section 20 forbids common carriers by water to disclose, without the consent of the shipper or consignee concerned any information

[6] See *The American Collegiate Dictionary*, Random House, 1970.

[7] The complainant alleges that when the agreement was signed, respondent said it would only remain in effect for "six months," i.e. that Dr. Hepner would only be barred from respondent's vessels for that period. The respondent denies this. Of course all evidence on this point is barred by the parole evidence rule. But even if complainant waited to see if respondent would abrogate the agreement after six months, it still was another 18 months before the complaint was filed here.

[8] I do not mean to imply that an agreement can never give rise to prejudice against one of the parties to an agreement. See e.g. *Inter American Freight Conference*, 14 F.M.C. 58 (1970). Indeed if duress or some form of coercion is present, any agreement could later be found prejudicial.

concerning "the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered by such common carrier . . ." when the information could be used to the detriment of the shipper or consignee. This section does not apply to the situation here so that even if respondent has made the disclosures alleged, the remedy of complainant lies elsewhere.[9]

The proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

[9] If there is something wrong with the agreement, then complainant's remedy would appear to lie in the local forum under the jurisdiction of which the agreement was executed.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–27
PASCOE BUILDING SYSTEMS

v.

PACIFIC WESTBOUND CONFERENCE AND AMERICAN PRESIDENT LINES, LTD.

NOTICE

DECEMBER 31, 1984

Notice is given that no exceptions were filed to the November 6, 1984, 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.

Pursuant to 46 CFR 502.253, respondent American President Lines, Ltd. shall pay complainant interest in the amount of $15,769.19, resulting in total reparation of $58,320.60, to be paid to complainant by January 15, 1985. Respondent shall also furnish the Secretary with evidence of payment within five days thereof.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–27

PASCOE BUILDING SYSTEMS

v.

PACIFIC WESTBOUND CONFERENCE AND AMERICAN PRESIDENT LINES, LTD.

1. Where a tariff provides in pertinent part that:

> Cargo freighted on a measurement basis shall be assessed rates on the gross or overall measurement of individual pieces or packages in cubic meters.

and further that:

> The three dimensions in centimeters . . . are to be multiplied together to produce the cube of one package or piece in cubic meters.

and *does not* provide that the outside measurement of the dimensions should be used, the tariff is clear and definite that the actual cubic measurement of each individual steel shape is the basis on which rates shall be assessed.

2. Where three dimensions, i.e., length x height x width are used to measure the number of cubic feet, the use of two measurements along an irregular (generally triangular) width so as to arrive at an average width, does not represent the use of a fourth "dimension" within the meaning of the tariff.

3. The "averaging" of the width measurement by the complainant, by generally using the widest and narrowest measurement along the width dimension and dividing by two, is a reasonably accurate measurement of the width of the steel shapes involved in this proceeding and comports with the tariff requirement that the rate shall be assessed on the gross or overall measurement of individual pieces in cubic meters. Further, the measurement of the steel shapes involved by using the "outside" or widest measurement and then multiplying that figure by the length x height does not result in the gross or overall measurement of individual pieces as the tariff requires. Rather, it results in a measurement of the smallest rectangular container into which the piece or package would fit.

4. The record in this proceeding does not support a finding that the practice in the industry *under the pertinent tariff for measuring the steel shapes involved here* is to use the measurement of width at its widest point so as to ultimately arrive at the number of cubic meters involved.

5. This holding is limited to the measurement of the steel shapes involved here. However, if the respondents wish to use the "outside" measurement

of the three dimensions to arrive at the number of cubic feet involved in the future, the tariff should so specifically provide.

Edward D. Greenberg for Pascoe Building Systems, complainant.
R. Frederic Fisher and *Charles L. Coleman, III* for Pacific Westbound Conference and American President Lines, Ltd., respondents.

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

Finalized December 31, 1984

This case involves the question of whether or not a portion of section 18(b)(3) of the Shipping Act, 1916, was violated because fabricated steel structures were mismeasured. The complainant alleges that four shipments are involved and that it is entitled to reparations totalling $42,551.41, with interest under the authority of section 22 of the Shipping Act, 1916.[2] It argues that the mismeasurement contravenes the provisions of the pertinent tariff.

FINDINGS OF FACT

The parties have stipulated certain facts in this proceeding. Reference to that stipulation is "S.F."

1. The complainant Pascoe Building Systems (Pascoe) is a division of Amcord, Inc., a Delaware corporation, and is generally engaged in the manufacture and sale of prefabricated steel structures used for building and construction purposes. S.F., par. 1.

2. The respondent, American President Lines, Ltd. (APL) is a common carrier by water in the foreign commerce of the United States, and has been a member of the respondent, Pacific Westbound Conference (PWC), at all times relevant to this proceeding. The respondent, PWC is a conference of carriers with various members, one of whom is American President Lines, Ltd. S.F., par. 2; Entire Record.

3. During the period of time involved in this proceeding PWC established special project rates to Hong Kong for the carriage of "machinery, equipment, materials, supplies and parts thereof.," in connection with the China Cement Company (Hong Kong) Ltd. cement plant project. The applicable project rate from December 17, 1980, through October 31, 1981, was $105.00 W/M, and the applicable rate from November 1, 1981, to February 1, 1982, was $116.00 W/M. The pertinent tariff pages publishing this rate appeared in PWC Local and Overland Tariff No. 11–FMC–19, Item

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

[2] Section (10)(b) of the Shipping Act, 1984, generally corresponds to section 18(b)(3) of the 1916 Act. Section 11 of the new act corresponds to section 22 of the old act. The pertinent law regarding the alleged violation is the same under either act.

982.3001.00, on page 774. The pertinent rates set forth in the tariff are contract rates and are available only to shippers signing the PWC dual rate contract. Pascoe became a signatory to such contact so that the rates applied to Pascoe's cargo movements which are here in issue. S.F., par. 3.

4. In addition to specific rates the tariff contained other pertinent provisions as follows:

(At page 81):

RULE NUMBER 39.0—METHOD OF COMPUTING FREIGHT (Except as otherwise provided, the following will apply.)

39.2 Measurement Cargo

> Cargo freighted on a measurement basis shall be assessed rates on the gross or overall measurement of individual pieces or packages in cubic meters * * *.

and further:

39.2.6 The Three dimensions in centimeters (rounded off according to the above) are to be multiplied together to produce the cube of one package or piece in cubic meters to six (6) decimal places.

and further:

39.4 Freight Charges are Subject to Revision

> Adjustments shall be made by the Carrier if shipment are found to be improperly described or if billed weight or measurement is found to be incorrect. For the purpose of this Rule, except as otherwise provided, the Pacific Cargo Inspection Bureau is designated as authorized representative of the Carriers.

(Entire Record.)

5. During the relevant time period involved in this proceeding Pascoe was a subcontractor for the China Cement Company (Hong Kong) Ltd. cement plant project. Pascoe contracted with Del Mar Shipping Corporation (Del Mar), an ocean freight forwarder, to arrange for the actual transportation from Pascoe's facility in Pamona, California, to the pier, book cargo aboard the PWC vessels, and pay the ocean carrier. S.F., par. 4.

6. There are four cargo movements of fabricated steel structures involved in this proceeding. They took place on June 14, 1981 (the *President Adams*); August 11, 1981 (the *President Grant*); November 19, 1981 (the *President Cleveland*); and January 22, 1982 (the *President Tyler*). The cargo involved in each of the shipments was freighted on a measurement basis in accordance with the pertinent tariff. S.F., par. 5.

7. When Pascoe tendered each of its shipments to APL, it furnished a packing list prepared by its engineering department setting forth the

dimensions which it believed were applicable to its cargo. In measuring the width of its steel shapes Pascoe arrived at a width measurement by generally taking the widest and the narrowest measurement (allowing for flanges) along the width and dividing by two. S.F., par. 5; Entire Record.

8. The Pacific Cargo Inspection Bureau (PCIB) rejected the width dimensions submitted by Pascoe and substituted its own measurement. The PCIB measured the width of Pascoe's steel shapes at their widest points and used that measurement to arrive at the number of cubic meters involved by multiplying the length x height x width. S.F., par. 9.

9. Using the width measurement submitted by Pascoe, the freight charges due by Pascoe were as follows:

Shipment	Charges
June 14, 1981	$94,721.37
August 11, 1981	76,402.42
November 19, 1981	283,514.38
January 22, 1982	83,715.69
Total	$538,353.86

S.F., par. 13.

10. Using the width measurement submitted by the PCIB, the freight charges due by Pascoe were as follows:

Shipment	Charges
June 14, 1981	$103,576.95
August 11, 1981	78,162.19
November 19, 1981	305,477.71
January 22, 1982	93,033.42
Total	$580,250.27

S.F., par. 13.

11. The PCIB did not remeasure the steel shapes for the August 11, 1981, shipment. Instead, the steel shapes were measured in Hong Kong after devanning by an independent marine surveyor, Sworn Measurers and Weighers (Hong Kong) Ltd., at a cost of $655.00. S.F., par. 10.

12. Pascoe has paid all the freight charges relating to the four shipments in issue on the basis of the measurements made by PCIB. In addition, it has paid the $655.00 referred to in paragraph 11, above. It now seeks to recover, with interest, the difference in the freight charges due under its measurements and those charges it has paid, including the $655.00. The total amount is $42,551.41. S.F., par. 6.

13. During the period from 1976 through 1982 Pascoe entered into numerous contracts to manufacture and ship cargoes of steel shapes, many of which were handled by the Del Mar Shipping Corporation, which acted as freight forwarder. The shipments were as follows:

Year	Number of Contracts
1976	34
1977	47
1978	64
1979	35
1980	22
1981	30
1982	47

Rebuttal Statements, Banuelos and Little, pars. 7 and 5, respectively.

14. The contracts referred to in paragraph 13, above, in each instance, included triangular steel shapes which formed a sizeable part of the cargo that was shipped. The cubed measurements of those shapes were arrived at by Pascoe in the same manner as were the cubed measurements for the shipments herein involved. The accuracy of those measurements was never questioned until this proceeding. Rebuttal Statements, Banuelos and Little; pars. 7 and 5, respectively.

ULTIMATE FINDINGS OF FACT

15. The tariff involved in this proceeding clearly provides that cargo freighted on a measurement basis "shall be assessed rates on the gross or overall measurement of individual pieces or packages in cubic meters" and the measurement used by Pascoe satisfies that requirement while the measurement used by PCIB does not. Entire Record.

16. The "averaging" of the width measurement employed by Pascoe by using the widest and narrowest measurement along the width and dividing by two, is a reasonably accurate measurement of the width of the steel shapes involved, and comports with the tariff requirement that the rate shall be assessed on the gross or overall measurement of individual pieces in cubic meters. The averaging of the width does not add a fourth "dimension" since the cubic meters are still arrived at by using three dimensions, i.e., length × height × width. Entire Record.

17. The measurement of the width of the steel shapes involved by using the "outside" or widest measurement and then multiplying that figure by the length × height does not result in "the gross or overall measurement of individual pieces or packages in cubic meters" as the tariff requires. Rather, it results in a measurement of the smallest rectangular container into which the piece or package would fit. Entire Record.

18. The record in this proceeding does not support a finding that the practice in the industry under the pertinent tariff for measuring the steel shapes involved here is to use the measurement of width at the widest point to arrive at the number of cubic meters involved. Entire Record.

19. Pascoe was overcharged $42,551.41, by APL for the four shipments involved here and is entitled to recover that amount, plus the appropriate interest. Entire Record.

ARGUMENT AND CONCLUSIONS

This case is one involving the proper measurement of steel shapes. There is no dispute as to the surrounding facts concerning the applicable monetary rate, the shipments involved or the description of the pertinent cargo. Indeed, there is no real dispute either as to how the complainants and respondents measured the steel shapes, or as to the accuracy of the numerical figures that were used. What is in controversy is which measurement in cubic meters satisfies the terms of the pertinent tariff.

With respect to the shipments involved here, Pascoe arrived at the dimensions of the tapered columns, which appear to be triangular in shape but are actually four sided,[3] from engineering specifications determined by its engineering department. From those specifications Pascoe prepared and gave packing lists to the respondents in advance of sailing. Pascoe arrived at the cargo measurement by, in effect "averaging" the width measurement of each tapered column. It argues that its measurement process results in the most accurate measurement of the overall or gross cubic dimensions of the tapered columns since the measurements "are based on precise engineering calculations (which are correct to the thousandth of a foot)." It argues further that Pascoe has been using this method to derive the cubic dimensions of its tapered columns for at least twenty years, and that in the last seven years made a large number of ocean shipments based on such measurements which were never questioned by any carrier.

Pascoe asserts that the respondents' method of measurement is to determine "the smallest rectangular container into which the piece or package would fit." Pascoe argues that in so doing the respondents violated the terms of the tariff because the tariff does not speak in terms of calculating the dimensions of such a hypothetical, rectangular container.

On the other hand, the respondents argue that Pascoe's method of measurement was wrong because Pascoe used four dimensions instead of the three "called for by the PWC tariff"; because Pascoe's method was not in accordance with standard industry practice; because Pascoe's argument that the PWC's tariff is ambiguous is an error; and, because Pascoe's measurement system is "arbitrary and unworkable."

Section 18(b)(3) of the Shipping Act, 1916, provides in part that:

> 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 or charges which are specified in its tariffs on file with the Commission. . . .

Given this statutory mandate it is clear that we must begin any examination of the issue involved here by determining just what the tariff says. In

[3] See complainant's Opening Statement of Facts, Exhibits 7 and 15 which contain drawings of the tapered columns.

so doing we find that its language is unequivocal. The basic tariff language says that:

> Cargo freighted on a measurement basis shall be assessed rates on the gross or overall measurement of individual pieces or packages in cubic meters.

That language, when applied to the steel shapes (tapered columns) which moved here, clearly requires that the measurement involved be of the individual pieces themselves and there is no provision that any "outside" measurement shall govern. Further, there is nothing in the tariff, either specifically or by implication which would measure the individual pieces by computing the smallest rectangular container into which the individual pieces would fit.

The tariff also states that:

> The three dimensions in centimeters . . . are to be multiplied together to produce the cube of one package or pieces in cubic meters.

This language, standing alone, does not change the basic tariff language by requiring an "outside" measurement of the three basic dimensions, i.e., length, height and width.[4] Further, we have also found as a fact that the use of two measurements along one dimension so as to "average" the dimensions is a reasonably accurate measurement of the width dimension involved here and comports with the basic tariff requirement. We have also found as a fact that the use of two measurements of width so as to arrive at the overall dimension does not add a "fourth dimension." Rather, the measurement of cubic meters, under the tariff, is still arrived at by the use of the three dimensions of length, height and width.

As we have noted, we think the tariff is clear so there is no need to go beyond its terms, at least not insofar as the steel shapes involved here are concerned. But even if we look beyond the terms of the tariff, as the respondents would have us do, in order to determine whether or not the complainant's method of measurement of steel shapes is contrary to the practice in the industry, we hold that the facts of record do not support any such finding.[5] While the respondents' witnesses talk generally of such a practice there is no real delineation between a tariff which requires an "outside measurement" to be used respecting irregular shapes and a tariff, like the one in issue here, that does not contain such a requirement. Further, there is no attempt by the respondents to deal specifically with the particular commodity involved here and instead, it is discussed generally along with automobiles and other similar commodities not in

[4] This statement also applies to the use of Tweed's Accurate Metric Cubic Tables, for which the tariff provides.

[5] This holding makes unnecessary any determination as to the extent to which an "industry wide practice" affects the clear and unequivocal language of a tariff.

issue. This, despite the fact that the complainant established, and we have found as uncontroverted fact, that from 1976 through 1982, it shipped tapered steel shapes which were measured in the same manner as were the steel shapes involved here. The characterization advanced by the respondents that in making such shipments Pascoe simply "got away with it in the past," meaning at least the past seven years, is a subjective, self-serving argument having no factual basis in this record.

When we turn from the facts to the case law we find that generally, the cases hold that strict adherence to filed tariffs is mandatory *Mueller* v. *Peralta Shipping Corp.*, 8 F.M.C. 361, 364 (1965), and that demanding and collecting greater compensation than specified in the tariff on file with the Commission violates section 18(b)(3) of the Shipping Act, 1916. *Bratti* v. *Prudential, et al.*, 8 F.M.C. 375, 380 (1965). The case law further provides that tariffs should be specific and plain, *Gelfand Mfg. Co.* v. *Bull SS Lines*, 1 U.S.S.B. 169, 170 (1929), and that if no specific commercial meaning has been engrafted on to a term, that term must be construed according to its ordinary meaning. *European Trade Specialists, Inc. and Kunzle & Tasin*, v. *Prudential-Grace Lines Inc. and the Hipage Co., Inc.*, 21 F.M.C. 888, 890 (1979), citing *Nix* v. *Hedden*, 149 U.S. 304 (1983).

In their brief the respondents make several arguments, one of which can be disposed of in summary fashion. The brief refers to Pascoe's "shifting" contentions and its abandoned "nesting" argument. Pascoe denies that its case rested on the "nesting" argument, and asserts that it is relying solely on the provisions and language of the tariff. This being so we have disregarded those portions of the record which relate to "nesting"[6] and have limited our consideration of the issue to which the tariff provisions require.

As we have noted, the respondents' primary argument, which is really three arguments, states:

> Pascoe seeks to impose a system of measurement which is contrary to the tariff, contrary to uniform industry practice and completely unworkable.

As to being contrary to the tariff, the language of the tariff, standing alone, does not allow the use of an "outside" measurement of width, even if all were to accept the idea that the use of three dimensions precludes the use of two measurements along one irregular dimension.[7] The only way the respondents can reach such a result is to establish that uniform industry practice, *as to the tapered steel shapes involved here,* requires that the "three dimensions" set forth in the tariff means the three "outside"

[6] The "nesting" argument rests on the assertion that since the irregular steel shapes could be "nested" or bundled together so as to conserve cargo space, the carrier ought not to use the outside measurement of width as to each tapered column in computing the number of cubic feet involved.

[7] As has been noted previously, we have held as a fact that the tariff does not preclude the use of two measurements along the width dimension.

dimensions. We have already held that the facts of record do not support the view that the tapered steel shapes involved here were historically measured as the respondents measure them. In their brief the respondents cite language from *Orleans Materials and Equipment Co.* v. *Matson Navigation Co.*, 8 F.M.C. 160 (1964) (*Orleans*). They state, and we agree, that the Commission rejected the argument that the measurement of cargo may be reduced to take into account the possibility of "nesting" the cargo so as to conserve stowage space. Further, the Commission's reasons for its decision, that is, that the cargo must be measured as it is received at the dock and that the possibility of "nesting" must be disregarded, are equally valid. However, that language does not support the respondents' case here.

In *Orleans, supra*, the complainant sought to have the Commission hold that because the cargo could be "nested" the measurement of the cube should not be based on the outside measurement of the dimensions, *even though, unlike the instant case, the applicable tariff provided that the outside measurement would govern.* The Commission correctly followed the terms of the tariff which specifically provided for the outside measurement. Likewise, here we would follow the terms of the tariff, and the fact that the tariff in *Orleans* specifically provides for the use of the outside measurement in arriving at the cube and the tariff here does not, calls into question the respondent's assertion that since the tariff here provides for the measurement of cube by using three dimensions it also requires use of the outside measurement. The problem is brought into focus by consideration of *Ocean Shipment of Associated Factories, Inc., 26 F.M.C. 144, (FMC Docket No. 83–33, 1983) (Associated)*, which is cited by the respondents. That case came to the Commission on referral from the United States District Court for the Southern District of Georgia. The issue presented was whether or not shipments of carpet were properly measured in calculating the cubic measurement by using the greatest dimensions of the role (rectangularization), where the tariff provided that:

> All cargo shall be measured on the overall measurements of the individual packages, unless otherwise specified.

The Commission decided that the measurement was improper and that the shipper was right in using a geometric measurement to find the volume of the cylinder (rug). The Commission stated:

> Rule 21(A) states that all cargo shall be measured on the "*overall measurements*" of the individual packages. What is meant by the "overall measurements" of a package is not defined or explained. Nor does Rule 21 specify what method is to be used to calculate the "overall measurements" of a package. In this regard, it is unlike those tariffs which state that the cubic measurement shall be the product of the three greatest dimensions. Specifying that the cubic measurement of the cargo shall be based on

the depth, width and length of the cargo precludes the use of the geometric formula for calculating the cubic volume of a cylinder. In contrast, nothing in Rule 21 precludes the use of the geometric formula in determining the "overall measurements" of the carpet rolls.* By this decision we are in no way overruling the general rule stated in *Orleans Material and Equipment Co., Inc.* v. *Matson Navigation Co.*, 8 FMC 160 [3 SRR 1055] (1964). Where rectangularization is clearly indicated, it continues to be a valid and essential means of rating cargo. Our holding here is based on our judgment that Rule 21(A) is sufficiently ambiguous to lead us to rule in favor of Associated.

In the absence of a tariff rule which clearly specifies the method to be used in order to determine the "overall measurements" of cargo, we conclude that in this instance Associated may have the benefit of the geometric formula. Ambiguous tariff provisions are construed against the maker, i.e., the carrier, and in a manner most favorable to the shipper in terms of yielding the lowest rate. *Bratti* v. *Prudential et al.*, 8 FMC 375, 379 [5 SRR 611] (1964); *Sacramento-Yolo Port Dist.* v. *Fred F. Noonan Co., Inc.*, 9 FMC 551, 558 [7 SRR 387] (1966); *United Nations Children's Fund* v. *Blue Sea Line*, 15 FMC 206, 209 [12 SRR 1067] (1972).

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*The Commission may look to matters outside the express language of the tariff to aid in its construction if there exists a custom or usage of a trade or course of dealing of the parties which, although not in the tariff, is such that it should be applied. *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 US 285, 291, 292 (1922); *Sacramento-Yolo Port Dist.* v. *Fred F. Noonan Co., Inc.*, 9 FMC 551, 560 [7 SRR 387] (1966). Although many tariffs specifically require "rectangularization" of cargo in calculating the cubic measurement for rating purposes, this does not establish that "rectangularization" is such a universal custom or usage in this trade and with this commodity so that it must be applied even though it is not specifically required by the tariff.

In the case before us the tariff contains precise language as to how cargo should be measured. There is no ambiguity within its terms. It does not specifically provide for the use of the "outside" measurement or rectangularization, as do other tariffs which the Commission refers to in *Associated, supra.* Given the clear language of the tariff and the failure of the record to establish that the use of the outside measurement is such a universal custom or usage in this trade, with this commodity and under the language of this tariff, we hold that it cannot be applied here and the complainant's method of measurement is proper.

In so holding we note that this case is not one where the definition of a commodity is in question. In those cases one can understand the inability of a tariff to cover every commodity within every description

so that it often becomes necessary to look outside the terms of the tariff itself. Here, all that is involved is how cargo is measured and the tariff contains language as to how this is to be accomplished in rather precise terms. Yet, unaccountably the tariff simply fails to specify that the "outside" or "greatest" dimension should be used. It seems obvious that if the tariff is to be clear and unequivocal as it is required to be, the intent that the "outside" dimension be used ought to be expressly stated and not left to a reliance on standard industry custom or practice. Otherwise, we are sometimes left with what we have here—a record that does not support a holding that in measuring this specific cargo outside measurements are always used.

Further, it is difficult to understand the respondents' assertion, through its witnesses that "a ruling in Pascoe's favor here would have catastrophic, industry-wide consequences." In advancing this premise the arguments made that there needs to be a uniform method for measuring cargo and a series of questions is propounded as the "How would we determine how many measurements to use?"; and, "if a package is hour-glassed shaped how do we determine the 'mean' width?" Then, these and similar questions are applied to different types of irregular shapes to show that the measurement is not feasible as to those shapes and that therefore, it should not be allowed as to the steel shapes involved here.

Of course, the answer to the above is that uniformity in a tariff is desirable, and it could have and can be achieved here by simply inserting a sentence in the tariff that makes clear that all irregular shaped objects will be measured by multiplying the three dimensions and that the measurement used for each dimension will be the "outside" measurement of that dimension. If the tariff were so clarified there would be no need to rely on extrinsic evidence as to what is meant, no agonizing over how to measure different irregular shapes and no possible lack of uniformity which might lead to "catastrophic industry-wide consequences."

So here, we hold that the specific language of the tariff is clear and that the measurement used by the complainant reasonably complies with the requirements of that language. We hold further, that the record in this proceeding does not support a finding that *under the language of this tariff and with respect to this commodity* the industry-wide practice is to use the "outside" measurement of width, so as to arrive at a hypothetical rectangle. Such rectangularization is not clearly indicated in this tariff as the Commission's decision in *Orleans, supra,* requires.

Finally, PWC in its brief states that "Pascoe's complaint against the PWC must be dismissed for failure to state a claim under the Shipping Act. See *Nepera Chemical Inc.* v. *Sea-Land Service, Inc.,* 527 F.Supp. 136 (D.D.C. 1981)." Given the facts of this case where the tariff involved is a conference tariff, and the measurements made by PCIB were made under the specific terms of the tariff, as well as other facts, it is clear

that the PWC is a proper party to this proceeding, even though it may not be liable insofar as reparations are concerned.

In view of the above the respondent, American President Lines Ltd., is hereby ordered to pay Pascoe the sum of $42,551.41, with appropriate interest.[8] It is further ordered that if the respondents want to measure all irregularly shaped cargo by using the "outside" measurement of each dimension so that the measurement achieves rectangularization, it be so specifically provided for in the appropriate tariff.

This proceeding is hereby discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[8] See 46 CFR 502.253 for the proper interest computation.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–5

SOUTH CAROLINA STATE PORTS AUTHORITY

v.

GEORGIA PORTS AUTHORITY

NOTICE

January 9, 1985

Notice is given that no appeal has been taken to the December 4, 1984, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–5

SOUTH CAROLINA STATE PORTS AUTHORITY

v.

GEORGIA PORTS AUTHORITY

ORDER DISMISSING COMPLAINT

Finalized January 9, 1985

This order summarizes some events which transpired at the hearing on Friday, November 30, 1984, and the speaking order issued at that time.

Counsel for complainant and counsel for respondent requested that the following statement be read into the record:

> The respondent Georgia Ports Authority acknowledges that it now recognizes that there are certain errors in Booz-Allen & Hamilton, Inc., report described in the complaint and that it agrees that the report will not be further distributed or circulated by the Georgia Ports Authority.
>
> In consideration of the above rapproachment the South Carolina State Ports Authority having achieved the primary purpose of this action now agrees to withdraw the complaint pending before the Federal Maritime Commission.

After the statement was read the complaint was ordered dismissed, with prejudice, and the proceeding was closed.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–38
NOTICE OF INQUIRY AND INTENT TO REVIEW REGULATION OF PORTS AND MARINE TERMINAL OPERATORS

January 18, 1985

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding having reviewed and adopted the Final Report of the Inquiry Officer.

DATE: Effective January 24, 1985.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* on September 14, 1983 (48 FR 41199), the Commission initiated this proceeding to accomplish a general review of its regulation of the marine terminal industry. The Commission proposed to review the continued need to require terminal tariffs to be filed and marine terminal agreements to be filed and approved, and the general area of antitrust immunity for marine terminal operators. Comments were solicited from the public, and Commissioner Robert Setrakian was appointed Inquiry Officer authorized to review written comments and solicit any other comments necessary to further the objectives of the Inquiry.

Numerous comments were submitted from various components of the ocean shipping industry and other interested parties, and hearings were held in certain U.S. port cities. The Inquiry Officer issued an initial report dealing with terminal tariffs and agreements, and has now issued a Final Report covering the area of antitrust immunity. Both reports, which have been reviewed and adopted by the Commission, are available from the Commission's Secretary. The Commission has now determined that the purposes of the proceeding have been accomplished and that it should be discontinued.

Accordingly, this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–10

THE COCA-COLA EXPORT CORPORATION

v.

PERUVIAN AMAZON LINE

ORDER OF REMAND

JANUARY 24, 1985

This proceeding was initiated by complaint filed by Coca Cola Export Corporation (Coke) against Peruvian Amazon Line (PAL) for alleged overcharges of $9,824.52 on the shipment of 14,366 cases of canned sodas from Miami, Florida to Iquitos, Peru.[1] Chief Administrative Law Judge John E. Cograve issued an Initial Decision denying reparations to which Coke has filed Exception.

BACKGROUND

The essential facts are not in dispute. Coke's contract of sale called for shipment of 14,336 cases of Coca-Cola and Sprite, and the Peruvian letter of credit precluded "partial shipment." Coke booked space for the shipment with PAL, and requested that eight containers be furnished. The cases of Coca-Cola and Sprite are automatically palletized as they come off the plant's production lines. However, the number of cases ordered could not be neatly divided into standard pallet loads. Coke therefore made up the requisite number of cases by providing the maximum number on pallets and the remainder in loose cases. Coke shipped the entire amount in containers, because the letter of credit prohibited "partial shipment"[2] and to avoid damage from excessive handling, exposure to the elements and pilferage. PAL was not informed, either at time of booking or shipment, that the greater portion of the cargo was palletized. The containers, provided by PAL, were loaded by Coke at its Miami plant.

At the time of shipment, the PAL's tariff contained the following rates:

Canned Goods & Beverages Palletized W/M $120
Canned Goods & Beverages in Boxes W/M $160

[1] The matter was tried under the "shortened procedure" of Subpart K of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.181.

[2] No explanation is given for Coke's belief that shipment on the same vessel for cargo that is partly on pallets and partly containerized or in loose cartons would constitute "partial shipment" under the terms of the letter of credit.

The bill of lading, prepared by Coke, did not reflect that some of the cargo was Palletized, and PAL rated the shipment at the higher rate, for cargo "in boxes." The complaint alleged that the lower rate for "palletized" cargo should have been charged and claimed reparations in the amount of $9,824.52.

In denying reparations, the Presiding Officer found that "[q]uite literally both rates for 'Beverages Palletized' and 'Beverages Boxed' would apply: The shipment was palletized and it was loaded into containers." He characterized the problem presented as not being the usual problem of tariff ambiguity but rather a case of ambiguity "created by the actions of the shipper, who first palletized at least part of the cargo and then placed those pallets inside a container (box)." The Presiding Officer concluded that Coke had elected to use containers in order to obtain certain benefits and that the higher container or "box" rate was appropriately charged as compensation for the higher costs incurred by PAL to supply the containers.

Coke argues on exception that the Initial Decision erroneously interprets the tariff description "in boxes" to mean "in containers," thus imputing container rates to a tariff which then contained none. Coke points out that the word "container" did not appear anywhere in PAL's tariff at the time of shipment and that the first reference to "containers or containerized cargo" was not made in the tariff until a number of months after the claim for overcharge was made.[3] Coke therefore concludes that a reading of PAL's tariff "leads to the inescapable conclusion that it is a typical, traditional breakbulk tariff, one which offers a lower rate for palletizing cargo as opposed to shipping 'boxes'."[4] While arguing that "a fair and reasonable construction must be given to the term 'in boxes,'" Coke does not allege that the tariff is ambiguous. To the contrary, Coke states that: "There is no ambiguity in the tariff."

In its Reply to Exception, PAL takes the position that the Presiding Officer's conclusions are correct and that Coke seeks to avoid compensating it for the additional costs of containerization while reaping its benefits by "concealing the packaging of the cargo from the carrier."

DISCUSSION

The Presiding Officer erred, in equating "boxes" and "containers." The Commission does not read the tariff term "in boxes" as describing

[3] In reply, Respondent explains that the later amendment was intended to "make perfectly clear what was already clear enough." Both parties are referring to Peruvian Amazon's Tariff FMC No. 3, original page 5A, effective March 18, 1983, which provides per container rates for "shipper owned" 20 and 40 foot containers, including separately stated charges for return of the empty containers. Because the shipment in question was not made in "shipper owned" containers, it appears that these rates would have been inapplicable to the shipments in question and provide no guidance for the question raised herein.

[4] Coke concedes on exception that the higher "box" rate should be applied to that portion of the cargo which was not palletized but moved in loose cartons within the containers and that PAL's "computation of the maximum overcharge of $8,128.92 based on a mix of 'palletized' and 'in Boxes' rate is more accurate" than the $9,824.52 amount sought in the complaint.

containers. Nor do we consider "box" synonymous with "container" in the context of a tariff setting forth the terms and conditions of, as well as the rates and charges for, transportation by water in foreign commerce.

PAL's tariff reflected two rates for canned beverages, "in boxes" or "palletized." As the Presiding Officer found, both rates were literally applicable. Neither referred to containerized shipment, and no other reference to containers was made in PAL's tariff effective at the time of shipment.

We cannot determine on this record whether the rate for cargo "in boxes" was the appropriate rate to apply in this case without examining factors which are not apparent from the existing limited record. Although there is some evidence of PAL's general past practice in handling cargo tendered to it in boxes, the record is devoid of any showing as to past dealings between Coke and PAL which might have led Coke to expect container service.[5] Nor is there any evidence in the record regarding the manner in which Coke's overseas shipments are usually made, whether by this carrier or other. Such evidence of past practice by a shipper might clarify the basis for its expectations of the rate to be charged. Evidence of a shipper's past practices and dealings may thus indicate its prior knowledge of the meaning and interpretation of tariff terms. While such knowledge by one shipper would not of itself generally make an ambiguous tariff unambiguous, it does serve to put the matter into proper perspective. *Cummin's Engine Co.* v. *United States Line,* 21 F.M.C. 944 (1979).

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding is set aside and that the proceeding is remanded for further hearing consistent with this Order.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

Commissioner Moakley, dissenting in part.

I would not remand this proceeding to the Administrative Law Judge because I believe there are no relevant facts in dispute.

The majority have concluded that the term "in boxes" as used in the tariff in question does not mean "in containers." I agree. Having disposed of that issue, the resolution of the case is clear. There is one tariff rate which applies to the cargo that was shipped in pallets and another, higher rate applicable to the remainder of the cargo that was shipped in loose cartons, or "boxes." No other tariff rates are at issue. The parties agree that application of these two rates to the cargo in question results in an overcharge of $8,128.92 to the shipper in this case.

[5] PAL stated in its pleadings that the higher rate for cargo "in boxes" is based upon its regular practice of providing containers, at additional cost to itself, for cargo which is shipped loose in cartons or boxes. The higher rate also allegedly compensates for the loss of vessel cubic capacity resulting from use of the containers. PAL further advised that it offers a lower rate for palletized cargo because it requires no further handling or packaging for protective purposes.

The majority would remand the proceeding to examine factors unrelated to whether the cargo moved in pallets or boxes. The issue they want the ALJ to pursue relates to past dealings between the shipper and carrier which might have led the shipper to expect container service. The theory seems to be (although it is not clearly stated) that if the shipper received the "benefit" of container service, it should have to pay for that "benefit," even though there is no such charge in the tariff.

Unlike the facts in the informal docket case cited by the majority,[1] there is no tariff ambiguity to resolve here. The only possibility of such an ambiguity—whether "in boxes" meant "in containers"—was resolved in favor of the shipper. Thus, past dealings between the shipper and carrier are totally irrelevant. The terms of a tariff cannot be amended or ignored on the basis of equitable principles.

I would discontinue this proceeding and award reparation of $8,128.92 plus appropriate interest to the complainant.

[1] *Cummins Engine Co.*, v. *United States Lines, et al*, 21 F.M.C. 944 (1979).

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–26

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

NON-SUBSTANTIVE AGREEMENTS; EXEMPTION

February 13, 1985

ACTION: Correction of Final Rule.

SUMMARY: This amends the Commission's rule regarding the exemption of non-substantive agreements to clearly and consistently provide that the exemption applies both to new agreements and modifications to existing agreements. The amendment corrects an inadvertent incongruity in the earlier rule and conforms the rule in all respects to the earlier expressed intention of the Commission.

DATE: February 13, 1985.

SUPPLEMENTARY INFORMATION:

The Commission's final rule in this proceeding (27 F.M.C. 430), in section 572.302, *Non-substantive agreements and non-substantive modifications to existing agreements—exemption,* defines non-substantive agreements and modifications and provides an exemption for them. The supplementary information to that rule indicates that in response to comments on the Interim Rule, the Commission had determined to clarify and enlarge the reach of the exemption so that it would coincide with the exemption previously in effect at 46 CFR 524.3 and 524.4. To accomplish this, it was necessary, *inter alia,* to provide for application of the exemption to *new* non-substantive agreements as well as *modifications* to non-substantive agreements. The Interim Rule's application had been limited to modifications. This intention to clarify and enlarge the reach of the exemption was carried out only partially. In the Final Rule, appropriate references were added in the section heading and in paragraph (a) of section 572.302 which defines a non-substantive agreement or modification. However, a similar reference was inadvertently omitted from paragraph (b) of the section which states the parameters of the exemption. The Commission hereby is correcting the incongruity in the rule created by this inadvertence.

Additionally, paragraph (b) also inadvertently failed to include a reference to "the Act" when describing the parameters of the exemption. This omission also is corrected by this document. This conforms the language of

this exemption to the language of sections 572.304, 572.305 and 572.306 of this part regarding other exemptions.

The Federal Maritime Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) an annual effect on the economy of $100 million or more;

(2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or,

(3) significant adverse effect on competition, employment, investment productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units or small governmental jurisdictions.

The Commission finds that good cause exists for dispensing with the prior notice, opportunity for comment, and deferred effective date requirements of 5 U.S.C. 553 in that this amendment imposes no new substantive requirements, but merely corrects an incongruity in the Final Rule and conforms the rule in full to the extent expressed by the Commission in its Final Rule.

List of Subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 553, and Sections 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1715 and 1716), paragraph (b) of section 572.302 of Title 46 CFR is revised to read as follows:

§ 572.302 *Non-substantive agreements and non-substantive modifications to existing agreements—exemption.*

* * * * *

(b) A copy of the non-substantive agreement or modification shall be submitted for information purposes in the proper format but is otherwise exempt from the Information Form, notice and waiting period requirements of the Act and of this part.

* * * * *

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–37

APPLICATION OF THE SHIPPING ACT OF 1984 TO CERTAIN TRANSSHIPMENT AGREEMENTS

February 13, 1985

ACTION: Final rule.

SUMMARY: This rule sets forth the approach the Commission will take under the Shipping Act of 1984 with regard to transshipment agreements where one party to the agreement provides a service in the domestic offshore commerce of the United States and the other party provides a service in the foreign commerce of the United States. The Shipping Act of 1984 does not provide for the regulation of common carriers by water operating exclusively in the domestic offshore trades. However, when the movement of cargo in a domestic trade is part of a through movement of cargo via transshipment involving the foreign commerce of the United States, the entire arrangement will be considered to be in the foreign commerce of the United States and, therefore, subject only to the Shipping Act of 1984.

EFFECTIVE DATE: March 21, 1985.

SUPPLEMENTARY INFORMATION:

The proposed rule in this proceeding was published in the *Federal Register* on December 14, 1984 (49 FR 48764) with comments due on January 28, 1985. The availability of the finding of no significant impact on the quality of the human environment was published in the *Federal Register* on January 24, 1985 (50 FR 3369).

In order to clarify the question of jurisdiction, the proposed rule indicated that the Commission would interpret the Shipping Act of 1984 (46 U.S.C. app. 1701–1720) to apply to all agreements involving domestic offshore movements when such movement is part of a continuous through movement of cargo via transshipment involving the foreign commerce of the United States.

The Atlantic and Gulf/West Coast of South America Conference; the West Coast of South America Northbound Conference; and the United States Atlantic and Gulf/Colombia Conference (collectively) filed the only

comment which indicated that the conferences fully support the rule and urge the Commission to adopt the rule as proposed.

Accordingly, the proposed rule is adopted as final without change.

The Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with Foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of Subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 553 and sections 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1715 and 1716), the Commission hereby amends Part 572 of Title 46 of the Code of Federal Regulations as follows:

1. The Authority Citation for Part 572 is revised to read as follows:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. 1701–1707; 1709–1710; 1712; and 1714–1717.

2. § 572.104 is amended by adding the following language at the end of paragraph (ff) to read:

§ 572.104 Definitions.

* * * * *

(ff) *Transshipment Agreement.* * * *

An agreement which involves the movement of cargo in a domestic offshore trade as part of a through movement of cargo via transshipment involving the foreign commerce of the United States shall be considered to be in the foreign commerce of the United States and, therefore, subject to the Shipping Act of 1984 and the rules of this part.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–36

JORGE REYNOSO IMPORT AND EXPORT CO., POSSIBLE VIOLATION OF SECTION 44(A), SHIPPING ACT, 1916

NOTICE

FEBRUARY 21, 1985

Notice is given that no exceptions were filed to the January 14, 1985, 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.

In the appearances for respondent on the first page of the initial decision, "Anthony G. Luongo" should read "Arthur G. Luongo."

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–36
JORGE REYNOSO IMPORT AND EXPORT CO., POSSIBLE VIOLATION OF SECTION 44(A), SHIPPING ACT, 1916

Respondent found to have been carrying on the business of forwarding without a license. Cease and desist order issued. Assessment of penalty found unwarranted.

Meyer M. Brilliant and *Anthony G. Luongo* for respondent, Jorge Reynoso Import & Export Co.

John Robert Ewers and *Janet F. Katz* as Hearing Counsel.

INITIAL DECISION [1] OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

Finalized February 21, 1985

This proceeding was instituted by Order of Investigation and Hearing (Order) served August 24, 1983. The Order was issued pursuant to sections 22, 32 and 44 of the Shipping Act, 1916, 46 U.S.C. 821, 831 and 841(b), to determine whether Jorge Reynoso Import and Export Co., a Florida corporation, had violated section 44(a) of the Shipping Act, 1916, 46 U.S.C. 841b(a), by carrying on the business of freight forwarding without a license. The Order required that the following specific issues be determined:

> 1. Whether Jorge Reynoso Import and Export Co. violated section 44(a) of the Shipping Act, 1916 (46 U.S.C. 841b), by carrying on the business of forwarding without a license issued by the Commission; and
> 2. Whether a civil penalty should be assessed against Jorge Reynoso Import and Export Co. pursuant to section 32 of the Shipping Act, 1916 (46 U.S.C. 831), for violation of section 44(a) of the Shipping Act, 1916, and, if so, the amount of penalty which should be imposed; and
> 3. Whether the Commission should order Jorge Reynoso Import and Export Co. to cease and desist from carrying on the business of forwarding without a license obtained pursuant to section 44 of the Shipping Act, 1916.

The Order named Jorge Reynoso Import and Export Co. as the respondent and named Hearing Counsel as a party in the proceeding.

Pursuant to order, issued August 31, 1983, on September 16, 1983, Hearing Counsel provided respondent with a statement setting forth 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 CFR 502.227).

facts they intended to introduce at the hearing; a list of, and copies of, all exhibits they intended to introduce in evidence; the names and a brief description of the witnesses they intended to call to testify; and a statement of the relevant law in the case.

Thereafter, also pursuant to the August 31st order, Hearing Counsel moved for a stay to permit them to conduct and conclude settlement negotiations with the respondent. The respondent joined in the motion, which was granted on October 11, 1983.[2] On January 6, 1984, Hearing Counsel submitted a proposed settlement, accompanied by their memorandum and other material in support of the settlement.

By Interim Order With Respect to Proposed Settlement, served February 16, 1984, I indicated my concern that the dollar amount of the proposed settlement was excessive. The "settlement" was for $5,000—the maximum penalty permitted to be assessed in a formal proceeding under sections 22 and 32 of the Shipping Act, 1916, for a violation of section 44 of that Act.

It is sufficient to note the following matters touched on in the Interim Order. I was perturbed because Hearing Counsel's memorandum advised, in effect, that among the matters they considered in evaluating a settlement, were mitigating factors and, while the memorandum demonstrated that some mitigating factors were present in the case, Hearing Counsel seemed to have given no weight to those factors in the "settlement." Yet, I did not reject the settlement outright. Instead, I suggested that the two parties reenter negotiations leading to a settlement which either reflected the matters in mitigation or explained why the maximum penalty provided by law should be approved.

In response to the Interim Order, Hearing Counsel submitted a supplemental memorandum in support of the proposed settlement contending it still believed the settlement to be reasonable, although they acknowledged that the "settlement" had become unsettled. For respondent's part, its counsel submitted a memorandum focusing on mitigation and maintaining that the "settlement" was based upon a fear that the cost of litigation would exceed the amount of penalty which could be imposed.

Because negotiations had come to a standstill, and the issues were still unresolved, a hearing was ordered to be held on June 19, 1984. In advance of the hearing, the parties entered into a stipulation sufficient to support a conclusion that the respondent was engaged in the business of freight forwarding without a license.[3] Thus, the sole issue left for determination at the hearing was the amount of the penalty to be assessed.

[2] Procedural Schedule Stayed, served October 12, 1983. Later, on November 3, 1983, the schedule was modified and, after a status report and motion for a further procedural schedule was filed, it was ordered that the proposed settlement and accompanying materials and memoranda be submitted by January 6, 1984.

[3] Respondent's reply brief, filed after the hearing, admitted that it had "previously stipulated it has violated section 44(a) of the Shipping Act, 1916." Reply brief, p. 2.

After a one-day hearing in West Palm Beach, Florida, Hearing Counsel filed an opening brief and respondent filed a reply brief.

SOME PERTINENT STATUTES AND REGULATIONS

The unnumbered section preceding section 2 of the Shipping Act, 1916 (46 U.S.C. 802), 46 U.S.C. 801, contains the following definitions:

> The term "carrying on the business of forwarding" means the dispatching of shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, and handling the formalities incident to such shipments.
>
> [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.]
>
> 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.*

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*Sec. 1608(c) of Public Law 97–35, approved August 13, 1981, provides that the previous definition shall remain in effect until December 31, 1983, after which time this definition shall apply. In addition, Sec. 1608(c) provides "By June 1, 1983, the Federal Maritime Commission shall submit a report to Congress evaluating the enforceability of this section and describing any reasons why this section should not be made permanent law."

Section 44 of the Shipping Act, 1916, provides:

> (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: *Provided, however,* That a person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license.
>
> * * * * *
>
> (e) A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others when and only when, such person is licensed hereunder and has performed with respect to such shipment the

solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, and at least two of the following services:

(1) The coordination of the movement of the cargo to shipside;

(2) The preparation and processing of the ocean bill of lading;

(3) The preparation and processing of dock receipts or delivery orders;

(4) The preparation and processing of consular documents or export declarations;

(5) The payment of the ocean freight charges on such shipments:

The Commission regulations governing independent ocean freight forwarders, 46 CFR Part 510, contain the following definitions of terms at 510.2:

(f) "Freight forwarder" is anyone who performs, or holds itself out to perform, the dispatching of a shipment of cargo for another by rendering any one or more of the services enumerated in § 510.2(h) of this part.

(g) "Freight forwarding fee" means charges billed by a freight forwarder to a shipper, consignee, seller, purchaser, or any agent thereof, for the performance of freight forwarding services as specified in § 510.2(h) of this part.

(h) "Freight forwarding services" refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by an oceangoing common carrier, which may include, but is not limited to, the following:

(1) Ordering cargo to port;

(2) Preparing and/or processing export declarations;

(3) Booking, arranging for or confirming cargo space;

(4) Preparing or processing delivery orders or dock receipts;

(5) Preparing and/or processing ocean bills of lading;

(6) Preparing or processing consular documents or arranging for their certification;

(7) Arranging for warehouse storage;

(8) Arranging for cargo insurance;

(9) Clearing shipments in accordance with United States Government export regulations;

(10) Preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;

(11) Handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;

(12) Coordinating the movement of shipments for origin to vessel; and

(13) Giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargos dispatch.

FACTS

CHAPTER I

JORGE REYNOSO IMPORT AND EXPORT CO.

(In which the reader may find a brief description of the notorious respondent and its officers, and how the respondent came to provide succor to its correspondent in a faraway island.)

The respondent's name indicates that it is both an importer and exporter. In fact, it is engaged in business, almost exclusively, as an exporter of goods from Miami, Florida, to an island off the coast of Colombia. The island is San Andres, and it is the only free port in Colombia.

Jorge Reynoso is the president and his wife, Edith, is the vice-president of the corporation, which has its place of business in Miami. Mr. Reynoso does not speak English.[4] Mrs. Reynoso, who testified at the hearing, does speak English.

The Reynosos have three children of their own, plus nine others of Mr. Reynoso's former marriage. Four of the nine are emancipated. The eight dependent children attend parochial schools or universities which charge tuition.

As a small business, the respondent files a Form 1120S[5] for its annual federal income tax return. According to its 1983 federal return, prepared shortly before the hearing, the respondent had ordinary income of only $16,350. The income was divided amongst inventory on the shelf and cash on hand at the end of the year. Although both Reynosos devote full time to the respondent, neither drew any salary in 1983. In order to live, they borrowed $38,727 from corporate assets. In addition to current and short-term liabilities of about $30,000,[6] the corporation owes $50,000 pursuant to a putative commitment made by Mr. Reynoso in connection with an investment in a river terminal.[7]

The respondent was incorporated in June 1979. Although the facts are not entirely clear, its entry into freight forwarding seems to have occurred, accidentally, in 1981. It came about this way. One of the persons the respondent did business with in San Andres became the agent for Hoover and Company in Colombia. The agent, a Mr. Basmagi, began to encounter some problems with Hoover shipments from Miami. Presumably because the respondent had gained a familiarity with processing shipments from Miami to San Andres, Mr. Basmagi asked the Reynosos to supervise the

[4] At the hearing, an interpreter was provided for Mr. Reynoso.

[5] U.S. Income Tax Return for an S Corporation.

[6] Not including about $23,000 in accounts payable.

[7] The circumstances surrounding this investment and debt were not clear to Mrs. Reynoso. It is clear, however, that the terminal is neither an asset nor a revenue producing property of the respondent.

shipments and the documentation for him. The same thing seems to have happened with Swift's customers in San Andres. All the services provided by the respondent—whether the cargo got to Miami in good condition; whether the pallets were unbroken; whether the cargo was in order; whether the documentation was prepared timely so that the consignors would be paid timely from letters of credit—were provided for the consignees and were paid for by them.[8]

Since January 1984, because the Colombian government then placed severe restrictions on importation of goods, the business of respondent has been brought to an all-time low. Whereas, in the first six months of 1983, respondent exported about 200 to 250 shipments to San Andres, during that same period in 1984, it exported only about ten shipments.

CHAPTER II

MARCH 1981—THE VISITOR

(In which the respondent learns that the comfort given Mr. Basmagi and other correspondents causes it to be accused of giving the appearance of an unlicensed freight forwarder.)

One day in March 1981, two of the Federal Maritime Commission's investigators arrived at the premises of the respondent. They went there because one of them[9] came across the respondent's name as forwarding agent on a bill of lading he saw at another place of business, a fact which "sort of indicated that the company might be acting as a forwarding agent." [10]

The investigator identified himself to Mrs. Reynoso (Mr. Reynoso was not in) and told her that the reason he was "visiting" was "to look through their shipping files to determine whether or not they were or were not engaged in unlicensed forwarding." [11]

"I didn't have anything to hide from him," Mrs. Reynoso recalled during her testimony.[12] She did not think of the respondent as being engaged in the freight forwarding business and with a clear conscience and spirit of cooperation "I showed him many, all my papers." [13]

After examining twelve to fifteen files, the investigator informed Mrs. Reynoso "that several of the shipping files gave her company the appearance of having participated in unlicensed freight forwarding." [14] Mrs. Reynoso disagreed. It was her understanding that a freight forwarder is an agent who is paid a commission by a steamship company and the

[8] On a few occasions, the consignor was billed for services or for ocean freight by the respondent, but this occurred only because of peculiarities or deficiencies in the consignee's letters of credit incident to a particular transaction.

[9] The other investigator seems to have played no further role in the events which followed.

[10] Tr. 14.

[11] *Id.*

[12] Tr. 62.

[13] *Id.*

[14] Tr. 15.

respondent had "never been paid any fees by a steamship company on our shipments." [15]

The record of trial evidences nothing to show that the investigator attempted to disabuse Mrs. Reynoso of her notion about payments from steamship companies being the *sine qua non* for freight forwarding. Nevertheless, pressed for an explanation why it was his opinion that the respondent "appeared" to be an unlicensed freight forwarder, the investigator replied that for some shipments the company prepared the bills of lading and that "their invoices to the customers were invoices that had charges similar to those that were put on invoices by ocean freight forwarders to their customers." [16] Essentially, all that the investigator imparted to Mrs. Reynoso was that "these documents indicate to me that you are engaged in freight forwarding." [17] He did not explain what it was about respondent's activities that section 44 of the Shipping Act and the Commission's regulations governing freight forwarding, 46 CFR Part 510, frowned upon. Here is what the investigator said he did not say to Mrs. Reynoso in March 1981, after listening to a colloquy with Hearing Counsel concerning the elements of freight forwarding activity: [18]

> Q. You didn't explain to her what it was in specific detail that the statutes or the regulations frowned upon?
>
> A. No. If I can recall exactly what I said to her, I would tell you.
>
> Q. But you don't recall spelling out the details of what constituted freight forwarding?
>
> A. Not to the extent that I did on the second visit.
>
> Tr. 123.

The investigator left the premises without telling Mrs. Reynoso to "stop" the activities he said gave the "appearance" of being (or "appeared to be") unlicensed freight forwarding. He did say the activities should "not be continued without a license." [19] But he did not say, unequivocally, that the respondent was in violation of law.[20]

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[15] Tr. 55.

[16] Hearing Counsel's PFF (proposed finding of fact) No. 8 would have me find that in March 1981, the investigator explained that one of the reasons it "appeared" that respondent was engaged in freight forwarding was that respondent "paid ocean freight." I am unable to make that finding. In response to a question of what explanation he made, the investigator said ". . . and as I recall—I am not sure at this time on those particular shipments, whether they paid the ocean freight on any of them. I believe they did pay the ocean freight on some of them." Tr. 25–26. The investigator's uncertain recollection is what controls. The fact that he "believes" that ocean freight was paid on "some of them" adds nothing because among the files he examined at that time were those relating to shipments of goods in which the respondent had a financial interest.

[17] Tr. 121–123.

[18] Tr. 115–121.

[19] Tr. 24–25, 4950, 127–128.

[20] At first blush, these may appear to be trivial semantic distinctions. However, they were not, at least in the mind of the investigator who seemed to be guided in his choice of words by a sincere belief that he was following clearly defined investigative procedures, as will be seen, *infra*. Moreover, as a witness,

Continued

There was a bemused ending to the visit. When he left, the investigator *thought* that Mrs. Reynoso understood what he was telling her.[21] But, *he knew* when he left that "she thought she was not a freight forwarder."[22] She did not think the respondent was a freight forwarder or was in violation of law. She had not been told that respondent was in violation of law. The investigator told her, apparently at the end of the visit, that he would come back. Consequently, in the context of all that was said and discussed during the visit, when there was no follow-up contact, she thought the "business had passed government inspection."[23]

CHAPTER III

MARCH 1981—THE VISIT

(In which the reader discovers that the visitor was not conducting an investigation during his visit. Or, when an investigation is not an investigation until it becomes an investigation.)

As noted (n.20, *supra*), the explanation of why the investigator employed vague euphemisims in lieu of straight talk in his conversation with Mrs. Reynoso may be found in his understanding of outstanding investigative procedures.

Although the picture that emerges to reveal those investigative procedures is not exactly lucid, it does provide some insight. Those procedures seem to work this way. According to the investigator, there is no procedure "at the beginning of an investigation * * *," "whereby people are warned in any way in writing that some of their activities might constitute violations of law."[24] The way we notify them is by telling them face-to-face at the time of the investigation."[25] Having heard this explanation, the reader might conclude that the investigator meant that the March 1981 visit was

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the investigator parried repeated questions asking if he told Mrs. Reynoso to "stop" by replying with variations of the theme that she should "not continue." The investigator knew full well the distinction between the stern admonition "stop" and the more permissive "not continue." E.g., on the second visit, *infra*, he told her to "stop," and on the second visit he discarded the word "appear" in favor of an affirmative statement that the company's activities constituted unlicensed freight forwarding. There is no evidence that on the second visit the investigator uncovered any data different that he found on the first visit to warrant the difference in terminology. In this respect, were the consequences not so serious, the investigator's partial response to questioning asking him why he used the term "appeared to be in violation," rather than saying that the respondent was in violation, might be regarded as humorous. He said, "I am not going to make a determination. I am not the Judge. I am just there to get the facts . . ." Tr. 24. Yet, as seen, with no more facts to go on than he obtained on his first visit, on his second visit he did make that determination and did say that the respondent was in violation.

[21] Tr. 26.

[22] Tr. 33.

[23] Tr. 62. According to Mrs. Reynoso, he said, "Okay. We will have to make a report, so we will contact you and we will come back." When asked, on cross-examination, if he said why he would contact her again, she replied, ". . . He said if they had other questions, something like that that I couldn't repeat exactly the way he told me, but something like meaning if they wanted more information they would come back to our office and get more information from us or papers from us." Tr. 100. See, also Tr. 128.

[24] Tr. 30.

[25] Tr. 31.

the beginning of the investigation of the respondent. That would be a mistake on the part of the reader. While it surely was the commencement of the investigation, it was not the commencement of the "formal investigation." The "formal" or "official" investigation was not opened until the investigator requested that it be opened.[26] Applying those definitions to the March 1981 visit, the plain meaning of the investigator's testimony is that it was the beginning of the investigation, but not a "formal" investigation, therefore the respondent could not be warned "face-to-face" that it was in violation. That warning would have to await the "official" investigation.

Inasmuch as there already have been some references to a second visit during which Mrs. Reynoso was given "face-to-face" warning that the respondent was in violation of law, it will come as no surprise that the investigator requested that his District Director open a "formal" investigation and that the request was granted.

Jumping out of sequence for a bit, it must be observed that *the second visit did not take place until sometime in January 1983—some twenty-two months later.* One, then, might reason that the "formal" investigation was not requested or granted until sometime in the late fall of 1982 or the winter of 1982–1983. That would be a faulty conclusion for, as the investigator testified, "An investigation was formally opened at the time that I requested it be opened, immediately after my first visit."[27] More precisely, the "formal" investigation was opened almost simultaneously with the first visit "in March of 1981 * * *"[28]

CHAPTER IV

JANUARY 1983—THE VISITOR RETURNS

(In which there is an investigation that is an investigation for real. Or, the respondent is informed that it has run afoul of the law and must refrain from any further freight forwarding.)

Sometime in January 1983, the investigator revisited the respondent's premises. He again spoke to Mrs. Reynoso and asked for her files. Again she cooperated by giving him access to all the information he wanted. After he examined the documents, he told her that the respondent was in violation of the Shipping Act because it was engaged in unlicensed freight forwarding[29] and it must stop. Although Mrs. Reynoso, even then, retained the impression that freight forwarding meant receiving compensation

[26] *Id.* To unravel the complexities of the investigation procedures which the text attempts to simplify, see Tr. 24–25, 27–29, 30–33.

[27] Tr. 31.

[28] Tr. 29.

[29] It was at some point during this conversation, that he first explained in detail why the respondent was a freight forwarder in connection with Swift and Hoover shipments. Tr. 123, *supra.*

from an ocean carrier, she obeyed the investigator's command and thenceforth the respondent ceased handling the Hoover and Swift shipments.

A stipulation entered into by respondent's counsel and Hearing Counsel[30] agrees that the documents examined by the investigator disclose that the respondent engaged in freight forwarding transactions in connection with forty-six shipments made by Swift and Hoover during the period from February 2, 1981, through December 28, 1982, inclusive. (N.b., however, that in its post-hearing brief, Hearing Counsel reduced its claim to thirty-one instances of alleged violation. Brief, p.14) All of those thirty-one shipments took place after the first visit.

The stipulation[31] states that the respondent prepared the bills of lading for all shipments.[32] The stipulation states that respondent booked, arranged or confirmed space for the cargo for all shipments.[33] The stipulation states that the respondent did not have a financial interest in any of the shipments.[34] The stipulation goes on to recite that for one or more of the shipments, the respondent prepared and/or processed a Shipper's Export Declaration; prepared or sent advance notifications of shipments or other documents to banks, shippers or consignees; advanced monies for ocean freight to the carrier; advanced monies for inland freight; prepared consumer documents; handled letters of credit.

The problem with the foregoing portions of the stipulation (giving effect to the material contained in the marginal notes to the preceding paragraph's text) is that because of the lack of specificity and the possible combinations and permutations, there is no way of telling for certain for which of the remaining thirty-one shipments the respondent was a freight forwarder. To some extent this is remedied by other parts of the stipulation which show that, for a particular shipment, the respondent performed a particular combination of services.[35] Nevertheless, despite the lack of clarity, it is fair to say that in connection with enough of the shipments enumerated in the stipulation, there was a sufficient showing of freight forwarding activity to permit me to find that the respondent was carrying on the business of a freight forwarder. I find, as well, that the respondent did

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[30] Ex. 1.

[31] Par. 5.

[32] In fact, the respondent did not do so for all shipments. See, e.g., Tr. 89.

[33] In fact, the respondent did not do so for all shipments. See, e.g., Tr. 89–90.

[34] In fact, it may have had such interest. See, e.g., Tr. 59–60. Perhaps this is a good a time as any to quote passages which appeared in respondent's counsel's Memorandum Reflecting Matters in Mitigation in response to the Interim Order. At p. 1, counsel wrote:

> The Settlement dated January 5, 1984 entered into between the Respondent and Hearing Counsel * * * was based upon the fact that the expense and inconvenience of an evidentiary hearing would exceed the amount of the penalty imposed, and as a practical matter and because of the economic status of the Respondent, it was more feasible to enter into the Settlement Agreement.
>
> * * *
>
> * * * We discussed the matters set forth in the interim Order but could not reach any decision in mitigation of the penalty. Hearing Counsel's stubbornness was matched only by the splendid co-operation, advice and help she has rendered to me in all these proceedings, for which I am sincerely grateful.

[35] See, e.g., Ex. 2, par. 53.

not hold a license issued by the Federal Maritime Commission and in effect during the period from February 2, 1981, through December 28, 1982, inclusive, authorizing it to carry on the business of freight forwarding.

CHAPTER V

FINIS

(In which a visit of another kind is recounted, and the reader may wish to reflect on whether the tale that is told in these five chapters is a detective story, a courtroom drama, an human drama, a comedy of errors or an horror story.)

On February 26, 1984, respondent's office was burglarized. Over $32,000 in cash was removed by a person or persons unknown.[36] The money did not belong to respondent. It was entrusted to Mr. Reynoso by four of respondent's customers and was to be paid to others or to be deposited in accordance with the customers' instructions. The loss was not covered by respondent's insurance. Respondent felt the loss was its responsibility and a debt of honor, so it borrowed against its own line of credit to repay the monies.[37]

All in all, the respondent's current economic situation is so bad that it is "seeking for different business now in order to continue." [38]

DISCUSSION AND CONCLUSION

I.

Except as explicitly or impliedly adopted in the preliminary statement and Facts, *supra*, or in this Discussion and Conclusion, Hearing Counsel's proposed findings of fact, including statements tantamount to proposed findings in their argument in brief,[39] are rejected for reasons of inaccuracy, irrelevancy or immateriality.

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[36] See Ex. 4. A Dade County, Florida Police Incident Report.

[37] Tr. 69–72.

[38] Tr. 72.

[39] E.g., in its Brief, at p. 13, Hearing Counsel writes, "Mrs. Reynoso admitted that the only difference between the activity of [respondent] and a freight forwarder was that [respondent] did not receive compensation from a carrier. (PFF 76)". There is no PFF 76. Obviously, PFF 75 was meant to be cited. PFF 75 reads:

> Mrs. Reynoso believes that because [respondent] did not receive compensation from a steamship company, it was not a forwarder but that was the only difference between [respondent] and a freight forwarder concerning the shipments in Hearing Exhibit 2 (Tr. 97).

I agree with everything in that sentence which precedes the word "but," and I have so found. However, the rest of the sentence is lacking in record support anywhere in the exhibits or transcript, let alone Tr. 97. Moreover, to the extent that the sentence implies that Mrs. Reynoso believed that this was the *only* difference between respondent's handling of the Swift and Hoover shipments and what a freight forwarder does, this too is not sustained by the record. Although Mrs. Reynoso was obviously wrong in her belief that the respondent was not a forwarder because it did not receive compensation from a carrier, the fact of her misconception is credible. She was not given copies of the statutes or regulations pertaining to freight forwarding. Although section 44(a) prohibits carrying on the business of forwarding, section 44 does not, itself, define the characteristics of the business. One must go to the definitions section of the Shipping Act to learn those

Continued

II.

The Respondent was engaged in carrying on the business of freight forwarding without a license in violation of section 44 of the Shipping Act, 1916.

It is admitted that the respondent was engaged in the freight forwarding business without a license in violation of section 44(a) of the Shipping Act, 1916.[40] Absent that admission, and even if the respondent did not forward every one of the thirty-one shipments, the respondent's overall handling of the Swift and Hoover accounts fits the statutory and regulatory definitions of freight forwarding. In order to facilitate oceangoing carrier transportation of cargo, for a sufficient number of those shipments, the respondent did perform that wide range of services involving handling and dispatching of cargo, which are components of freight forwarding services within the meaning of 46 CFR 510.2(b). Docket No. 80–5, *Dynamic International Freight Forwarder, Inc.—Independent Ocean Freight Forwarder License Application and Possible Violation of Section 44, Shipping Act, 1916,* Report and Order Partially Adopting Initial Decision, 23 F.M.C. 537.

This conclusion implies no *mens rea* on the part of the respondent for, indeed, none has been established. However, the statute does not require a guilty intent for a finding concerning the legality of respondent's conduct. All that is necessary is a showing that the respondent has done what the law proscribes. This was decided long ago in *Bullen v. Wisconsin,* 240 U.S. 625 (1916), where Mr. Justice Holmes wrote at 630–631:[41]

> We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion, what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.

III.
Cease and Desist Order

Inasmuch as the respondent urges that a cease and desist order against future violations be issued,[42] one will be entered.[43]

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characteristics and then go to the regulations in 46 CFR 510.2 for a clearer understanding. On the other hand, a part of section 44, subparagraph (e) does explain aspects of freight forwarding, in terms of compensation from carriers.

[40] See n. 2, *supra.*

[41] See, also, *Interstate Commerce Commission v. AAA Car Drivers Exchange, Inc.,* 340 F. 2d (820, 826 (2 Cir. 1965).

[42] Respondent's Reply Brief, p. 4.

[43] A cease and desist order is "a remedy traditionally fashioned to discontinue ongoing violations or to forestall future violations." *Windjameer Cruises, Inc.,* 19 F.M.C. 112, 123 (1976). Here, as seen, the violations were voluntarily discontinued as of the second visit in January 1983, and there is no evidence to indicate

IV.

No monetary penalty is warranted.

Hearing Counsel relentlessly continues to pursue the imposition of the maximum penalty permitted by law, although the evidence cries out for no penalty at all. Their reasons may be paraphrased this way: The respondent engaged in the business of freight forwarding after March 1981 and because the respondent previously agreed to settle for $5,000, it is only reasonable to assess that amount as the penalty.

The underpinning of Hearing Counsel's argument is what they call the "warning" of March 1981. Their argument concerning the warning, in its entirety,[44] is shown below:

> More importantly, some 31 shipments occurred after a visit from a Commission investigator who told an officer of [the respondent] that its activities could be considered forwarding [The respondent] did not stop forwarding or even question the possibility of a violation. The Commission has held that:
>
> > Once Commission warnings not to engage in ocean freight forwarding have been clearly disseminated to a respondent so that a reasonable man would understand them, or lacking such understanding, would undertake to inquire as to matters he did [sic] not understand, the subsequent act of engaging in freight forwarding without a license in [sic] not a "technical" violation and will not be excused because of alleged lack of willfulness, ignorance, lack of harm or other similar factors.
>
> *Air/Compak Inc.—Independent Ocean Freight Forwarder License Application,* Docket No. 79–98, Initial Decision served August 5, 1980. 23 F.M.C. 224[45] Mrs. Reynoso knew enough to realize that there was a problem with [the respondent's] activities since she disputed [the investigator's] conclusions about possible unlawful freight forwarding during his first visit. [The respondent] can-

a likelihood of resumption. However, it is appropriate to enter a cease and desist order when requested by a respondent as part of the disposition of a proceeding.

[44] Brief, p. 14.

[45] The Initial Decision in that case, hereafter *Air/Compak,* is published at 20 SRR 263 (23 F.M.C. 224). It was adopted by the Commission on September 10, 1980. I do not understand why Hearing Counsel failed to provide the SRR citation in their brief. My curiosity is whetted by the fact that Hearing Counsel seem to be quoting from the SRR headnote rather than the decision. The equivalent language of the decision appears at 20 SRR 268, as follows:

> The holding in this case stands for the proposition that once Commission warnings not to engage in ocean freight forwarding have been clearly disseminated to a respondent so that a reasonable man would either understand them, or lacking such understanding, would undertake to inquire as to matters he does not understand, the subsequent act of engaging in freight forwarding without a license is not a "technical" violation and will not be excused because of alleged lack of willfulness, ignorance, lack of harm or other similar factors.

My inquiry does not end there. As will be seen later, Hearing Counsel chose not to include, in its selection, a significant sentence of the paragraph from which they quoted, beginning after the words ". . . similar factors."

> not now claim that it was not warned or did not understand the warning.
>
> Hearing Counsel recognize that [the respondent] was cooperative in providing documents for [the investigator] to examine. This does not offset the effect of the warning nor did [the investigator's] inspection constitute approval of [the respondent's] activities as Mrs. Reynoso claimed. [References to PFF omitted.]

Where Hearing Counsel go astray is on the facts and the law. The "facts" they rely upon find no support in the record and the legal rationale upon which they rely, while otherwise valid, is inapposite to the facts.

In the first place, with respect to the "facts," it must be manifest by now that the investigator's admittedly vague and non-specific remarks in March 1981 hardly qualify as a warning of any kind, let alone a clear warning.[46] Second, the statement that the respondent "did not . . . even question the possibility of a violation," standing alone, boggles the mind. In juxtaposition with the later statement that "Mrs. Reynoso . . . disputed [the investigator's] conclusions about possible unlawful freight forwarding during the first visit," Hearing Counsel's earlier statement leaves one breathless. Third, Hearing Counsel seem to lay at respondent's door, alone, the claim that it was not "warned" or that it did not understand the "warning." Plainly and simply, it was the investigator who bore witness that he did not clearly and affirmatively inform Mrs. Reynoso that the respondent was a freight forwarder and that she never did understand that the respondent was a freight forwarder. Fourth, there is no claim that the "inspection" constituted approval of the respondent's activities. Rather, it was the investigator's failure to respond to Mrs. Reynoso, within a decent interval after the "inspection" to resolve the questions that had been raised that brought about the reasonable belief on her part that the respondent had passed muster.

Hearing Counsel's reliance on the rationale of *Air/Compak* is misplaced. The facts of *Air/Compak* are nowhere near akin to those in the instant proceeding. The facts are patently distinguishable, a matter of no small moment, especially if one were to go on to read more of the *Air/Compak* holding than proffered by Hearing Counsel (see n. 45, *supra*), where the following is found:

> Further, a civil penalty of at least $5,000[47] is warranted in such cases, where there are no *material* distinguishing facts. 20 SRR 268 (23 F.M.C. 231).

[46] N.b. Hearing Counsel's seeming recognition that the "warnings" were, at best, feeble by their lukewarm characterizations of those warnings: (a) the investigator telling the respondent "that its activities *could be considered* freight forwarding; and (b) the respondent disputed the investigator's "conclusions about *possible* unlawful freight forwarding." [Emphasis supplied.]

[47] At the time *Air/Compak* was decided, each forwarding transaction was treated as a separate unit of offense carrying a maximum penalty of $5,000.

The facts in *Air/Compak*, with respect to "warnings" may be summarized as follows: (1) Air/Compak had filed an application for a freight forwarder's license; (2) one of the principals of Air/Compak had about four years' experience working at the various activities engaged in by freight forwarders; (3) on June 1, 1978, a representative of the Commission's Office of Freight Forwarders discussed the application with that principal, telling him that Air/Compak was not permitted to engage in freight forwarding without a license; (4) one week later, on June 7, 1978, the Commission's Chief, Office of Freight Forwarders, notified Air/Compak, *in writing*, saying: that its application for a license had been received; that the applicant's attention was directed to section 44 of the Shipping Act, 1916, which prohibits freight forwarding without a license; that " 'Carrying on the business of forwarding' is defined under Section 510.2 of the *enclosed*[48] General Order 4 and Section 1, Shipping Act, 1916;"[49] that if Air/Compak engaged in freight forwarding prior to the issuance of a license, it would be subject to penalties provided by law; (5) thereafter and notwithstanding the clear warnings, Air/Compak engaged in forwarding activities; (6) that on December 18, 1978, during an inspection, a Commission investigator[50] discovered freight forwarding activity which occurred after the letter of June 7, 1978, and he informed Air/Compak not to conduct such activity without a license in the future; and (7) on January 30, 1979, Air/Compak was found out by another investigator to have engaged in yet more freight forwarding activity after the December 18, 1978, warning.

It does not take the wisdom of a Solomon to recognize the contrast between the clear and repeated cautioning of Air/Compak and the tepid euphemisms here.

Finally, with respect to "warning," it must be said that a situation of the kind disclosed here, which may be a worst case scenario, is unlikely to recur. I take official notice of the Commission's Director of Programs' memorandum to Bureau Directors, dated December 19, 1983. The subject of the memorandum is "Interim Procedures for Handling Investigative Reports." The following instructions concerning the need for written warnings before instituting penalty procedures in certain kinds of cases (of which this is one) may be found at page 6;

Administrative Closing

> Hearing Counsel may recommend discontinuance with reasons of a referred matter by referring the matter to the substantive bureau or Bureau of Investigations which shall prepare and transmit a warning or cautionary letter or a letter informing the subject that the matter is closed. *Generally, a warning letter should issue for an insignificant violation, especially one which occurred prior to an official warning (written notification) or other non-serious*

[48] Emphasis supplied.

[49] The unnumbered section preceding section 2 of the Shipping Act, 1916, is also called section 1.

[50] The same person identified in n. 9, *supra*.

situations. A number of other possible situations arise where a warning letter may be appropriate.[51]

Presumably, the warning letter to unlicensed persons believed to be engaged in forwarding, sent pursuant to those Interim Procedures, includes copies of relevant portions of the statute and regulations governing forwarding activities. This would comport with what the facts in *Air/Compak* indicate to be standard practice for persons who apply for forwarding licenses.[52] Obviously, if this detailed information is given to persons who have extensive and intensive experience in forwarding, can any less be given those, like respondent, who are not well oriented?

Unfortunately, for respondent, those Interim Procedures did not apply to formal proceedings already instituted. It is unfortunate, too, that Hearing Counsel did not understand the worth of the Interim Procedures in evaluating the mitigating factors present in this case. Even more unfortunate is the fact that, after hearing the evidence showing that there was no effective communication of a warning; showing fewer forwarding transactions than claimed during the settlement process; and showing the deterioration of the respondent's financial condition, Hearing Counsel did not soften its demands.[53]

I have already mentioned several factors bearing on mitigation, e.g., respondent's financial condition and the number of persons dependent upon profits from the business. There are others, all of which confirm my prehearing impression that the settlement was unreasonable.[54] But in view of my determination that a monetary penalty is unwarranted because the respondent was not adequately forewarned and there is convincing evidence

[51] Emphasis supplied.

[52] N.b. To be eligible for a license, an applicant must demonstrate that its "qualifying individual has a minimum of three (3) years of experience in ocean freight forwarding in the United States." 46 CFR 510.11(a)(4).

[53] While it is not my intent to intrude into the settlement process (except as I am required, as for example, when called upon to rule on a proposed settlement) and substitute my judgment for that of Hearing Counsel, I am compelled to direct some remarks to Hearing Counsel's recommendation for a specific dollar amount to be assessed by me. Just as the amount of settlement of claims is Hearing Counsel's prerogative, the function of the imposition of a penalty is the province of the trier of the facts. It is my preference that this task be performed without prompting. This does not mean, of course, that Hearing Counsel should not express its general views, based upon the record, concerning the severity of an offense.

[54] Hearing Counsel contend that the $5,000 penalty, to be paid out over a period of three years under the settlement agreement, was and continues to be reasonable. They say that "this penalty was based on considerations including ability to pay." Brief, p.14. Whatever those other considerations may have been, the only one which seems to have survived the hearing, as a point of their argument, is "ability to pay." However, one may search Hearing Counsel's proposed findings of fact in vain to uncover even a scintilla of evidence indicating an "ability to pay." When the settlement was submitted for approval, Hearing Counsel tendered an affidavit prepared by a Commission accountant who said that he had examined the respondent's 1982 income tax returns and came to the conclusion that the respondent could pay $5,000, but only if spread over three years. Hearing Counsel did not offer the 1982 return in evidence, nor did it produce a witness to testify on the subject of "ability to pay." My evaluation of the 1983 tax return and the testimonial evidence is that the assessment of any penalty would work a hardship on the respondent and its officers.

that, if properly informed, the respondent would have stopped the unlawful forwarding at once,[55] it is unnecessary to belabor the mitigation issue.

ORDER

The respondent, Jorge Reynoso Import and Export Company, having been found to have violated section 44(a) of the Shipping Act, 1916, by carrying on the business of forwarding without a license issued by the Federal Maritime Commission during the period from January 1982 through December 1982, is ordered to cease and desist and thereafter to refrain from carrying on the business of forwarding unless and until such time as there is issued to respondent and in effect a license authorizing respondent to carry on the business of forwarding.

The assessment of a civil penalty having found to be unwarranted, it is further ordered that no assessment be imposed upon the respondent.

(S) SEYMOUR GLANZER
Administrative Law Judge

[55] In their argument, Hearing Counsel write "We have no evidence whether [the respondent] is acting as a freight forwarder." Brief, p. 15. The short and simple rejoinder to that remark is that the evidence of record shows that the respondent stopped forwarding activity after the second visit.

FEDERAL MARITIME COMMMISSION

DOCKET NO. 84–6

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

NEW YORK SHIPPING ASSOCIATION, ET AL.

DOCKET NO. 84–8

PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO MARINE MANAGEMENT, INC.

v.

NEW YORK SHIPPING ASSOCIATION

Initial Decision adopted with factual and legal clarifications and modification to remove all "excepted" treatment for transhipped/rehandled cargo.

Clarification made with respect to application of Maritime Labor Agreements Act and remedies available to PRMSA/PRMMI. Agreement No. LM–86 modified and schedule prescribed for effectuating necessary modifications and assessment adjustments. General procedure established for "phasing out" of special treatment for transshipped/rehandled cargo.

Appearances as below, except for the following additional appearances:

Kevin Marrinan for Intervenor ILA.

Edward J. Sheppard for Intervenor Massachusetts Port Authority.

REPORT AND ADOPTION WITH MODIFICATIONS OF INITIAL DECISION

February 27, 1985

By the Commission: (Alan Green, Jr., *Chairman*; James J. Carey, *Vice Chairman*; Edward J. Philbin, *Commissioner*. Thomas F. Moakley, *Commissioner*, dissenting in part. Robert Setrakian, *Commissioner*, concurring and dissenting.)

These consolidated proceedings [1] came before the Commission on Exceptions to an Initial Decision (I.D.) of Administrative Law Judge Norman D. Kline (Presiding Officer or ALJ) by New York Shipping Association (NYSA) and its members, International Longshoremen's Association, AFL–CIO (ILA), Puerto Rico Maritime Shipping Authority (PRMSA) and Puerto

[1] The complaints in Docket No. 84–6 and Docket No. 84–8, filed on February 22, 1984 and February 27, 1984, respectively, were consolidated by the Presiding Officer for hearing and decision. The complaint in Docket No. 84–8 was subsequently amended, for purposes of clarification, on May 15, 1984. (I.D. 5.)

Rico Marine Management, Inc. (PRMMI), the Port Authority of New York and New Jersey (Port Authority), Sea-Land Service, Inc. (Sea-Land), a member of NYSA appearing through separate counsel and also acting as an intervenor in Docket No. 84–8, Maryland Port Administration (MPA), Massachusetts Port Authority (Massport), and Hearing Counsel. The Presiding Officer found that the assessment formula used by NYSA and the ILA to fund certain fringe benefits for longshoremen under Agreement No. LM–86 (Agreement or LM–86) was "unfair and unjustly discriminatory" to PRMSA/PRMMI and the Port Authority and directed that it be modified and that prospective credits be granted PRMSA/PRMMI for payments under the present formula made between the time of the filing of its complaint and the conclusion of these proceedings. The Presiding Officer denied certain modifications to the present formula requested by PRMSA/PRMMI, interest on the credits made, and reparations for assessments made between the formation of the agreement and the filing of PRMSA/PRMMI's complaint. Replies to the exceptions were filed by all of the aforementioned parties. We heard oral argument on January 10, 1985. Under the Maritime Labor Agreements Act of 1980, P.L. 96–325, 94 Stat. 1021 (1980), our "final decision" must be issued by February 27, 1985, *i.e.*, within one year of the filing of the complaint.

Before turning to our disposition of these proceedings, we feel that a brief discussion of the nature of LM–86 and the modifications found necessary by the ALJ may be helpful.

BACKGROUND

These proceedings involve the lawfulness under the Maritime Labor Agreements Act of 1980 (MLAA)[2] of the whole tonnage assessment formula used by the NYSA and ILA to fund fringe benefits under Agreement No. LM–86, for the period from October 1, 1983 to September 30, 1986. Under this formula assessments are levied against carriers, with certain exceptions explained below, with respect to each ton of cargo carried in and out of the Port of New York/New Jersey. The present rate of assessment is $8.90/ton. The benefits funded through the assessments include holidays, vacations, welfare, clinics, pensions, and Guaranteed Annual Income (GAI). The two challenges to the Agreement were filed by the Port Authority and PRMSA, a carrier in the Puerto Rican trade operated by the Commonwealth of Puerto Rico, and PRMMI, its operating agent.

The Port Authority essentially claims that LM–86 is "unjustly discriminatory" and "unfair" to the Port of New York/New Jersey because it places an improper burden on the Port's ability to compete for cargo with other

[2] Under the MLAA, assessment agreements become "effective" upon filing with the Commission, subject to subsequent "modification or disapproval" and assessment adjustments upon a finding of "unjustness" or "unfair discrimination" to shippers, carriers, or ports. the original MLAA also contained "detriment to commerce" as a disapproval standard, but this standard was removed by the Shipping Act of 1984, Pub. L. No. 98–237, 98 Stat. 67 (1984).

North Atlantic ports. PRMSA/PRMMI claims unfairness and unjust discrimination to it as a carrier and to the shippers of Puerto Rico. Both the Port Authority's case and that of PRMSA/PRMMI are based on the alleged unfairness of the present formula. Specific challenges are made concerning allegedly unlawful "special privileges" granted under that formula whereby certain activities (handling of empty containers, stuffing/stripping containers, and maintenance work at marine terminal facilities) are unassessed, and certain other activities are assessed at an "excepted" or man-hour rate (*e.g.*, transshipped/rehandled cargoes, domestic trade cargoes).

The Port Authority seeks modification of the present assessment formula to fund most costs (about two-thirds) on a man-hour basis and the remainder on a per-container basis. PRMSA/PRMMI seeks modification of the formula to allow most costs (about two-thirds) to remain on a tonnage basis, but to assess the remainder on a man-hour basis. PRMSA/PRMMI also seeks an additional 25% reduction for cargo moving in the Puerto Rican trade on the tonnage portion of the new assessment, assessment adjustments for the period from the filing of its complaint to date of Commission decision, plus interest on its adjustments, and reparations from October 1, 1983, the date of LM–86, to February 27, 1984, the date of the filing of its complaint.

Following extensive discovery, 10 informal telephonic conferences, 2 formal pre-hearing conferences, seven days of evidentiary hearings, and the filing of briefs, the Presiding Officer issued his Initial Decision on November 9, 1984.

In his Initial Decision the ALJ found the whole tonnage formula which is presently the basis of LM–86 "unfair and unjustly discriminatory" to the Port Authority and PRMSA/PRMMI. He ordered the Agreement modified substantially along the lines suggested by PRMSA/PRMMI, but without the additional 25% reduction for the tonnage portion of the new assessment for cargo moving in the Puerto Rican trade. While granting PRMSA/PRMMI assessment adjustments for the period from the date of filing its complaint to date of Commission decision, he denied interest on the adjustments and reparations from the date of LM–86 to the date of the filing of PRMSA/PRMMI's complaint.

We find that the Initial Decision is, in general, well-reasoned, supported in law and by the preponderance of the evidence of record, and reaches the proper resolution of the matters in issue. We therefore adopt it, except for certain factual and legal clarifications which we here make, and for the treatment of transshipped/rehandled cargo, for which we find all excepted treatment is unlawful and should be removed.

We turn now to a detailed consideration of the Initial Decision and the exceptions and replies to exceptions.

THE INITIAL DECISION

Respondents' Affirmative Defenses

In his Initial Decision, the Presiding Officer first disposed of several affirmative defenses raised by NYSA and ILA going to the ability of the Commission to deal with the merits of the complaints—(1) claims of waiver, estoppel and *res judicata* based on the Commission's approval of a settlement between NYSA, ILA and PRMSA/PRMMI's predecessor carrier and approval of a whole tonnage formula in 1974; (2) the timeliness of the complaints here as a challenge to a formula which NYSA and ILA assert has existed since 1974; (3) the binding effect of the collective bargaining agreement and the grievance and arbitration procedures; and (4) the inapplicability under the MLAA of any other substantive provisions of the shipping statutes and the unavailability of reparations as a remedy for periods prior to the time of the filing of PRMSA/PRMMI's complaint. The Presiding Officer rejected all but the last category of affirmative defenses, holding that he had authority to entertain the claims on the merits but that the Port Authority's remedy was limited to modification or disapproval of the assessment agreement (the only relief they had requested), and that PRMSA/PRMMI's relief was confined to disapproval or modification and one year's prospective assessment credits (I.D. 8–38).

More specifically, the Presiding Officer found: (1) PRMSA's predecessor's settlement dealt only with the 1969–1977 period and was not intended to be a permanent bar to later challenges, and that the Commission had never approved or investigated the assessment agreements for 1971–1974 and 1974–1977 on their merits, so that no defenses could be based on their "approval" (I.D. 21–26, 33–38); (2) each three-year agreement must be treated as a separate agreement regardless of its terms, in accordance both with Commission precedent and the practice of the parties in renegotiating and refiling them every three years (I.D. 12–16); (3) the MLAA was intended to preserve the right of parties to collective bargaining agreements (and others) to challenge the lawfulness of assessment provisions, and the collective bargaining agreements' grievance procedures were inadequate and arbitration irrelevant with respect to PRMSA/PRMMI's claims of unlawful contract provisions under federal law (I.D. 16–20, 26–33); and (4) the MLAA established limited standards of agency review for assessment agreements and created assessment adjustments and disapproval or modification as exclusive assessment agreement remedies and specifically removed application of other substantive standards and remedies (I.D. 38; 59–65).

Applicable Legal Standards

After a discussion of the contentions of the parties (I.D. 38–52; see also 3–7), the Presiding Officer established "preponderance of the evidence" as the standard for burden of proof in the proceedings (I.D. 52–54), and "benefit/burdens" as the applicable general test for judging the

lawfulness of the assessment formula's application to different categories of "assessees." (I.D. 54–58).[3] As far as the Port Authority is concerned, the standard is conceded to be "port discrimination" as enunciated in cases like *Boston Shipping Association* v. *FMC*, 706 F.2d 1231, 1240 (1st Cir. 1983) and *Port of New York Authority* v. *AB Svenska et al.*, 4 F.M.B. 202 (1953). The Presiding Officer clarified this standard by holding that "unfairness" or "unjust discrimination" to a port need not involve "naturally tributary" cargo or "adsorptions" but might also include such lesser factors as "limitation of ability to participate in a market" or "clear probability of substantial harm." (I.D. 65–69).[4] The Presiding Officer then found it unnecessary to make a specific determination as to whether the Shipping Act, 1916 (1916 Act) or the Shipping Act of 1984 (1984 Act) applies to the proceeding since he determined that the provisions of the MLAA applicable to these proceedings are substantially the same under both Acts. (I.D. 69–70).[5]

The Port Authority's Case

The Presiding Officer then turned to the merits of the Complainants' cases. He concluded that the Port Authority has carried its burden of proof by demonstrating by the "preponderance of the evidence" that the present tonnage assessment formula is unfair and injustly discriminatory to it because it injures the Port by placing it at a competitive disadvantage, especially with regard to Midwest containerized cargo, such disadvantage resulting from a $200–$300 cost differential on containerized cargo which could be alleviated if NYSA/ILA would modify their formula to one recognizing both man-hours used and cargo or containers transported. He also found that "the facts are that the Port of New York/New Jersey competes with other ports, especially with Baltimore, that the differential handicaps the Port in its efforts to attract carriers to serve New York rather than Baltimore, for example, and that the differential is unnecessary, being the product of an unreasonable and unfair formula, which taxes

[3] Although NYSA and ILA at first contested this as the proper test, they suggested no other and concluded that it is unnecessary to decide whether that test still applies because the current formula satisfies that test. (I.D. 44; see also NYSA op. br. at 127). That NYSA/ILA finally admit that "benefits/burdens" is the proper test may be seen from their criticism on their Reply to Exceptions of a formula suggested by the Port Authority: "Suffice it to say that it is patently illegal because it doesn't even make a pretense of balancing benefits and burdens." (Reply to Except. 2).

[4] The ALJ discounted, as beyond the scope of the proceedings, the creation of a "superfund" to be raised by assessments at all ports as a remedy for possible discrimination against the Port of New York. Concern over such "superfund" had been raised by MPA and Massport. (I.D. 51, fn. 18).

[5] NYSA, PRMSA/PRMMI, and Hearing Counsel would have the Commission apply the 1916 Act, while the Port Authority and Sea-Land contend that the 1984 Act applies (see I.D. 69). Although we agree with the ALJ that, as a practical matter, it makes little difference in most instances whether we apply the MLAA before or after the 1984 amendments, we will make specific findings under the MLAA before such amendments to insure that "manifest injustice" does not occur, as could be the case, at least under one interpretation with respect to the requirements relating to the payment of interest under the 1984 amendment. See FMC Notice, 49 Fed. Reg. 21798 (May 23, 1984) and pages 113, 116, *infra*.

carriers in inverse proportion to the amount of labor used for all costs." (I.D. 73).

The Presiding Officer explained that his findings were based upon written, documentary, and testamentary evidence, as well as inferences drawn from such evidence and credibility determinations with respect to testifying witnesses. (I.D. 74–75). Among his critical findings supporting the Port Authority's case are:

(1) Although the assessment formula at New York in general provides for assessment on a whole tonnage basis, there are numerous exceptions, both with respect to certain "excepted" cargoes, which are assessed on a "man-hour basis," and "special status" cargoes, which are assessed by "special rates of payment or special status with regard to measurement." (I.D. 78–79).

(2) "Since empty containers, by definition, do not contain any assessable tons, no fringe benefits are collected from the handling or movement of empty containers through the Port of New York/ New Jersey." (I.D. 81).

(3) In most other ports, assessments are on a man-hour basis, and hence fringe benefit assessments are collected there on empty containers. (I.D. 81–82).

(4) Empty containers constitute 32% of all containers handled at the Port of New York and 29% of containers in the Far East Trade. (I.D. 82).

(5) There is no assessment at the Port of New York on stuffing and stripping containers, even though containers which are stuffed and stripped required 3 times as many man-hours as "throughput" containers. Assessment at other ports, including Baltimore, reflects man-hours used and is proportional to their use. (I.D. 82–83).

(6) No assessment at New York is made for man-hours used in maintenance work since assessment is on a tonnage basis, yet one carrier used between 25% and 30% of its over one million man-hours on such work. (I.D. 83).

(7) "A tonnage assessment assesses labor costs in inverse proportion to the use of labor. It therefore shifts costs from low productivity operators to high productivity operators because low productivity operators do not pay labor costs in proportion to their use of labor." (I.D. 83)

(8) Tonnage assessments are paid by steamship lines. Man-hour assessments, at New York and other ports, are paid by the direct employer of the longshore labor, *i.e.*, the stevedore or terminal operator. (I.D. 84; 101).

(9) Cost studies of several carriers serving both New York and other ports show that fringe benefit costs per container at New York are much higher than at other ports. (I.D. 85–86).

(10) Carrier officials indicated that they take assessment costs into consideration in making cargo routing decisions. (I.D. 85–86).

(11) One carrier's cost study contains the notation: "The killer is NYSA assessment of $7.50/ton compared to: Baltimore $8.10/Man-hour; Portsmouth $10.35/Man-hour." (I.D. 86).

(12) "On average, a loaded container handled at the Port of New York/New Jersey costs from $200–$300 more in assessments than a similar container handled at other U.S. ports." (I.D. 87).[6]

(13) "If other North Atlantic ports used the NYSA tonnage assessment system for funding fringe benefit requirements, the assessment differential between New York/New Jersey and these ports would be an average of $90 per container." (I.D. 87).

(14) "If the Port of New York/New Jersey were to use a man-hour assessment method to collect fringe benefit obligations, the assessment differential between New York/New Jersey and other North Atlantic ports would average less than $50 per container. The man-hour rates of New York/New Jersey would have been $17.73 based on 1983 collection requirements." (I.D. 87).

(15) "The fact that fringe benefit packages at Baltimore, Hampton roads, and Philadelphia are considerably less costly than at New York does not account for the magnitude of the assessment differential per container at New York, as seen from the preceding comparisons." (I.D. 87).

(16) The Port Authority's primary competition for Midwest containers comes from the Port of Baltimore, but costs and competitive advantages of the two ports, apart from the container assessment differential, are about the same. (I.D. 88).

(17) Steamship lines control cargo routing through the use of intermodal rates and route code systems, port-to-port rate limitations quoted to exclude New York, New York surcharges, and outright denial of a particular port. (I.D. 89).

(18) Ports also solicit sales directly from steamship lines. (I.D. 89).

(19) A shipper has indicated that it can no longer use New York because carriers refuse him space there but attempt to direct his cargo to other ports. (I.D. 89–90).

(20) Steamship lines route cargo away from New York because of assessment differentials. (I.D. 90).

(21) NYSA–ILA Contract Board Members have frequently expressed concern that too high an assessment will divert cargo away from New York. (I.D. 90).

[6] NYSA/ILA claimed that the differential is $150. The ALJ's finding of the $200-$300 cost differential is based to some extent upon the credibility of a witness who contradicted himself in this respect, having earlier testified as to the $200-300 range of cost differential. (I.D. 87). An assessment differential of roughly $250 between Baltimore and New York is corroborated independently by a carrier witness in these proceedings. (See Tr. 847–848).

(22) Twelve different steamship line executives of eleven different lines admitted that the New York tonnage assessment caused them to divert cargo to other ports. (I.D. 91–94).[7]

(23) Of all the containers handled in the Port of Boston in 1983, 47.5% were transshipped through the Port of New York/New Jersey. (I.D. 96).

(24) But for the tonnage assessment at New York, it would be less expensive to move the cargo between New York and Boston by Truck. The payment of assessments for cargo transshipped between New York and Boston on a manhour basis (see page 4, *supra*) results in an assessment cost of $300 per container less than the tonnage assessment for cargo moving by truck between these two ports. (I.D. 96).

(25) The Contract Board, which grants assessment exceptions or special status to cargoes to keep them in the Port or to regain cargo which formerly moved through the port, sometimes grants relief and sometimes denies it. In some circumstances, denial results in further cargo loss to the Port. (I.D. 96–98).

(26) Although the amount of tonnage handled at New York has remained relatively stable, New York's market share with respect to other North Atlantic ports has decreased, particularly with respect to containerized cargoes. (I.D. 98–99).

(27) A fairer system of assessment would distinguish between present fringe benefit costs of employed longshoremen, assessed on a man-hour basis, and "transition costs" of containerization assessed on a tonnage basis, as advocated by the Port's expert witness, Mr. Leo Donovan. (I.D. 101–102).[8]

The Presiding Officer summarized his conclusions with respect to the Port Authority's case, stressing the significance of the limited relief requested by the Port Authority (*i.e.*, some formula adjustment), the strength of carrier admissions respecting cargo diversion from New York, the decreasing proportion of New York cargo vis-a-vis other Atlantic ports, the fact of the $200–$300 container cost differential at New York carrier cost studies which reflect the differential and, at least in one instance, specifically link it with diversion, and the possibility of full funding of assessment costs at New York using several fairer alternative formulas. (I.D. 103–108).

[7] Respondents attempted to discredit these admissions as "alleged statements" and "hearsay." The fact they were made has not been rebutted, "admissions" are not hearsay under the Federal Rules of Evidence, and, in any case, hearsay is not excludable solely on such grounds in administrative proceedings. (I.D. 94; 105–106).

[8] Mr. Leo Donovan suggested several alternative formulas which would reduce the burdens of the assessment at New York by shifting to variants of a combination container/man-hour formula. The Presiding Officer found it unnecessary to choose between the Donovan formulas as he found the formula of PRMSA/PRMMI's economic expert, Dr. Silberman, will give the Port relief, and at the same time is more appropriate in its analysis of categories of assessment benefits/burdens. (See I.D. 101–102, 107–108). Mr. Leo Donovan should not be confused with Mr. Paul Donovan, the Port Authority's counsel.

Problem of Witness Credibility and Evidence Admissibility

The Presiding Officer explained that he found Complainants' cases more persuasive because Respondents improperly attempted to impose a higher standard of burden of proof than preponderance of the evidence and improperly characterized their own officials' admissions as "hearsay". He also found Respondents' witnesses advocating their own self interest to preserve special treatment under the present formula with respect to empty containers or transshipped cargoes less credible than the above discussed carrier admissions. (I.D. 105–108). The ALJ's main findings on credibility, however, were centered around NYSA's economic expert witness, Mr. Sclar. The ALJ found Mr. Sclar not credible in expounding support for a tonnage assessment because he testified in support of a man-hour assessment on the West Coast, failed to make cogent and internally consistent arguments with respect to the characterization of different types of longshoremen's benefits, and contradicted another highly qualified NYSA witness with respect to the apportionment of pension benefits. (I.D. 109–112). In the course of discussing Mr. Sclar's testimony, the Presiding Officer denied a motion of Respondents to strike Exhibit 48, Mr. Sclar's West Coast testimony, on the grounds that Respondents had adequate opportunity at the hearing to re-examine Mr. Sclar with respect to the exhibit. The ALJ pointed out that he and the parties even offered Respondents several additional days to recall Mr. Sclar. (I.D. 113–120).

PRMSA/PRMMI's Case

The Presiding Officer then considered the merits of PRMSA/PRMMI's case. Basically, PRMSA/PRMMI contends that while all containerized cargo benefited equally from containerization, the burdens under the present assessment formula on containerized cargo are not equal. It asserts that such improperly allocated burdens result from a whole tonnage formula, because such a formula imposes on all carriers the costs related to current employment of longshoremen, which should be borne by individual employers rather than the industry as a whole, and also penalizes carriers for efficiencies not related to containerization. The present formula in addition gives favored treatment to certain carriers, like those who operate in the domestic trades and rehandle or transship containers, who pay "excepted" man-hour assessments, and carriers engaged in moving empty containers, stuffing and stripping, and maintenance work, who pay *nothing* toward the fringe benefits of longshoremen engaged in these activities. (I.D. 120–123).

The Presiding Officer cited five critical facts showing unfair distribution of burdens at New York caused by the assessment formula:

(1) In 1982–1983 PRMSA paid $16.1 million under the formula and moved 59,142 containers for an average assessment cost of $272 per container. Another carrier moving ⅓ more containers paid

only $141 per container, and another bigger carrier, moving more than twice the containers of PRMSA, paid $168 per container;

(2) PRMSA employed 2.5% of man-hours at the Port but paid 8.5% of the total assessment;

(3) Three carriers avoided $20 million in assessments because of the special treatment for domestic and transshipped/rehandled cargoes;

(4) PRMSA must pay the assessment costs for stuffing and stripping and handling of empties, because the fringe benefits of longshoremen engaged in these activities are covered by assessments funded under the agreement, and these activities are assessed nothing under the present formula.

(5) In 1982–1983 PRMSA paid $50.74 per man-hour to fund fringe benefits under the formula, whereas the direct wage was only $14 per man-hour. (I.D. 123–127).

The Presiding Officer found a sound theoretical basis for removing such inequities in the formula proposed by PRMSA/PRMMI's expert economic witness, Dr. Silberman. Like the formulas proposed by the Port's expert, Mr. Leo Donovan, the Silberman formula would divide longshoremen's fringe benefits into costs of different types. Dr. Silberman divides fringe benefits costs onto Type I costs, which relate to the current labor costs of presently employed workers, which costs are essentially substitutes for direct wages (holidays, vacations, welfare and clinics) or deferred compensation (pension), and Type II costs, which are industry-wide expenses related to containerization, and include benefits for displaced workers (GAI, and those portions of holiday, vacation, welfare, clinic and pension benefits attributable to GAI recipients). Welfare and clinic benefits for retirees and their dependents and the unfunded portion of pension benefits for retirees would also be treated as Type II costs under Dr. Silberman's approach. (I.D. 174, 176). Type I costs would be assessed on a man-hour basis, and Type II costs on a tonnage basis. Under Dr. Silberman's formula 67% of the costs of assessments would be Type II costs and thus would still be assessed on a tonnage basis. To prevent breakbulk cargo, which is very labor-intensive, from being unduly burdened, however, Dr. Silberman would place a "cap" on breakbulk contributions so that they will not exceed present levels. He would also continue the present special treatment for all activities other than domestic and transshipment transportation, and the transportation of empty containers and stuffing and stripping. (I.D. 127–130). (See also PRMSA/PRMMI Opening Brief, 24–25).

The ALJ rejected Respondents' contention that all ILA men are industry-wide employees for all purposes and thus all fringe benefits may be funded by tons on an industry-wide basis. The facts that ILA longshoremen work for more than one employer and accrue benefits by working 700 hours or achieving GAI credits from different employers do not, he found, mean that all benefits should be paid on an industry-wide basis. Wages, for which fringe benefits are substitutes, are not paid on an industry-wide

basis, and the requirement for eligibility for benefits does not determine who is responsible for labor costs related to the use of eligible employees. (I.D. 133–134).

In examining in detail the special privileges granted to transshipped or rehandled cargoes and domestic cargoes, the ALJ concluded that three carriers, Sea-Land, United States Lines (U.S. Lines), and McAllister Brothers, Inc. barge service (McAllister) are the only beneficiaries, and cost the industry an additional $20 million a year, of which PRMSA pays over $3 million. Transshipped cargoes alone constitute 12% of the containers subject to the tonnage assessment. On transshipped/rehandled and domestic cargoes, Sea-Land paid an average assessment of $23 per container and U.S. Lines $13.05, compared to PRMSA's $272. In fact, Sea-Land and U.S. Lines failed to pay even their direct labor utilization Type I costs with respect to domestic and transshipped/rehandled cargoes, which would have been $6.35 per man-hour, rather than the $5.50 per man-hour presently assessed under the current formula.[9] (I.D. 135–139).

The Presiding Officer rejected the defense that Sea-Land and U.S. Lines require special treatment for transshipped and rehandled cargoes to prevent such cargoes from leaving the Port of New York/New Jersey and thus aggravating the GAI costs at the Port. He found that the additional cost to Sea-Land of paying for these services on a man-hour/tonnage basis is small, that leaving New York/New Jersey would cause major unrealistic modifications of Sea-Land's operations, and that there is no credible evidence to support its likelihood of making such changes. (I.D. 139–142). The ALJ found U.S. Lines' transshipment expanding and unlikely to change because of assessment formula modifications (I.D. 142–143).

The exception for "domestic" cargoes rests upon an assumption that the ALJ found the record does not support—*i.e.*, that these cargoes are marginal based on declining volume and profits and the existence of inland competition. U.S. Lines moves over half a million tons a year in these trades, and pays only an average of $10 per container, compared to PRMSA's $272. There is no credible evidence that U.S. Lines' domestic cargoes will be lost to the Port of New York/New Jersey if a modified version of Dr. Silberman's formula is adopted, the ALJ concluded. He further found that U.S. Lines' vessels involved in the "domestic" movement would make their sailings in any case and that the domestic cargoes are "incremental" in nature, and could thus be carried at very low rates. (I.D. 143–148).

PRMSA, the Presiding Officer found, unlike U.S. Lines and Sea-Land, has already shown actual diversion from New York/New Jersey because of the operations of a competing carrier at the Port of Philadelphia, Trailer

[9] U.S. Lines actually paid even less than this because it pays under a formula which only approximates the $5.50 per man-hour rate. (I.D. 138, 145).

Marine Transport, Inc. (TMT), which does not employ ILA labor and thus does not pay assessments (I.D. 149–150).

The Presiding Officer found no justification for the failure to pay anything toward fringe benefits on the transportation of empty containers and on stuffing and stripping of containers. There is no likelihood, he determined, that a man-hour assessment on these activities would drive work away from the Port. There is already a higher man-hour assessment on these activities at other ports than would exist under Dr. Silberman's formula ($10.49 at Baltimore and $12.28 at Philadelphia as compared to an estimated $6.35 per man-hour at New York under Dr. Silberman's formula). (I.D. 81, I.D. Appendix). Moreover, the stuffing and stripping activity cannot be "lost" to New York because it is mandated by the Rules on Containers. Dr. Silberman and the Presiding Officer would retain the total exemption for maintenance activities because of the substantial likelihood that any payment for that activity would lead to utilization of non-ILA deep-sea (ILA "METRO") labor, which PRMSA already uses, and consequently aggravate the funding situation. (I.D. 150–155).

The ALJ preserved a "man-hour" exception to the Silberman man-hour/tonnage assessment for the transshipment services of the McAllister barge service between New York/New Jersey and Boston/Providence. He found that to assess McAllister under the Silberman formula would kill this service, which depends upon the absence of a tonnage assessment to survive, and would grossly aggravate the GAI situation at Boston. (See page 13, *supra*, findings 23 and 24). It would also, the ALJ found, remove an alternative routing for shippers. A "McAllister exception" does not let the service off free, however, since it would still pay for its Type I benefits under the man-hour portion of the Silberman formula. (I.D. 155–159).[10]

The ALJ made another (and major) departure from the Silberman formula in denying an additional 25% reduction from the tonnage portion of the new assessment for Puerto Riccan cargoes. He did so on the grounds that: (1) Such additional reduction is not supported by quantitative evidence; (2) PRMSA will obtain substantial benefits for the people of Puerto Rico in modifying the basic formula and obtaining assessment adjustments; (3) PRMSA's relief in the past in assessment cases has not gone beyond protecting it against assessments it should not have borne because of lack of responsibility; (4) the MLAA does not contain a "public interest" standard; and (5) the burden on the public might not be affected by the requested 25% reduction in the tonnage charge since PRMSA is in a loss position and has increased its rates some 70% since February, 1981. (I.D. 159–168).

[10] To protect against "unfairness between carriers" all carriers offering competing services with McAllister, including Sea-Land, would be given the same "excepted" man-hour treatment. (I.D. 159).

The Presiding Officer then turned to problems related to the allocation of specific types of fringe benefits to Dr. Silberman's Type I and Type II costs. Such procedure is necessary to assure proper credit adjustments for PRMSA/PRMMI and to provide for proper application of the assessment formula in the future. (I.D. 169).

Insofar as *holiday* payments are concerned, holiday payments for presently-employed workers were allocated to Type I costs, GAI recipients' holiday payments to Type II costs. The ALJ rejected NYSA/ILA's contention that an additional $5 million should have been allocated to holiday payments for GAI recipients for the 1982–1983 contract year on the grounds that the NYSA/ILA witness who so testified (Mr. Fier) was not credible and that Dr. Silberman made the best calculations he could from the evidence submitted by NYSA. (I.D. 170–172).[11]

The Presiding Officer allocated all *vacation* payments between Type I and Type II workers, rejecting NYSA/ILA's contention that two of the vacation weeks should be allocated to Type II benefits as industry-wide costs and obligations, on the grounds that insofar as currently employed workers are concerned, vacations are, like holidays, compensation in lieu of wages and should be paid by the employers of such workers, who have the benefit of their skills, and not by the industry as a whole. (I.D. 172–174).

PRMSA and NYSA/ILA agree that *welfare and clinic* costs should be allocated so that benefits for GAI recipients and for all retirees and their dependents should be treated as Type II costs, but disagree with respect to exact allocation (the difference is $3.1 million). The ALJ accepted Dr. Silberman's allocation as more accurately reflecting that portion of welfare and clinic costs attributable to GAI recipients. Since no contributions are made on behalf of retirees and dependents, he agreed with Dr. Silberman that it would be improper to base GAI upon contributions made to the fund rather than upon benefits received. (I.D. 174–175).

The most difficult allocation problem faced by the ALJ related to *pension* liability. There is theoretical agreement between Respondents and PRMSA/PRMMI that Type I costs include contributions for currently working employees, and that Type II costs include contributions for currently enrolled GAI recipients and the as yet unfunded portion attributable to retirees. There are at least four methods of calculating this unfunded liability for retirees, one suggested by PRMSA's expert, Mr. LoCicero, and three suggested by NYSA's expert, Mr. Camisa. Although the ALJ found all of the methodologies reasonable, he accepted Mr. Camisa's lowest estimate because he felt Mr. LoCicero's method had not been shown to be better and PRMSA had the burden of persuasion, Mr. Camisa's lowest figure was tantamount to a "statement against interest," and its acceptance would

[11] Although Respondents assert that the allocation between Type I and Type II benefits is unnecessary and improper (see page 18, *supra*), they go on to attack some of the allocations made by Dr. Silberman, assuming, *arguendo* that allocation is a proper procedure. (See page 34, *infra*).

cause least disruption of the status quo, and finally, that the unfunded nature of the pension liability and large proportion of retirees was due in some unquantified way to the advent of containerization, the expenses of which are to be borne on an industry-wide basis. (I.D. 175–181).

Lastly, the Presiding Officer allocated NYSA's *administrative costs* in the same proportion as benefit costs in general, *i.e.*, he required that the same proportion be divided between Type I and Type II costs as is divided between them for the total of fringe benefits. The ALJ however directed a separation from administrative expenses of those which relate to a labor contract with a different union and found that the proper allocation to the contract in issue is $7 million. (I.D. 182–183).

The Presiding Officer then summarized what he felt to be the most significant factors indicating the reasonableness of those portions of Dr. Silberman's formula which he had adopted, *i.e.*, those other than the McAllister barge treatment, and the special 25% discount for the Puerto Rican trade:

(1) The willingness to allocate 67% of the benefit costs to Type II benefits, which is contrary to PRMSA's interest.

(2) The cap on breakbulk assessments, which is also contrary to PRMSA's interest, although of benefit to the industry as a whole in reducing GAI costs by retaining work for the Port of New York/New Jersey on breakbulk cargoes.

(3) The willingness to allow maintenance activities to remain free of benefit assessments, in spite of the fact that PRMSA doesn't use ILA deep-sea labor for maintenance work.

The ALJ noted that any hardship from the shift to the Silberman formula could be protected against by the joint NYSA–ILA Contract Board's ability to give special consideration to specific commodities and by the Commission's ability to phase in the increases in assessments for carriers which had formerly enjoyed unjustified special privileges. (I.D. 183–187).

The Presiding Officer then discusses the remedies to be employed in making adjustments in PRMSA/PRMMI's favor, suggesting that a period for verification and resubmission of contested computations to the Commission may be proper. He denied interest, however, as a part of PRMSA/PRMMI's adjustments on the grounds that it is not equitably warranted. (I.D. 187–189).[12]

[12] A good summary of the Presiding Officer's conclusions and reasoning is contained in the final portion of his Initial Decision, which is styled "Ultimate Conclusions" and found at I.D. 189–195. Also useful for quick analysis is the appendix to his decision, which is a graphic display of the effects of the various assessment formulas upon different categories of cargoes and transportation activities.

POSITIONS OF THE PARTIES ON INITIAL DECISION

Exceptions

All of the parties except to some extent to the Initial Decision, their exceptions ranging from minor requests for clarification to full scale attacks on the major findings and holdings of the Presiding Officer.

NYSA/ILA

The most far reaching of the exceptions are those of NYSA/ILA, which assert that the ALJ erred to the extent he ordered any modification of the assessment formula and granted any relief to the Port Authority and PRMSA/PRMMI.

NYSA/ILA's basic attack on the Initial Decision is their contention that the ALJ substituted his own judgment for that of the parties to the assessment agreement without properly finding that the present assessment formula is unlawful. (Brief on Excep. 3–6).

Attack on the Port Authority's Case

In analyzing the Presiding Officer's conclusions with respect to the Port Authority's case, NYSA/ILA contend that the Port Authority has failed to carry its burden of proof on three of the four critical elements necessary to show an unlawful effect on the Port created by the assessment formula. NYSA/ILA acknowledge the existence of competition between the Port of New York/New Jersey and the other North Atlantic ports (Brief on Excep. 8), but contend that the ALJ improperly found the existence of "injury," "proximate causality" of injury due to the formula, and "unreasonableness" of the formula (Brief on Excep. 7–32).

NYSA/ILA contend that the Presiding Officer applied the wrong legal standard in determining the existence of "harm" (Brief on Excep. 8–12). They maintain that the ALJ "confuses the substantive element of injury with the standard of proof needed to establish it" (Brief on Excep. 9), and that the proper standard is "real harm, either existing or certain to occur." *(Id.)* They further contend that in order to show injury, a port must show loss of "naturally tributary" cargo (Brief on Excep. 11–12).

NYSA/ILA then contend that the facts of record relied upon by the ALJ were lacking in probative value because they consisted only of a study showing that New York/New Jersey's share of the market for containerized cargo decreased from 69% to 56% from 1972 to 1982 and testimony of a Port Authority official, who recited statements made by carrier representatives (Brief on Excep. 12–21). They assert that the market share study is as easily explainable by conclusions that consumption demand in New York has not kept pace with that of other ports, or that other ports have been containerizing their breakbulk cargoes at a faster rate than that experienced in New York. Either of these explanations, they maintain, is as likely as the ALJ's conclusion that the loss of market

share is attributable to a shift of container cargoes from New York to other North Atlantic ports (Brief on Excep. 13–14).

NYSA/ILA then contend that the testimony of the Port official, Mr. Robert N. Steiner, which the ALJ had characterized as containing "admissions" (see I.D. 105–106, 94, fn. 30), is not of sufficient probative value because it merely relates his impressions of statements made to him by others and fails to contain quantification of the tonnages involved, specification of the favored ports or in the origins/destinations of the cargoes, particularization of the entities having control over the routing, or indication that the statements, which were made more than a year prior to institution of these proceedings, remain viable today (Brief on Excep. 14–21).

NYSA/ILA then asserts that the record evidence in fact shows lack of injury because it demonstrates that the carriers lack the control over the routing of cargo which would be necessary to divert it away from the Port of New York/New Jersey. They assert that carriers no longer use intermodal rates for 90% of their traffic, and that even where point-to-point rates are used, shipper preference still usually dictates the choice of port. NYSA/ILA further assert that routing cargo away from New York to avoid the assessment there would be self-defeating because lost work in New York would increase GAI there and cause carriers to pay twice—once in New York on remaining cargo and once in the port to which cargo has been diverted (Brief on Excep. 21–23).

NYSA/ILA then turn to the third test of unlawful discrimination against a port—"proximate causality." They maintain that any loss of cargo which New York/New Jersey may have suffered because of the assessment cost differential between that port and other North Atlantic ports is due solely to the higher assessment costs at New York/New Jersey and not to the formula for apportioning those costs. NYSA/ILA make computations which they purport show that even under the modified assessment formula adopted by the ALJ, the differential of assessment costs per container between New York and Baltimore is still in the range of between $131.35 and $227.72.[13] There is no showing, NYSA/ILA assert, that reduction in the differential would help the Port compete for cargo. A straight man-hour formula would greatly reduce the assessment differential per container but would do so at the price of shifting the cost to the breakbulk sector, which allegedly would be unfairly burdened by man-hour assessment (Brief on Excep. 23–31).

Lastly, NYSA/ILA assert that the Port Authority has failed to demonstrate the "unreasonableness" of the present formula since the ALJ's finding that the formula is unreasonable because it "taxes carriers in inverse proportion to the amount of labor used for all costs" (I.D. 73) is based on an error of law borrowed from PRMSA's case (Brief on Excep. 31–32).

[13] NYSA/ILA compute the assessment cost differential per container between New York and Baltimore under the present formula as ranging between $158.58 and $335.02. (Brief on Excep. 27) (see also Excep. Nos. 26–30).

Attack on PRMSA/PRMMI's Case

NYSA/ILA maintain that the Presiding Officer erred in finding their formula unlawful with respect to PRMSA/PRMMI because PRMSA/PRMMI's higher payments under the formula result from its own business judgments, rather than the formula itself. Specifically, NYSA/ILA assert that the ALJ erred in his conclusions that the formula is unfair because it contains no man-hour component and that it gives unwarranted special privileges to certain categories of cargo and transportation activities (Brief on Excep. 32–49).

Insofar as the absence of a man-hour component in the present formula is concerned, NYSA/ILA assert that there is no requirement in law that an assessment formula contain a man-hour component, and that the Commission has approved assessment formulas without such components (Brief on Excep. 33–35). NYSA/ILA claim that the ALJ's treatment of maintenance work and of the cap on breakbulk cargo are admissions that a man-hour component is not necessary even for funding benefits due presently working employees (Brief on Excep. 35–36). They assert that the formula adopted by the Presiding Officer benefits only PRMSA/PRMMI, and that the efficiencies PRMSA/PRMMI claims are being taxed arise only from its use of non-deep-sea ILA workers and non-compliance with the Rules on Containers, not from the employment of more efficient workers. PRMSA/PRMMI, NYSA/ILA assert, is thus able to shift its costs to other container carriers (Brief on Excep. 36–42).

NYSA/ILA's objection to the ALJ's disallowance of "excepted" (*i.e.*, man-hour) treatment for transshipped/rehandled cargoes is based on their contention that the exception is fair because PRMSA/PRMMI can utilize it to the same extent as any carriers which have operations involving transshipment or rehandling. The statute, they assert, forbids discrimination between carriers, not between carrier operations. The exception for the McAllister barge service, a type of transshipment, on the other hand, does, they maintain, create an unlawful discrimination between carriers. To impose a tonnage assessment on transshipment/rehandling, NYSA/ILA maintain, would result in making such operations pay for lost man-hours due to containerization, when they are actually adding man-hours through an activity only tangentially related to containerization and not in the minds of the parties when they negotiated to protect against lost man-hours due to containerization (Brief on Excep. 42–47; see also Excep. 45).

NYSA/ILA contend that the absence of assessments for handling empty containers and stuffing and stripping is justified because all carriers are treated equally with respect to these activities, these activities are not "benefits of containerization," but rather add hours and hence reduce GAI, and that assessing them will drive cargo from the port of New York/New Jersey. (Brief on Excep. 47–48).

NYSA/ILA contend that the excepted (man-hour) treatment of domestic cargo is justified because such cargo is "marginal," that volume is declin-

ing, and that it will be diverted from the Port to move via inland carriers if the exception is removed. (Brief on Excep. 49).

NYSA/ILA maintain that the overall labor cost to PRMSA/PRMMI (*i.e.*, the total of direct wage costs, container royalty, and tonnage assessment) is roughly the same as that of Sea-Land and U.S. Lines, and thus the assessment formula treats PRMSA/PRMMI fairly under the "benefits/burdens" test. (Brief on Excep. 50–53).

NYSA/ILA conclude that, regardless of the legality of the ALJ's decision, it would be virtually impossible to implement because the necessary data could not be collected. (Brief on Excep. 53–54).

Appended to the Brief on Exceptions of NYSA/ILA is a separate listing of some 62 numbered exceptions. To the extent they have not been elaborated upon in the above discussion, they include the following:

(1) The alleged misreading of PRMSA/PRMMI's complaint by the ALJ to include an allegation of diversion of cargoes "naturally tributary" to the Port of New York. (Excep. 1).

(2) The preservation of the "affirmative defenses" to the assessment agreement rejected by the ALJ. (See pages 6–8, *supra*) (Excep. 2).

(3) The characterization of NYSA/ILA's argument with respect to the "burden of proof." (Excep. 3–6).

(4) The ALJ's characterization of the "benefits/burdens" test under *Volkswagen* v. *FMC*, 390 U.S. 261 (1968) (Excep. 5).

(5) The ALJ's reference to an alleged NYSA/ILA "plan," not of record, which they state merely is an intent to reduce the tonnage assessment rate based on projected tonnage increases. (Excep. 13).

(6) An alleged inconsistency in the ALJ's witness credibility rulings. (Excep. 14).

(7) The ALJ's findings with respect to NYSA control over fringe benefit funds, NYSA member control over formulas at other ports, and the amounts of pension and welfare benefits at various ports. (Excep. 15–17).

(8) The ALJ's failure to find that the increase in empty containers is due to trade imbalance. (Excep. 18–20).

(9) The ALJ's failure to find that the handling of empties and the stuffing/stripping of containers are funded through the assessment formula. (Excep. 21).

(10) The ALJ's use of carrier cost studies in connection with the Port Authority's case, which NYSA/ILA claim are flawed in methodology and underlying data. (Excep. 22–25, 39).

(11) The ALJ's findings that New York has lost midwest cargo to Baltimore, that ships discharging loaded minibridge containers on the West Coast pick up the empties at New York, that intermodal ratemaking is the wave of the future, and that carriers generally control routing. (Excep. 31–35).

(12) The Initial Decision's allegedly inconsistent findings with respect to the effect of the assessment on "diversion" from New York by U.S. Lines and Sea-Land, on the one hand, finding that the assessment differential has forced them to divert cargo from New York, and, on the other hand, asserting that removal of the excepted treatment for transshipped/rehandled cargo will not create such diversion. (Excep. 37, 53).

(13) The findings that New York lost frozen meat to Philadelphia because of the tonnage assessment at New York, "New York is an ever-increasing consumption and production area," and that New York has lost a substantial share of cargo and is losing its share of containerized cargo to other North Atlantic ports. (Excep. 40–43).

(14) The treatment of NYSA/ILA witnesses in general, and Mr. Sclar in particular, and the refusal to strike Exhibit 48, Mr. Sclar's testimony in the West Coast case. (Excep. 44, 46–47, 60).

(15) The failure to find that longshoremen are industry employees for all benefit assessment purposes. (Excep. 49).

(16) The failure to find that the domestic trade is declining, rather than expanding. (Excep. 50).

(17) The failure to find that 16 steamship lines, rather than 3, use the McAllister barge transshipment service. (Excep. 51).

(18) The failure to find that U.S. Lines will incur a $14.5 million increase in assessment costs if Dr. Silberman's formula is adopted rather than the $3.5 million increase found by the ALJ. (Excep. 52).

(19) The distinction between Type I and Type II costs, and the allocation between them assuming such distinction is proper (Excep. 58). In this connection NYSA/ILA maintain that a proper allocation of costs shows that the excepted $5.50 man-hour rate fully funds Type I costs. (Excep. 54).

(20) The finding that U.S. Lines' domestic cargoes will not be lost to New York if exposed to a tonnage assessment. (Excep. 55).

(21) The finding that PRMSA/PRMMI has established a case of diversion to TMT because of the NYSA/ILA assessment formula. (Excep. 56).

(22) The finding that $5 million in holiday payments to GAI recipients was already involved in the GAI Fund account. (Excep. 59) (see pages 22–23, *supra*).

(23) The finding that administrative costs properly allocated to the NYSA/ILA labor contract amount to only $7 million. (Excep. 51) (see pages 24–25, *supra*).

(24) Lastly, NYSA/ILA object to certain procedural rulings relating to: (1) subpoenas which they attempted to obtain directed to TMT; (2) carrier cost studies; and (3) testimony by a PRMSA official

(Mr. Carr) relating to alleged diversion of PRMSA cargo to TMT. (Excep. 62).

Hearing Counsel

Hearing Counsel adopt a position similar to that of NYSA/ILA, contending that neither PRMSA/PRMMI nor the Port Authority has made out a case against the legality of the present assessment formula. Hearing Counsel assert that the ALJ misapplied the "benefits/burdens" test as enunciated in *Volkswagen* v. *FMC*, 390 U.S. 261 (1968) and its successor cases, asserting that only a "reasonable relationship" between benefits and burdens is required. They further assert that all container carriers benefited equally from containerization and so should be taxed equally under the formula, as they are under the tonnage basis (Excep. 3–5). Hearing Counsel contend that the ALJ's treatment of maintenance work is inconsistent with his treatment of stuffing/stripping, empties, and rehandled/transshipped containers because all of these activities add work and therefore should be similarly treated. They attack the Type I/Type II cost dichotomy on the grounds that all employees are industry-wide employees for all purposes and thus all costs are industry-wide costs. To the extent the dichotomy is proper, they maintain that container carriers are equitably assessed because even if they overpay for Type I costs, they underpay for Type II costs, just as non-containerized operators overpay for Type II costs and underpay for Type I costs. (Excep. 5–7).

Insofar as the Port Authority's case is concerned, Hearing Counsel contend that the Port has failed to show that it has lost "naturally tributary" cargo which should have moved through New York/New Jersey, and that such showing is a legal requirement of its case. It must also show, they assert, that any cargo loss was the result of an "unjust" diversion. The essential elements missing from the Port Authority's case, Hearing Counsel assert, are a showing that the assessment formula was the "proximate cause" of cargo loss, and that the loss, if any, was unreasonable. The Port Authority, Hearing Counsel contend, has shown neither that the assessment formula was the sole cause of the higher container handling costs at New York, or that it is the sole cause of New York's declining market share. (Excep. 8–13).

Sea-Land

Sea-Land also generally supports NYSA/ILA, and contends that the present formula has not been shown to be unlawful. Insofar as PRMSA's case is concerned, Sea-Land contends that the ALJ improperly and inconsistently held that a tonnage formula is unlawful *per se*, and that his findings that excepted or exempt treatment for certain cargoes or types of activities is not justified are an improper shift of the burden of proof, and contrary to the preponderance of record evidence. (Excep. 3–9). Sea-Land contends that the excepted treatment of relay cargo is justified because Sea-Land

pays for its direct costs on a man-hour basis and adds, rather than reduces, man-hours. (Excep. 9–11). Sea-Land maintains that it can easily shift its operations to other ports to avoid paying a tonnage assessment at New York/New Jersey and has done so in the past, and that the records shows it would be "prohibitively expensive" for it to stay in New York/New Jersey if it had to pay such assessment. (Excep. 11–16). Sea-Land asserts that the Initial Decision's excepted treatment of the McAllister barge service is inconsistent with its denial of excepted treatment to relay and transshipment services in general. (Excep. 17–18).

Insofar as the Port Authority's case is concerned, Sea-Land contends that the Port has failed to show that it has been injured by the assessment formula at New York since it has not shown that the formula, rather than the total costs at New York, is responsible for any diversion from New York, or that carriers have the ability to control cargo routing. The record, Sea-Land asserts, is to the contrary. Sea-Land also contends that the ALJ's conclusion with respect to diversion of cargo from New York/New Jersey by Sea-Land in the Port Authority's case are inconsistent with his conclusions that such diversion would not occur as a result of the removal of the transshipment/rehandling exception in PRMSA's case (Excep. 21–25). Sea-Land contends that the ALJ erred in choosing another assessment formula over the present one merely because it is "fairer." (Excep. 26–27).

Lastly, Sea-Land asserts that the Commission cannot modify the Agreement, as opposed to directing the parties to modify the Agreement, and, in any case, should allow the parties to work out any modification themselves, if such proves to be necessary. (Excep. 28–32).

PRMSA/PRMMI

PRMSA/PRMMI excepts to only four conclusions of the Initial Decision: (1) the denial of a 25% discount from the tonnage component of the assessment for the Puerto Rican trade; (2) the exeption (*i.e.*, man-hour assessment) created for the McAllister barge service and competitive services; (3) the denial of interest on the adjustments due PRMSA/PRMMI for the period from date of filing its complaint to date of decision; and (4) the denial of reparations for the period from formation of the assessment agreement to filing of the complaint.[14]

PRMSA/PRMMI asserts that the 25% reduction for the Puerto Rico trade is justified because of the unique problems of the Puerto Rican economy and the Commission's recognition of Puerto Rico's problems in rate and other assessment cases. (Excep. 4–10). PRMSA/PRMMI contends that the Presiding Officer erred in failing to give proper weight to the Commission's actions and articulated reasons for those actions in earlier

[14] PRMSA/PRMMI has chosen not to pursue its contention that the allocation of pension costs was improper under one of the formulas outlined by Respondents' witness Mr. Camisa and adopted by the Presiding Officer. (Excep. 4, fn. 2).

cases. It asserts that the removal of the "public interest" standard from the MLAA does not prevent the Commission from considering the welfare of Puerto Rico under the "unfair" and "unjustly discriminatory" provisions, and that PRMSA/PRMMI's recent rate increases, far from showing that PRMSA/PRMMI is not harmed by the assessment formula, show that the failure to grant the 25% reduction would cause greater harm. PRMSA/PRMMI also states that it requires relief in addition to that granted by removing the special privileges, and that the 25% reduction is based on expert judgment similar to that which the Commission has exercised in favor of the Puerto Rican trade in the past. (Excep. 10–18).

PRMSA/PRMMI objects to the McAllister exception because it results in making other carriers pay for McAllister's fringe benefits solely to preserve a service which is not necessary fully to fund all fringe benefits. The exception will extend not only to McAllister but competing carriers, including new ones. If cargo can move more cheaply by truck absent the exception, if should do so, and there is no showing of shipper support for McAllister's service. PRMSA/PRMMI suggests the possibility of phasing in a man-hour/tonnage assessment or freezing assessment at the present revenue level to protect against hardship. (Excep. 18–27).

PRMSA/PRMMI asserts that it has an absolute right to interest under the MLAA (Excep. 28–32), but that even if the award of interest were discretionary, the facts here show it should be granted. (Excep. 32–55).

PRMSA/PRMMI lastly argues that its claim for reparations for the period between the creation of the assessment formula agreement and the filing of the complaint is preserved by the MLAA, as shown by its legislative history and *California Cartage Co., Inc.* v. *United States,* 721 F. 2d 1199 (9th Cir. 1983), *cert. denied,* 53 U.S.L.W. 3230 (U.S. Oct 2, 1984) (*Cal Cartage*). (Except. 35–40).

Port Authority

The Port Authority agrees with the conclusions of the Initial Decision with respect to the unlawful effect of the assessment formula on the Port of New York/New Jersey, but excepts to the failure of the Initial Decision to adopt the formulas proposed by its expert, Mr. Leo Donovan, which would have allocated only GAI and some GAI-related costs on a per container basis, and funded the costs for other benefits on a man-hour basis. The Port Authority's latest proposal would impose a $9.00 per man-hour charge on all uses of labor, including maintenance and assess container cargo a flat $87.96 per container charge. The Port Authority would remove all exceptions and exemptions except the $.05 per box rate for bananas, and assess transshipped cargo the per container rate only once. The Port Authority specifically charges that the exemption for maintenance work is unjustified, and that the excepted treatment of the McAllister barge service is discriminatory and an unlawful burden on other carriers. The Port Authority concludes that the formula adopted by the ALJ does not

sufficiently remove the unlawful discrimination against the Port of New York/New Jersey, and that the formula it proposes will do so and at the same time be of greater benefit to PRMSA/PRMMI than Dr. Silberman's formula.

Other Exceptions

MPA excepts generally to the Presiding Officer's conclusions with respect to the Port Authority's case, asserting that he improperly ignored cases relating to cargo diversion and absorptions and maintaining that the Port Authority's problem of lost cargo relates, not to the formula, but to the overall size of the benefit package at New York compared to that of other ports. MPA also expresses continued concern over the use of a "superfund" as a possible remedy in assessment cases.

Massport urges that if the Presiding Officer's approach is adopted, his treatment of transshipment services between New York and Boston (see I.D. 155–159, esp. fn. 43; and 21, *supra*) be clarified to insure that all transshipment between the two ports, not only those of the McAllister barge service, be assessed on an "excepted" man-hour basis. Transshipment, Massport asserts, is a substantial and expanding service upon which the Port of Boston depends.

Replies to Exceptions

All parties have filed replies to exceptions to the Initial Decision, the most lengthy being those of PRMSA/PRMMI and the Port Authority, the Complainants, who largely prevailed before the ALJ.

Port Authority

The Port Authority reaffirms its position that the ALJ properly found that the present assessment formula is unfair and unjustly discriminates against the Port. It details 13 specific factual findings which the ALJ made which it claims constitute the necessary evidence to support his conclusion. (Reply to Excep. 2–4). It reasserts its contentions that the "naturally tributary" concept is not applicable, that the Port's limitation on its ability to compete is legally cognizable injury, and that the Port has in fact shown actual cargo loss. (Reply to Excep. 5–8). The Port Authority states that the statements made by various carrier officials to Mr. Steiner were admissions of considerable value, which were not challenged by cross-examination or presentation of the "admitters" as witnesses. The one "admitter" who was presented as Respondents' witness was not even examined on the matter. (Reply to Excep. 7–8). In response to specific errors alleged by NYSA/ILA on exceptions, the Port Authority asserts:

(1) The $100–300 container cost differential is admitted by one of Respondents' own witnesses, and the lower $158.58 differential is based upon an admittedly erroneous productivity figure. (Reply to Excep. 9).

(2) The formula, rather than the greater costs at New York, is responsible for the differential. (Reply to Excep. 9–10).

(3) Carriers diverting cargo from New York are not worried about GAI increases. Any increase in GAI caused by diversion would be minimal compared to costs savings from the diversion. (Reply to Excep. 10–11).

(4) It is absurd to contend that a reduction in cost differential does not ease competitive disadvantage because a differential which could cause diversion still remains. (Reply to Excep. 11).

(5) The record does not support NYSA/ILA's assertion that carriers don't control routing because 90% of container traffic moves under port-to-port rates. The record evidence does not support the 90% figure and, moreover, shows that lines do control traffic, even under port-to-port rates. (Reply to Excep. 11–12).

Due weight must be given to the ALJ's credibility determinations, the Port Authority asserts, which show from his observation and consideration that NYSA/ILA's witnesses in general were not credible. (Excep. 12–13).

The New York/Boston transshipment service should, the Port Authority maintains, be treated like any other transshipment service and, under the formula suggested in the Port's Exceptions, would be taxed substantially less than under the ALJ's formula. The Port Authority ends its Reply to Exceptions with a reiteration of its argument in support of its latest proposed formula. (Reply to Excep. 13–18).

PRMSA/PRMMI

PRMSA/PRMMI contends that the ALJ properly found that the present formula was unfair and unjustly discriminatory in its general treatment of "benefits/burdens," and that this unfairness is exacerbated by additional special favoritisms.[15] Contrary to NYSA/ILA's position, PRMSA/PRMMI asserts that the ALJ found the present formula unlawful because of its basic unfairness shown on the record, not because Dr. Silberman's formula was better. Dr. Silberman's formula was adopted because, once the present formula was shown to be unfair, it appeared to be the best way to remedy the defects. (Reply to Excep. 5–7).

PRMSA/PRMMI contends that the Presiding Officer properly found the present formula unlawful because it improperly assigned Type I costs and penalized efficiencies having nothing to do with the problems of containerization which the tonnage formula was designed to meet. Dr. Sliberman's alternative formula recognizes the distinction between current individual employer costs and industry costs and does not penalize carriers

[15] The bulk of PRMSA/PRMMI's comments is directed to the exceptions of NYSA/ILA. PRMSA briefly challenges Sea-Land's assertion that the Commission cannot legally modify the agreement, and Hearing Counsel's support of NYSA/ILA's position. The "special treatment" for transshipment cargo of concern to Sea-Land and Massport PRMSA/PRMMI treats in response to similar arguments by NYSA/ILA. (See Reply to Excep. 4–5).

for efficiencies unrelated to containerization. It also is "neutral" with respect to the breakbulk sector by freezing breakbulk's contribution at the present level. (Reply to Excep. 7–17).

PRMSA/PRMMI contends that NYSA/ILA's error with respect to carrier responsibility is caused by NYSA/ILA's use of the word "productivity" to include both innovations related to containerization loading/unloading and efficiencies not so related, but having to do with non-loading/unloading functions—*i.e.*, handling of empties, stuffing/stripping, and maintenance. PRMSA/PRMMI argues that its efficiency is so great that the proper calculations show that even with the exclusion of non-loading and unloading functions, PRMSA/PRMMI is still about twice as efficient as Sea-Land and U.S. Lines. (Reply to Excep. 17–30).

The Presiding Officer did not find, PRMSA/PRMMI asserts, that a tonnage formula is illegal *per se*; he held that it is unfair here because of the improper allocation of costs in general. The result allegedly would have been different if containerized operations of the different carriers were more uniform and if there were not a substantial Type I component of overall fringe benefit costs. (Reply to Excep. 30–33).

PRMSA/PRMMI attacks NYSA/ILA's argument that the formula is fair because all carriers have the equal opportunity to tailor their operations to take advantage of exceptions. It asserts such argument is legally defective because it is contrary to a court decision and the legislative history of the MLAA, and also factually defective. It further contends that all parties do not in fact have equal ability to take advantage of exceptions. (Reply to Excep. 33–36).[16]

PRMSA/PRMMI contends that practical difficulties in administration of an alternative formula cannot justify the perpetuation of unfairness of the existing formula. It notes, however, that a combined man-hour/tonnage formula has been used by NYSA/ILA in the past and is used by many other ports at the present time. It further notes that the present formula contains many special classifications which require separate calculations, some on a man-hour basis. (Reply to Excep. 36–39).

PRMSA/PRMMI contends that the ALJ properly found the favoritisms which he disallowed to be "unfair and unjustly discriminatory." The "excepted" treatment of transshipped/rehandled cargo was allegedly properly denied because it is not necessary to prevent diversion. PRMSA/PRMMI accuses NYSA/ILA of attempting to create a new justification ("fairness") *post hoc*, which it cannot lawfully do, having invited the Judge to utilize the "diversion" test. They further argue, however, that the exception is not required by "fairness" because GAI, GAI-related obligations, welfare and clinic benefits for retirees and their dependents, and unfunded pension benefits for those now retired are industry-wide costs, a fair share of

[16] PRMSA notes that "NYSA expressly defines 'domestic' to exclude the Puerto Rican trade . . . ." (Reply to Excep. 35).

which must be borne by transshipped/rehandled cargo. (Reply to Excep. 39–44).

The Boston/New York transshipment service for which Massport asserts a broad exception is in fact increasing and will, PRMSA/PRMMI contends, further burden those who must pay for the costs evaded by the carriers taking advantage of the exception. (Reply to Excep. 45–46).

PRMSA/PRMMI maintains that Sea-land mischaracterizes the ALJ's treatment of the handling of the transshipment/rehandling exception. He did not "shift the burden of proof," as Sea-Land contends, but found on the record that the cargo diversion which Sea-Land (and U.S. Lines) claimed would take place under the tonnage assessment would not be likely to occur. PRMSA/PRMMI contends that the evidence of record supports this finding since cross-examination defeated the self-serving claims of the Sea-land and U.S. Lines' witnesses. The facts of record, PRMSA/PRMMI maintains, show that the diversion would not occur, but that if diversion did occur and "only 23.5% of the Sea-Land and U.S. Lines transshipped, rehandled, and domestic activities were returned, the Port's fringe benefit funding program would have been better off in the 1982–83 contract year without the exception." (Reply to Excep. 46–51).

PRMSA/PRMMI claims that the unfairness of the transshipment/rehandling exception is shown by its own proof of already existing diversion of New York cargo by TMT to Pennsauken, New Jersey (a part of the Port of Philadelphia), which NYSA has refused to recognize, while accepting the arguments of Sea-Land and U.S. Lines with respect to a diversion which the record here shows in unlikely to occur. (Reply to Except. 51–54).

PRMSA/PRMMI asserts that NYSA/ILA offer virtually no defense for the continuation of the exception for domestic cargoes. The problem of diversion is the only proferred excuse, and the record shows none. The isolated "statistic" of cargo decline since 1973 which NYSA/ILA highlight is misleading since in fact cargo has shown a steady increase from 1980 to 1983. (Reply to Excep. 55). The record shows U.S. Lines, which receives 95% of the benefits for the domestic cargo exception, will continue to transport such cargo regardless of cost increases because it is incremental in nature. Moreover, even if U.S. Lines lost all domestic cargo, it admitted it would be reasonable to expect that such cargo would be replaced with additional cargoes from the Far East to the East Coast. (Reply to Excep. 54–59).

PRMSA/PRMMI maintains that assessment of empties and stuffing/stripping for direct man-hour costs is not unfair as such activities would pay only their own direct labor costs and nothing for GAI or other industry-wide costs. PRMSA/PRMMI further contends that such assessment will not divert cargo because it would be operationally infeasible and too costly to divert empty containers, and the Rules on Containers forbid "diversion" of stuffing/stripping work. (Reply to Excep. 59–62).

PRMSA/PRMMI appends an "Appendix A" to its Reply to Exceptions in which it responds to the specific numbered exceptions of NYSA/ILA which it feels are not otherwise adequately dealt with and which are significant for decisional purposes as follows:

(1) NYSA/ILA incorrectly state that PRMSA/PRMMI's complaint didn't allege diversion of cargo naturally tributary to New York. (Reply to Excep. 1) (A 2).

(2) The ALJ's ruling on NYSA/ILA's "affirmative defenses" was based not on presence or absence of "changed circumstances," but on the findings that NYSA/ILA's tonnage formula was never approved on the merits, the new agreement (LM–86) gave rise to a new cause of action, and principles of labor law cannot extinguish a carrier's rights under the Shipping Act to challenge an assessment agreement. (Reply to Excep. 2) A 2–3).

(3) The ALJ correctly stated the "burden of proof." (A 3).

(4) The ALJ correctly stated the "benefits/burdens" standard. (Reply to Excep. 3 and 4) (A 3).

(5) The ALJ correctly characterized the present formula as shifting labor costs from low productivity operators to high productivity operators. This is the necessary effect of a whole tonnage formula which includes Type I costs. (Reply to Excep. 12) (A 3).

(6) The ALJ properly found the extent to which credibility determinations influenced his decision. (Reply to Excep. 14) (A 3–4).

(7) NYSA/ILA err in asserting that empties, stuffing/stripping, and maintenance are assessed under the formula. (Reply to Excep. 21) (A 4–5).

(8) The ALJ criticized NYSA/ILA's witnesses, not because they had "strong feelings," but because they were "doctrinaire" and "unduly rigid." (Reply to Excep. 44) (A 5).

(9) The ALJ did not exclude or strike Mr. Sclar's testimony or give it little weight solely because of its inconsistency with his testimony in another proceeding. He give it minimal and proper weight for seven specified reasons. (Reply to Excep. 46) (A 5).

(10) The motion to strike Exhibit 48 was properly denied for the reasons stated by the ALJ. (Reply to Excep. 47) (A 6).

(11) The ALJ did not find that longshoremen were not industry employees for any purpose. He found that certain costs were single employer costs which should not be borne by the industry as a whole. The benefit of containerization is the same for all carriers, with efficiencies differing among them due to their effectiveness of labor use. All carriers continue to pay for continuing costs of containerization under the formula adopted by the ALJ. (Reply to Excep. 49) (A 6).

(12) The ALJ properly found the removal of the transshipment exception would increase U.S. Lines' assessment burden by $3.5 million,

and that the total increase for U.S. Lines would be $6.9 million. He properly declined to find that U.S. Lines' assessment will actually increase by $14.5 million. (Reply to Excep. 52) (A 7–8).

(13) The ALJ properly found that transshipped/rehandled and domestic cargoes do not even pay their own Type I costs under the proper allocation of Type I costs under the proper allocation of Type I and Type II costs. (Reply to Excep. 54) (A 8).

(14) NYSA/ILA were not prejudiced by the ALJ's failure to subpoena data from TMT since NYSA/ILA had adequate opportunity to test PRMSA/PRMMI's diversion claims by cross-examining PRMSA/PRMMI's witnesses. The ALJ also properly disregarded arguments concerning PRMSA/PRMMI's purported loss of Baltimore cargo to TMT and New York cargo to Sea-Land since the argument was based on meaningless statistics. (Reply to Excep. 56) (A 8–9).

(15) The ALJ made properly supported findings with respect to the apportionment of Type I and Type II costs. (Reply to Excep. 58) (A 9).

(16) The ALJ correctly accorded little weight to Mr. Fier's testimony with respect to the accounting of holiday payments received by GAI recipients because the record showed Mr. Fier did not know how the auditors prepared their accounts. (Reply to Excep. 59) (A 9).

(17) The ALJ correctly found that Mr. Sclar's position respecting vacation benefits as in part involving Type II costs was inconsistent with his prior testimony in another case (Reply to Excep. 60) (A 10).

(18) The ALJ properly found that the assessments should not fund administrative costs for other collective bargaining agreements. The discrepancy between assessment revenues and NYSA/ILA expenses arises from the fact that neither all fringe benefits nor all administrative expenses are funded from assessments (Reply to Excep. 61) (A 10–11).

(19) The ALJ properly denied the various motions to strike Mr. Carr's testimony on diversion (Reply to Excep. 62 (d), (e)) (A 11).

NYSA/ILA

NYSA/ILA respond to the exceptions of both the Port Authority and PRMSA/PRMMI. They contend that the Port's proposed formulas are not justified by the "benefits/burdens" test but rely solely on a reduction of the impact of the present assessment formula on New York, without showing that such impact is unlawful (Reply 2–3). They contend that PRMSA/PRMMI's four exceptions to the Initial Decision are all unwarranted. They assert that the 25% discount for the Puerto Rican trade is outside the Commission's authority to grant, and that the need for, and

benefit from, such discount are unsubstantiated by the record (Reply to Excep. 4.) They maintain that the MLAA creates an exclusive damage remedy under a single provision of the Shipping Act and thus forecloses reparations for a period prior to the filing of PRMSA/PRMMI's complaint (Reply to Excep. 4–5). They contend that the remedy of interest on assessment adjustments is a discretionary one under the MLAA, and that the ALJ correctly denied such interest based on the usual and proper considerations in assessment agreement cases (Reply to Excep. 5–8). They maintain that PRMSA/PRMMI's exception to the Initial Decision's treatment of the New York/Boston transshipment service is a "sacrifice [of] the Port of Boston to eke out a few more dollars for PRMSA's purse." (Reply to Excep. 4). NYSA/ILA's reply concludes with a reiteration of their contention that the Initial Decision merely constitutes a substitution of judgment by the ALJ for that of the parties to the assessment agreement (Reply to Excep. 8–9).

Hearing Counsel

Hearing Counsel limit their replies to a defense of the Presiding Officer's denial of the 25% discount on the tonnage portion of the assessment for the Puerto Rican trade. They contend that such discount is justified neither by Commission precedent nor the record in these proceedings.

Sea-Land

Sea-Land replies in support of the ALJ's determination with respect to the four types of relief denied PRMSA/PRMMI. Specifically, Sea-Land asserts that Puerto Rico has made out no case for a 25% discount on the tonnage assessment (Reply to Excep. 7–8), that it is not entitled to reparations as a matter of law (Reply to Excep. 4–5), that it is not entitled to interest (Reply to Excep. 5–7),[17] and that the transshipment exception recognized by the ALJ was proper but should be broadened to include all transshipment operations, which Sea-Land contends is required by fairness and shown as needed by the facts of record (Reply to Excep. 8–9). Sea-Land concludes that the parties to the assessment agreement should be allowed to negotiate a settlement (Reply to Excep. 2–4, 10).

Other Replies

MPA supports the ALJ's conclusion that the Port Authority's formula was not proper merely because it would have reduced the container "handicap" between New York and Baltimore to a greater extent. It also generally associates itself with the exceptions of Hearing Counsel, Sea-Land, and NYSA/ILA.

Massport supports the ALJ's conclusion with respect to the propriety of excepted treatment for New York/Boston transshipment services on the

[17] Sea-Land maintains, in fact, that the Commission has no authority to grant interest on assessment adjustments (Reply to Excep. 6–7).

grounds that such services should not be required to pay for GAI because they are adding hours of work, and that to deny the exception would act to kill the McAllister barge service and severely injure the Port of Boston, which depends on transshipment cargo for half of its container operations. Massport further asserts it would be unfair to make such services pay for full labor costs at New York when they already pay full labor costs at Boston (Reply to Excep. 2–6). Massport asserts that the formula suggested by the Port Authority of New York/New Jersey in its exceptions will not adequately solve Boston's problem because the per container charge element of it will improperly burden transshipment services with labor costs they should not have to bear (Reply to Excep. 6–7).

DISCUSSION

We find that the exceptions to the Initial Decision are, for the most part, merely reiterations of matters raised before, and fully and correctly disposed of by the ALJ.

NYSA/ILA's "Affirmative Defenses"

As a threshold matter, the Commission finds no merit to the various arguments that we should not or cannot entertain one or both complaints because of problems relating to *res judicata,* estoppel, waiver, settlement, timeliness, and the effects of labor law principles. These "defenses" were adequately addressed and correctly rejected by the ALJ. See pages 6–8, *supra,* and I.D. 9–38.[18]

Correction and Clarification of Certain Factual Findings

We find that in general the factual determinations of the Presiding Officer are proper and well-supported by the record. Although there are minor errors, none of them is outcome determinative. For the sake of accuracy, however, we here correct those findings which we feel could be the source of confusion:

(1) On page 19 of the I.D. at fn. 7, the Presiding Officer refers to *Council of North Atlantic Shipping Associations* v. *F.M.C.,* 672 F.2d 171 (D.C. Cir.), *cert denied,* 459 U.S. 830 (1982), as holding that the MLAA preserved our jurisdiction over certain portions of collective bargaining agreements. The statement should more correctly read that the MLAA preserved our jurisdiction over rates, charges, regulations, or practices required to be set forth in tariffs, regardless of whether or not such matters arose out of, or were otherwise related to a collective bargaining agreement.

[18] As PRMSA/PRMMI correctly points out (Reply to Excep., A 2–3), the ALJ's ruling on NYSA/ILA's "affirmative defenses" was based not merely on the presence or absence of "changed circumstances," but also on findings, *inter alia,* that NYSA/ILA's tonnage formula was never approved on the merits, the new agreement (LM–86) gives rise to a new cause of action, and principles of labor law cannot extinguish rights under the Shipping Act to challenge an assessment agreement.

(2) On page 49 of the I.D. at fn. 16, the Presiding Officer states that Sea-Land pays "nothing" on its relay containers. As will be seen from other portions of the I.D., (*e.g.*, 135, 137), it is clear what is meant is that Sea-Land pays nothing on a tonnage basis. It pays on a man-hour basis. The movement is "excepted," not exempt from assessment.

(3) On page 73 of the I.D., the Presiding Officer states that the tonnage formula "taxes carriers in inverse proportion to the amount of labor used for all costs." As will be seen from his statement in finding 27 on page 83, what the Presiding Officer intended to express is the idea that the effect of a whole tonnage assessment, as opposed to a man-hour assessment, is to assess costs with respect to work performed in an inverse proportion to the labor used in that work. Thus, since the assessment is used to fund *all* fringe benefit costs, including costs for those benefits that are substitutes for wages or that represent deferred compensation, the effect is to shift labor costs for expenses of direct employment of labor from low productivity operators to high productivity operators. Industry-wide costs (GAI, GAI-related costs, welfare and clinic costs for retirees and their dependents, and unfunded pension liability for pensioners) are properly borne by all in proportion to cargo handled. The statement might better read "taxes carriers in inverse proportion to the amount of labor used for direct costs of their employees."

(4) On page 77 at findings Nos. 8 and 9, the Presiding Officer makes certain determinations with respect to the relationship of the master contract and local contracts insofar as pension and welfare benefits are concerned. The findings on this matter should more properly read: The master contract sets the rate of contribution for pension and welfare benefits, but the amounts of these benefits vary from port to port and are negotiated on a local basis.

(5) The Presiding Officer found that the assessment differential between New York/New Jersey and other North Atlantic ports if all ports funded fringe benefits on the tonnage basis used at New York/New Jersey would be an average of $90 per container. NYSA/ILA maintain that the differential should be higher because the Port Authority used an average load factor of 21.7 assessment tons rather than the correct figure of 28.78 ton. We acknowledge the correctness of this observation. (See *e.g.*, page 137 of the I.D., where the ALJ used a load factor of 29 assessment tons in his computations.) We note, however, that the proper load factor only acts to magnify the differential between ports based on a whole tonnage formula and a different type of formula.[19]

[19] We also take this opportunity to correct minor wording errors in the I.D.:

(1) The reference on line 9 on page 82 should be to "Port Authority" opening brief.

LAWFULNESS OF THE PRESENT NYSA/ILA ASSESSMENT FORMULA AGREEMENT

INTRODUCTORY STATEMENT ON APPLICABLE STANDARD

The basic issue for Commission determination is the question of whether or not the present NYSA/ILA assessment formula agreement is "unfair" or "unjustly discriminatory" as between shippers, carriers, or ports within the meaning of the MLAA. Such determination requires application of the "benefits/burdens" test, about which some confusion appears to exist.

There is no dispute at this stage of the proceeding over the applicability of the "benefits/burdens" test. (See page 8, *supra*). The "benefits/burdens" test is the appropriate one for determining the legality of the assessment formula. As the Initial Decision found, it is the well-established test and the one which the Congress intended to preserve (see I.D. 54–58). The test requires that an assessment formula impose charges which are "reasonably related to benefits" (*Volkswagen* v. *FMC,* 390 U.S. 261, 295 (1968) (Opinion of Justice Harlan)) and that the formula achieves a "broadly equitable arrangement of benefits and burdens" (*New York Shipping Ass'n* v. *FMC*, 571 F. 2d 1231, 1238 (D.C. Cir. 1978)). It does not require "absolute equity" (*Transamerican Trailer Transp., Inc.* v. *FMC*, 492 F.2d 617, 620 (D.C. cir. 1974)) (*TTT*) or "perfect" or "exact" correlation of benefits and burdens (*Volkswagen* at 295 (Opinion of Justice Harlan)).

It is true, as NYSA/ILA assert, that "any analysis of the present problem must leave room for the implementation of some uniform, practical, general rule of assessment even though it have some features that are less desirable than some alternative imperfect rule." (*Volkswagen* at 293 (Opinion of Justice Harlan)). It appears that the present formula could not, however, be defended on that basis. It is neither general nor uniform. It imposes special (and lower) types of assessments on particular commodities. It also creates numerous exceptions for certain cargoes or activities. Domestic, transshipped/rehandled cargoes, as well as numerous other commodities, are "excepted" from the tonnage assessment and pay on a man-hour basis (I.D. 78–79). Other activities, such as handling empty containers, stuffing/stripping, and maintenance work, are totally exempted from assessment and pay nothing. (I.D. 81–83.)

While the present system may be "practical," it is no more practical than the one the ALJ requires. Both will fund the assessments, and to the extent that practical problems arise with respect to the administration of the formulas, they should be no greater under the formula adopted by the ALJ than the present one. In fact, the type of problems that NYSA/ILA recite with respect to difficulties caused by exceptions and different systems of assessment (Brief on Excep. 53–54) are present now. If anything,

(2) The first sentence on page 108 should read: "But for the existence of Dr. Silberman's alternative formula, which, with modifications to eliminate certain excessive features I adopt, I would recommend Mr. Donovan's formula (third alternative) with some modifications."

the removal of some of the "special treatment" may simplify the administration of the assessment formula. A small, uniform charge, evenly applied, might be reasonable even if all did not receive equal benefits. See *Volkswagen* at 281; *Evans Cooperage Co.* v. *Board of Commissioners of the Port of New Orleans,* 6 F.M.B. 415 (1961).[20] A large charge unevenly applied, however, would not. See *Volkswagen* at 281; 293–294 (opinion of Justice Harlan).

Nor may it be sufficient to say that since an assessment may be uniform within a single group, it is "fair" as required by the statute. "The uniformity of an assessment does not necessarily make it fair and reasonable." (*TTT* at 629). In fact, in *TTT* the Commission was upheld by the Court of Appeals in finding that the container operators in the Puerto Rican trade were not responsible for a "shortfall" in man-hours and thus should not have to bear the assessment burden based on shortfall, while other container operators had to bear such burden. *TTT* at 625–628; see also *Agreement No. T–2336,* 15 F.M.C. 259, 265–272 (1972).

In addition, where, as here, special treatment of large assessments is created for certain categories of cargoes and shipping activities, the Commission, as both Justice Harlan and the Court of Appeals for the District of Columbia Circuit have observed, has the obligation to examine different methods of allocation to see if the "special" rules created are "the fairest that could be devised." It also has the obligation, in the case of different assessments on different groups, to see that the charges "are as appropriately proportioned as would be feasible." See *Wolfsburger Transport* v. *FMC,* 562 F.2d 827, 829–830 (D.C. Cir. 1977) (*Wobtrans*); *see also Volkswagen* at 293–294; *TTT* at 624.

As noted above, "precise calculations are elusive, and absolute equity is beyond concrete demonstration" (*TTT* at 620), "charges need only be 'reasonably' related to benefits, and not perfectly or exactly related" (*Volkswagen* at 295 (Opinion of Justice Harlan)), and the Commission need only see that "the parties acting independently have achieved a broadly equitable arrangement of benefits and burdens" (*New York Shipping Ass'n* v. *FMC,* 571 F.2d at 1238). Nevertheless, the inquiry required to assure that such equity exists must, as *Volkswagen, TTT,* and *Wobtrans* mandate, be sufficiently searching to see that adequate explanation exists both for the formula in general and any of the "special" treatment created under it.

The burden of proof is, of course, on complainants. See *Boston Shipping Ass'n* v. *FMC,* 706 F.2d 1231, 1239–1240 (1st Cir. 1983). This means that complainants must at least summon record support for contentions that any "special treatment" is "unfair" or "unjustly discriminatory".

[20] Another example of a small, uniform charge evenly applied is the container royalty charge. See Brief for Respondent Federal Maritime Commission at 30–32, *Boston Shipping Association* v. *FMC,* 706 F.2d 1231 (1st Cir. 1983).

The Port Authority's Case

As the Port Authority itself recognizes, it must show competitive injury caused proximately by the tonnage assessment formula here challenged. See *e.g., Port of New York Authority* v. *AB Svenska Amerika Linien,* 4 F.M.B. 202 (1953). The Port Authority must also show that the effect upon it is "unreasonable", which in the context of this proceeding, means unjustified by the "benefits and burdens" test. *Boston Shipping Ass'n* v. *FMC,* 706 F.2d at 1240–1241.

Although the matter is not one on which the record evidence is so overwhelming that an argument could not be made that "reasonable men" could not have made the contrary conclusion, we are convinced that the "preponderance of the evidence"[21] is such that the Port Authority has established that the present formula is "unfair and unjustly discriminatory" to the Port of New York and New Jersey.

The Commission finds that the Port Authority has shown by a preponderance of the evidence that competitive cargo has been diverted from the Port of New York/New Jersey by the assessment formula and that it has been injured by such diversion.[22]

We do not agree, as opponents to the Port Authority's claim contend, that any diversion must be caused *solely* by the assessment formula or that unlawful diversion may take place only with respect to "naturally tributary" cargoes. "Proximate cause" is not the same as "sole cause." While there must be sufficient evidence to show that the assessment formula is the cause in fact of the diversion, there is no authority for the proposition that so long as other factors contribute to the diversion, the Commission is powerless to act. *Cf. e.g., McDonald* v. *Santa Fe Transportation Co.,* 427 U.S. 273, 282 (1976). Similarly, NYSA/ILA's contention that only "naturally tributary" cargo can be diverted from a port, and that the diversion of any other cargo, even if intentional and the result of unlawful practices, is not unlawful [Excep. 11–12] is completely unfounded. No authority is cited for such proposition, and none exists. Obviously, if a diversion exists as a result of an unlawful practice, it is unlawful.

As a general matter, as we have explained in *Pacific Westbound Conference—Equalization Rules,* 26 F.M.C. 313, 332 (1984) (*PWC*), the "naturally tributary" concept seems to have little continuing validity, and the proper means of determining the lawfulness of port competitive practices in the container age is to examine whether the contested practice is directed against certain commodities or exists at the expense of economic or oper-

[21] The ALJ properly determined that "preponderance of the evidence" is the criterion for testing MLAA complaints. It is true, as NYSA/ILA contend (Excep. No. 4), that they were not the proponents before Congress of a "clear and convincing" standard of proof in MLAA cases. Nevertheless, this latter, higher standard was rejected by the Congress, as the ALJ correctly found.

[22] As the ALJ properly found, the Commission need not find that the one causing an unlawful discrimination must control both the action relating to the discrimination and the actions relating to those not discriminated against, *i.e.,* in the context of these proceedings the Commission need not find that the same carriers control assessments at ports other than New York/New Jersey. See I.D. 67, fn. 22, and cases thus cited.

ational efficiencies. The Port Authority's case is buttressed by an analogy to *PWC*. If the assessments could be fully and fairly funded by a means which would reduce the per container cost at New York/New Jersey vis-a-vis the other ports with which it competes, then the failure to adopt such means could be said to be "economically and operationally inefficient."

A finding of unlawful discrimination against a port has never necessarily depended upon a showing that the cargo involved was "naturally tributary" to the port. See *e.g.*, *Boston Shipping Association* v. *FMC*, 706 F.2d, and *Port of New York Authority* v. *AB Svenska et al.*, 4 F.M.B., neither of which relies on "naturally tributary" considerations. Similarly, *Port of New York Auth.* v. *FMC*, 429 F.2d 663 (5th Cir. 1970), *cert. den.* 401 U.S. 909 (1971) and *Intermodal Service to Portland, Oregon*, 17 F.M.C. 106, 128–130, 138–139 (1973) hold that the ability of ports to be able to compete for *all* cargoes, regardless of origin, without unlawful impediments is the goal of the Commission's regulatory activities.

Hearing Counsel's attempt at oral argument to "reconcile" the court decisions in *Boston Shipping Association* v. *FMC*, 706 F.2d (*BSA*) and *Dart Containerline Co., Ltd.* v. *FMC*, 639 F.2d 808 (D.C. Cir. 1981) (*Dart*) from a "naturally tributary" approach is misguided. It is true that *Dart* involved naturally tributary cargo, and the Commission there found unlawful diversion. It is also true that, so far as appeared, *BSA* did not involve naturally tributary cargo, and the Commission there found no unlawful diversion. The distinction, however, is irrelevant for our purposes here. *Dart* involved an "absorption" of land transportation cost expenses which was found to be operationally and economically inefficient, and which discriminated against shippers of a particular commodity. (See *PWC*, 22 S.R.R. at 962.) *BSA*, on the other hand, involved the payment of container royalties on transshipped cargoes to longshoremen at New York rather than to longshoremen at the Port of Boston.

Boston had two theories for recovery, one of which depended upon a naturally tributary approach and one of which did not. Boston's main theory was that the payment of royalties to New York longshoremen rather than to Boston longshoremen caused Boston to impose greater assessments and carriers to divert cargo because of these greater assessments. The origin or destination of the cargo was irrelevant for purposes of this theory, and neither the Commission's decision nor that of the Court considers it. The theory failed for lack of proof. (See pages 72–73, *infra*).

Boston's second theory was that the payment of the royalties to New York longshoremen rather than Boston longshoremen was basically wrong. See BSA brief in *Boston Shipping Association* v. *FMC, 706 F.2d at 15;* see also FMC brief in *BSA* at 24–25; 33. In order to prove this, Boston would have had to show that Boston longshoremen were somehow fundamentally entitled to that cargo, and that New York longshoremen were not. It failed to do so.

The second theory of Boston in *BSA* and the Port Authority's theory here are entirely different. Boston had to prove that Boston longshoremen alone were entitled to the royalties in order to prevail, and thus some sort of "tributary" approach was necessary to its case. The Port Authority here, however, does not seek to prove, and need not prove, such entitlement. As the cases above discussed show, it need only show an improper impediment to its ability to compete for cargo with other ports.

NYSA/ILA err when they contend that the ALJ "confuses the substantive element of injury with the standard of proof needed to establish it." (Brief on Excep. 9.) The Presiding Officer correctly held that injury of the type shown by the Port Authority here is injury of the type of which we may take legal cognizance. In *NARI* v. *FMC*, 658 F.2d 816, 827 (D.C. Cir. 1980), the court held that injury amounting to "detriment to commerce" could exist in the form of market place disadvantage even if a shipper's sales were increasing. Insofar as the "standard of proof" is concerned, the ALJ correctly found that *Dart* clearly indicates that no "smoking gun" is necessary to show the existence of injury.

In point of fact, there is much evidence of record of injury to the Port's ability to compete caused by the assessment formula, both of a general and of a very specific nature. Simple mathematical computations show that the greater assessment cost at New York/New Jersey vis-a-vis the ports with which it competes is not alone responsible for the assessment differential on containerized cargo at New York/New Jersey. (See I.D., page 87, findings 41–44, and page 12, *supra*.)[23]

The evidence also shows that the proportion of cargo moving through the Port of New York/New Jersey in comparison to other North Atlantic ports has decreased, particularly with respect to containerized cargo. (I.D. 98–99.) That decrease cannot be fully explained by other factors such as later expanding containerization at other ports, since the record does not show this to be true. As the ALJ found, even in New York/New Jersey a good deal of container facilities were not developed until 1975 or later (completion of Sea-Land, Maersk Terminal, Red Hook, South Brooklyn Marine Terminal, etc.). (Ex. 31, pp. 6–7.) There was also much

[23] A differential of approximately $250 on loaded containers is admitted by a carrier witness in these proceedings (see page 12, *supra*) and is confirmed by NYSA/ILA's own figures:

NYSA–ILA Formula

New York: Throughput Container (2 man-hours) 28.78 tons x $8.90 = $256.14.
Baltimore: 2 man-hours x $10.49 = $20.98.
Per Container Differential + $235.16.
The differential if 4 man-hours in moving the container is used would be $214.18. (See NYSA/ILA Brief on Excep., 27.)
NYSA's witness (Mr. Sclar) had originally used as 9.3 man-hour number as the time required to handle an "average" container. Since this figure included non-cargo handling hours, like maintenance, and empty, "stuffed/stripped," and throughput containers, which have very different productivities, it was not meaningful. (Ex. 29, pp. III–11 through III–13.) Mr. Sclar admitted on cross-examination that the "incremental" man-hours required to move one throughput container was in the range of 4–5 rather than 9.3 man-hours (Tr. 554–556).

development of container facilities at other North Atlantic ports by 1970 although it continued to 1975. Also, the same full containerships calling at New York also called at Baltimore and Hampton Roads (*Id.*).

The uncontradicted testimony of record, moreover, shows that the tonnage assessment was responsible for carrier diversion from the Port of New York/New Jersey. This testimony came from officers of Respondents and constituted, as the ALJ found, "admissions" very much against the declarers' interests. One would hardly expect a carrier to declare that it could not afford to serve a certain port if it were not true, in light of the effect such declarations would have on the activities of shippers wishing to use that port. It is particularly interesting to note NYSA/ILA's attempt to discredit these admissions. Despite NYSA/ILA's assertions to the contrary, a simple reading of these statements quoted in NYSA/ILA's Brief on Exceptions to the Initial Decision (at pages 24–25) shows repeated references to the tonnage form of assessment mandated by the NYSA/ILA assessment agreement as the cause of carrier concern and determinations relating to use of the Port of New York/New Jersey.[24]

NYSA/ILA (Brief on Excep., 14–21) exaggerate the imprecision of the admissions. While they in most cases specifically do not quantify lost cargo, they do highlight the severity of the problem. The Chairman of Dart Line admitted that "Dart was forced whenever possible to move cargo around the Port of New York/New Jersey *due strictly* to the tonnage assessment." (I.D. 92, finding 63; Ex. 1, Testimony of Steiner, 10, Attachment 1) (Emphasis supplied), Similar statements are made by officers of Costa Line and Barber Blue Sea. (I.D. 92, 93, findings 62, 68; Ex. 1, Testimony of Steiner, 9–11, Attachment 1) Quantifications are made by officials of Sea-Land and Hapag-Lloyd. The present container assessment at the New York/New Jersey ranges from $256.14 to $356.00 on throughput containers. (See NYSA/ILA Brief on Ex., 27.) Sea-Land admitted that it could not afford to pay assessment costs at New York/New Jersey in the $300–$500 range. (I.D. 93–94, finding 69; Ex. 1, Testimony of Steiner, 12, Attachment 1.) The present container assessment differential on throughput containers ranges from $214.18 to $335.02. (See NYSA/ILA Brief, Ex. 27.) Hapag-Lloyd admitted that a $128 assessment differential would make a difference in how it would route cargo. (I.D. 90, finding 54; Ex. 9, Att. F, p. 43.)[25]

[24] If the statements were untrue or misleading, the fact could have been shown by calling the "admitters" as witnesses. NYSA chose not to do so. Sea-Land indicates on brief that one of them may not have been available at the time of hearing. (See Sea-Land Ex., 25.) Assuming this is so, Sea-Land could have protected itself against consequences flowing from the unavailability of the witness for cross-examination at the time of the hearing by attempting to depose the witness and submitting his deposition. See Rule 209(a)(3), FMC Rules of Practice and Procedure, 46 C.F.R. §502.209(a)(3). No reason appears why the other "admitters" were not called, or why the "admitter" who was called (Mr. Scioscia of U.S. Lines) was not examined about his admission.

[25] It is not surprising that the admissions of the carrier executives are not more detailed or definitive as to actions which will be taken when one realizes such actions would be highly detrimental to their interests. As the Supreme Court observed in *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 249 (1968), in upholding

The record, moreover, does show some "smoking gun" type evidence from a carrier and from a shipper of diversion away from the Port of New York/New Jersey caused by the assessment formula. Spanish Lines lost 25,000 tons of waste paper to another carrier through the Port of Boston because the NYSA/ILA Contract Board refused to give waste paper an "exception" from the tonnage assessment, as shown by evidence from NYSA's own files. (See I.D. 97, finding No. 82; Ex. 1, Steiner Testimony pp. 15–17, Att. 3–4). An importer of "Perrier" water can no longer use the Port of New York because steamship lines refuse to handle his cargo there, but will handle it at Baltimore or Norfolk. Perrier is a low-rated commodity that would have approximately 40 revenue tons per container. (See I.D. 89–90; Steiner Testimony, Ex. 1, 14–15).

The arguments about who controls the routing of cargo and the effects of such routing miss the point. The evidence of record shows, as the ALJ properly found, wide-spread and expanding use of intermodal rates. (Exhibit 1, Testimony of Tozzoli, p. 13; Exhibit 1, Testimony of Steiner, p. 5–6; Exhibit 1, Testimony of Longschein, pp. 5–6; Exhibit 9, Attachment A; Deposition of Everhard, pp. 41–42; Exhibit 9, Attachment F: Deposition of Leedy, p. 13; Exhibit 10, Attachment N: Deposition of Halpin, pp. 64, 68; Exhibit 10, Attachment W: Deposition of Moriconi, pp. 21–23; Exhibit 14(d), Attachment B: Deposition of Tozzoli, pp. 84–85). It also shows, however, as indicated by the Perrier shipper's experience, that the question of who technically controls routing doesn't matter, as a shipper can and is persuaded by carriers not to use certain ports. Uncontradicted testimony shows that competing ports actively solicit lines for cargo (Ex. 10, Att. N), and that steamship lines control routing by influencing shippers to choose certain ports, route code systems, port-to-port rates quoted with the understanding that they would not be used through New York/New Jersey, surcharges only on cargo moving through New York/New Jersey, as well as (in the case of the "Perrier" shipper) outright denial of a particular port. (Ex. 1, Steiner Testimony, pp. 13–15).

The cost studies cited by the ALJ (I.D. 85–85) as supporting the Port Authority's position have been attacked by NYSA/ILA as fatally flawed because of defective methodologies. If the studies were intended to make exact comparisons between assessment costs at different ports, there might well be merit in NYSA/ILA's contention. We believe, however, that the ALJ intended to use the studies, as we use them, only as supplying corroboration for the recognition by carriers of the higher per container assessment

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a factual finding of the Commission that travel agents were forced by a disparity in commissions paid by sea and air carriers to direct prospective passengers to air transport:

> "It is true that no agent testified that he had ever persuaded a customer to travel by air over the customer's preference to travel by sea. Agents heavily dependent on [ocean] conference business could hardly be expected to make such an admission, but one agent did go so far as to concede that under some circumstances, there was a 'definite tendency' to encourage a customer to choose air travel because 'it is easier to sell' and 'you make more money.' This amply supports the Commission's conclusion."

burden created by the tonnage assessment at New York/New Jersey vis-a-vis other ports. At least one comparison shows that when the assessment at New York/New Jersey was only $7.50 per ton, rather than the present $8.90 per ton, it was described as "the killer" compared to the Baltimore assessment of $8.10 per man-hour and the Portsmouth assessment of $10.55 per man-hour. Other cost studies, not attacked by NYSA/ILA (I.D. 86, finding 39), moreover, clearly show the much greater container cost created by the tonnage assessment at New York/New Jersey vis-a-vis the total stevedoring container costs at other ports.

Perhaps the most instructive comparison that can be made for "burden of proof" purposes is one of the record in this case with the record in *BSA*. In *BSA* the Commission was upheld by the Court of Appeals for the First Circuit in its determination that the Port of Boston had not made out a case of "unjust discrimination" or "unfairness" to it caused by the payment of container royalties to New York, rather than Boston, longshoremen. The failure there to make a case, however, resulted, apart from the inability to show "entitlement" on the exclusive part of Boston longshoremen alluded to above (see pages 64–66), from the fact that the record rebutted any causal connection between the payment of royalties to New York, rather than Boston longshoremen, and injury to the Port of Boston. The record there demonstrated that, contrary to Boston's contention, the additional dollar per ton assessment imposed by the Port of Boston ("Boston dollar") was unrelated to any injury caused by "loss" of container royalties. The "Boston dollar" was not necessary to protect longshoremen's pensions, since all benefits had always been paid, pension benefits had frequently been increased over the period in question, and would have substantially increased without the additional dollar assessment. The record, moreover, did not show that a carrier's decision to call at Boston was in any way influenced by the existence of the "Boston dollar," revealed Boston witness admissions that a carrier's decision to serve Boston was not influenced by the "Boston dollar", and reflected the expansion of services between Boston and Canadian ports, on which the "Boston dollar" was also imposed. Lastly, the record showed that the decline in Boston cargo could have been due to other factors, because cargo not subject to the dollar suffered a worse decline than that which was, and competing over-the-road services expanded. In the light of such evidence, it was appropriate for the Commission to expect Boston to come forward with some evidence to show the necessary connection between the practice and alleged injury. It failed to do so. See generally, *BSA* v. *NYSA, et al.*, 24 F.M.C. 1110, 1135–1138, *adopted* 24 F.M.C. 1104, 1107–1108 (1982); *BSA*, 706 F.2d at 1235, 1239–1241; FMC brief in *BSA*, p. 36.

Here the facts of record are much different. There is a definite nexus shown between injury and the assessment formula at New York/New Jersey by carrier admissions, corroborated by cargo statistics, and carrier cost studies. Shipper and carrier testimony relating to their activities shows

diversion caused by the assessment formula. Injury has been shown to the Port by relative cargo decline vis-a-vis other ports.[26]

We also find that the Port Authority has shown, by a preponderance of the evidence, that the present assessment formula is "unreasonable" because it improperly assesses users of longshore labor, forcing some users to pay the cost of others.[27] Moreover, such unreasonable assessment formula creates "unfairness" and "unjust discrimination" to the Port of New York/New Jersey by creating a diversion from the Port of cargo which has been routed away from the Port because of the assessment formula.[28] We therefore conclude that the Port Authority has sustained its burden of showing that the present assessment formula must be modified.

The major problem of the Port Authority's case lies not so much with the question of "proximate cause" or the "reasonableness" of the present formula but with the propriety of the relief sought by the Port Authority. As we have explained, there is sufficient evidence of record to demonstrate that the formula acts to inhibit the movement of cargo through the Port of New York/New Jersey. There is also, as we have found and will explain in detail in connection with PRMSA/PRMMI's case, a sufficient showing that the present formula is unreasonable. This alone, however, does not demonstrate that the formulas proposed by the Port Authority are proper. Unreasonableness arises when a formula improperly allocates benefits and burdens relating to the subject matter of a particular assessment agreement. (See pages 57–61, *supra*, and cases there cited). The fact that the formula proposed by the Port Authority would reduce the assessment burden at the Port of New York/New Jersey more than another formula may show (or help show) "injury" resulting from the latter formula, but it shows nothing about the appropriate apportionment of benefits and burdens.

By failing to take cognizance of all of the expenses relating to industry wide cost the formulas suggested by the Port Authority understate that proportion of benefit expenses which should be borne on a tonnage basis, *i.e.*, by the industry as a whole in proportion to the amount of tonnage

[26] While other factors may have contributed to the relative cargo decline, here, unlike the situation in *BSA*, we have evidence that injury was caused by the tonnage assessment in the form of carrier admissions, and the "smoking guns" of Spanish Line and the "Perrier" shipper, which should be contrasted with the absence of any evidence of linkage of injury to the challenged practice in *BSA*.

[27] We are uncertain of the intent of NYSA/ILA's argument that the "unreasonableness" argument of the Port Authority in Docket No. 84–6 is derived by the ALJ from PRMSA/PRMMI's case in Docket No. 84–8. (See Excep. 31). It certainly would not have been improper for the ALJ to have so acted since, by his rulings of March 20 and April 3, 1984, the proceedings were consolidated for evidentiary purposes. However, the statement is in error. The "unreasonableness" of the current assessment formula and the need for modification was, as the Presiding Officer found, demonstrated by Mr. Leo Donovan, the Port Authority's expert witness. (I.D. 101–102, 107–108). Only the data as to the extent of the necessary modifications come from PRMSA/PRMMI's cases.

[28] Contrary to NYSA/ILA's assertion (Brief on Excep. 22–23), diversion away from the Port of New York/New Jersey would not be self-defeating because of the increase in GAI caused by such diversion. As the port Authority points out (Reply to Excep. 10–11), while the assessment differential caused by the tonnage formula is in the neighborhood of $250 per container, the additional GAI cost per container would be minimal, say at the high end $60 (4 man-hours x $15 per man-hour), which would be spread across all cargo remaining in the Port).

each carrier transports. All pension, welfare, clinic, holiday, and vacation costs of GAI recipients are industry costs related to reduced manhours and were properly treated as such by the ALJ. Similarly, welfare and clinic costs of retirees and their dependents and unfunded pension costs of pension recipients cannot be allocated directly to any single employer and should, as the ALJ found, be borne on a tonnage basis by the industry as a whole.

While the Port Authority's proposals would undoubtedly be a greater benefit to the Port of New York/New Jersey, any adjustments shifting more expenses to the Type I category would result in improperly relieving carriers of industry-wide burdens which they should bear.[29] Moreover, the greater shift to Type I expenses would create an even greater burden on labor intensive carriers which all parties, including the Port Authority, agree must be protected against further assessment cost increases.

The Port Authority's latest proposal would make no allowance for any of the categories of cargo for which special treatment was adopted other than bananas. The Commission finds, however, that the record supports the need for a broader protection for all breakbulk cargo, since it shows that breakbulk cargo has experienced an extreme decline in tonnage in contrast to virtual constancy in total assessment tons and that although breakbulk cargo accounts for less than 10 percent of the Port's assessment tons, it is responsible for nearly one quarter of total cargo man-hours. (See PRMSA/PRMMI Opening Brief, 119–121, and record references there cited). Moreover, the Port Authority's expert, Mr. Leo Donovan, himself testified that breakbulk cargoes are "extremely important to the port's welfare" and that "care must be taken to assure that no assessment formula change causes a substantial increase in breakbulk assessment charges." (Ex. 31, at 30). The man-hour basis of assessment adopted by the ALJ will protect breakbulk cargo from bearing any share for costs relating to containerization, and the cap placed on total breakbulk assessments at present levels will protect against further breakbulk cargo loss to the Port. While the Port Authority's proposed $9.00 per man-hour would be lower than the current man-hour rates at other ports, it cannot be justified on a "benefits/burdens" basis, and we cannot act on the basis of figures lacking proper analytical support.

Moreover, the record will not support a conclusion that the present "special treatment" for cargoes other than transshipped cargoes and domestic cargoes and the handling of empty containers and stuffing/stripping is unlawful, and these are matters upon which, as we have noted (see page 61,

[29] We do not mean to imply that the formula we here adopt will not be beneficial to the Port. The remaining container assessment differential under the formula adopted by the ALJ is computed by NYSA/ILA to be between $161.52 and $153.24 on average throughput containers. This is a reduction from differentials of between $235.16 and $214.18 on such containers under the present formula. (See NYSA/ILA Brief on Excep., 27–28). It also is in the neighborhood of the $128 assessment differential that a Hapag-Lloyd official said could make a difference in cargo routing by carries, and thus should be of some benefit to the Port. (Ex. 9, Att. F, p. 43).

supra), the Port Authority has the burden of proof. The Port Authority itself observes in its Exceptions (page 15), "If the [NYSA/ILA] Contract Board determines that other exceptions are necessary, it could design future exceptions in a way that it finds administratively feasible." The Contract Board has, however already granted such exceptions, and absent some showing that it should not have done so, they cannot be overturned here.

Lastly, the Port's proposed charge on "container" rather than a charge on "tonnage" seems less appropriate to fund Type II benefits since the amount of cargo actually moved is a better measure of benefits accruing from containerization.

We conclude our consideration of the Port Authority's case by observing that even if the Port Authority had not made out its case, the ultimate result here reached with respect to the lawfulness and necessary modifications to the present formula would be the same, because of our conclusions with respect to PRMSA/PRMMI's case. In other words, since we find that PRMSA/PRMMI has sustained its burden of proof and shown that the present assessment formula is "unfair" and "unjustly discriminatory" as to it and other carriers not given unjustified special treatment, the effects of the necessary modification would also redound to the benefit of the Port Authority. The injurious effect of the whole tonnage formula will be mitigated to the extent it has been shown to be unreasonable in the apportionment of benefits and burdens, and to that extent the Port will be better able to compete for the cargo which it has lost because of the tonnage formula.

PRMSA/PRMMI's Case

PRMSA/PRMMI's case depends upon contentions of two types—that the basic structure of the Agreement is unlawful, and that this unlawfulness is exacerbated by various unjustified "special privileges".

The NYSA/ILA Whole Tonnage Formula

The Commission agrees with the ALJ that the basic structure of the NYSA–ILA whole tonnage formula is unlawful under the facts and circumstances of this case. There is no hard and fast rule as to how assessments must be funded in all situations. A whole tonnage formula could be found lawful in some circumstances, although we have never found it to be so in a fully litigated proceeding.[30] The examples of *Volkswagen*

[30] Sea-Land's contention that the ALJ found the whole tonnage formula to be unlawful *per se* is incorrect. He found it unlawful here for the reasons enumerated. (See I.D. 120–122). Moreover, Sea-Land's whole approach to the question of the relationship of man-hour and tonnage formulas and legality is confused at best. First, it contends on brief (Excep., 5) that a pure man-hour form of assessment is lawful *per se* because it has been removed from our jurisdiction. If this is true, why doesn't it follow that the farther one moves from a man-hour form of assessment, the less likely the result is to be lawful? How can one say that a man-hour form of assessment is presumed good and then criticize the ALJ for incorporating man-hour elements in an assessment formula? Moreover, is it really true that the removal of a pure man-hour assessment from our jurisdiction shows that that form of assessment is good? The injury caused by a man-hour assess-

Continued

and *Wobtrans* are of little utility here as they involved only the assessments on automobiles and, in any case, the Commission actions there were reversed on review. Those cases, moreover, involved a mix of carrier productivities and mix with respect to the kinds of benefits far different from that involved here. Where, as here, and unlike the situations in *Volkswagen* and *Wobtrans*, we deal with a mix of fringe benefits which includes many not related to work displacement caused by containerization (*e.g.* pensions, welfare, clinic, holidays, and vacations of currently employed workers) and an industry where, within a single sector (*i.e.*, containerized carriers) there are marked differences in productivities, a whole tonnage formula does not meet the "benefits/burdens" standard. In this situation, industry wide expenses (*e.g.*, Guaranteed Annual Income (GAI) and fringe benefits paid to those on GAI, as well as welfare and clinic benefits for retired employees and their dependents and the unfunded pension liability for those now on pension, which cannot be directly and quantitatively related to responsibility of current employers) are properly applied to the industry at large on a tonnage basis. But expenses relating to currently employed workers are not.

Use of a whole tonnage formula in the circumstances shown in these proceedings will have the effect, as explained by the ALJ (I.D. 120–122; 125–126; 129–133), of taxing PRMSA/PRMMI and other containerized carriers which have developed efficiencies in non-cargo loading/unloading functions not related to the containerization which lay behind the adoption of the full tonnage formula for those efficiencies by assessing benefits for currently employed workers on a tonnage basis.[31] Moreover, the "exceptions" to the formula for transshipped/rehandled cargoes and domestic cargoes exacerbate this basic unfairness by creating additional penalties on efficiencies not directly related to the containerization which was the concern of LM–86 and its predecessor agreements. (See I.D. 122; 125–126).[32] As PRMSA/PRMMI has shown, the present formula is particularly unfair to it because it has great efficiencies not related to the decision to containerize, both in the non-cargo loading/unloading functions and in cargo loading/unloading functions. (See I.D. 123–126; 130–131; and PRMSA/PRMMI Reply to Ex., 23–30, and record computations there made).

The best means of record to remedy the unfairness created by the whole tonnage formula in the context of the proceedings is the "Type I/Type II" formula adopted by the ALJ, where Type I costs, those related to current fringe benefit expenses for currently employed workers, are funded

ment to breakbulk cargo because of its low productivity was the very reason for the creation of a formula based partially on tonnage in the first place. See *NYSA* v. *FMC*, 571 F.2d at 1233–1234, *TTT*, 492 F.2d at 622.

[31] An elaboration of the unfairness of the effects of a whole tonnage formula on non-cargo loading/unloading functions is found at pages 85–89, *infra*.

[32] An elaboration of the unfairness of the "exceptions" to the whole tonnage formula for transshipped/rehandled and domestic cargoes is found at pages 89–101, *infra*.

on a man-hour basis, and all other expenses are funded on a tonnage basis.[33]

The argument in support of the whole tonnage formula here rests upon the expert testimony of Respondents' witness Mr. Sclar, and upon the general contention that longshoremen are industry-wide employees for all purposes.

There is nothing in law or fact to convince us that all longshoremen are industry wide employees for the purpose of determining who should bear the expense of those longshoremen actually employed for benefits which are substitutes for wages or designed as deferred compensation. The ALJ's treatment of this matter is thorough and correct. The facts are as found by the ALJ, and the law is not to the contrary. (See I.D. 133–134). *NLRB* v. *Truck Drivers Local Union No. 449,* 353 U.S. 87 (1957) (*Truck Drivers*), cited by Hearing Counsel, does not stand for the proposition that all longshoremen should be treated as industry wide employees for the purposes of allocating responsibility for benefits. It merely holds that in a multi-employer bargaining unit employer solidarity to preserve that unit could be enforced by an industry wide lock out of union employees when a union struck a single employer. It does not address employer responsibility for benefit cost—or how employees are to be treated with respect to such costs.[34]

Respondents' own actions, moreover, are inconsistent with the idea that all benefits must be borne by the entire industry on a tonnage type basis. Wages, like benefits, are fixed generally by the multi-employer collective bargaining agreement. Yet these wages are paid, not on some proportion of tonnage moved basis, but on an hourly basis by the employer utilizing the labor. Why should not fringe benefits which are substitutes for such wages or "wages deferred" for men actually working not be paid on the same basis?

Insofar as witness Sclar's testimony is concerned, we find it unconvincing on the point of appropriate assignment of assessment burdens here. Even if it were not inconsistent with his earlier testimony in the West Coast

[33] We reject Hearing Counsel's contention that the present NYSA/ILA formula is "fair" because it over-assesses some cargo for some benefits and underassesses it for others and makes up for it by under-assessing certain other cargo for some benefits and over-assessing it for others. (See Excep. 5–7 and pages 35–36, *supra*). Such a formula would hardly appear to be "fair". *Cf.* the famous *dictum* in the Constitutional realm of fairness, the "equal protection" clause of the 14th amendment: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948). More importantly, however, the present formula does not balance "over assessments" and "under-assessments". It properly assesses breakbulk cargo, in light of the great burden upon it which would be imposed by a man-hour assessment. The cap on the total breakbulk assessment we and the ALJ adopt preserves this treatment. The present formula also properly assesses containerized cargo for industry-wide Type II costs. However, the present formula over-assesses certain containerized cargoes for wage-type benefits for other containerized operators' employees, a fault corrected by the man-hour/tonnage formula required here.

[34] Justice Harlan's reference to *Truck Drivers* in his concurrence in *Volkswagen* was solely for the purpose of noting that the longshore industry, like the trucking industry, was one in which collective bargaining was done with multi-employer units (at 283). Nothing was said about the consequences of this for the purposes of assigning responsibility for benefit funding, and aside from the fact that benefit responsibility must be assigned within such unit, nothing follows from it.

case,[35] it would not convince us. Regardless of the existence of the West Coast testimony, we find that, because of the varying productivities within the containing sector and the mix of benefits here involved, many of which relate to benefits paid in lieu of wages or as deferred compensation to presently working longshoremen, a whole tonnage assessment is not appropriate.

NYSA/ILA's criticism of the ALJ's treatment of witnesses as inconsistent (Excep. 14) is unwarranted. The ALJ's statement that "the case does not essentially appear to rely upon sense perception, memory, reputation, etc., which are amenable to cross-examination" was made in a preliminary order prior to hearing, whereas the ALJ's credibility determinations were made after hearing and after he had had the opportunity to observe and analyze the conduct of witnesses on the stand. Nor is it fair to contend, as NYSA/ILA do (see Excep. 44), that the ALJ found their witnesses generally not credible. The Presiding Officer found witness Sclar and witness Fier not credible, but only in the context of these proceedings and only for sufficient reasons fully described. (See I.D. 108–112; 171–172). On the other hand, the ALJ found Respondents' witness Camisa very credible, and in fact adopted his analysis of computation of unfunded pension benefits for pensioners over that proferred by PRMSA/PRMMI's witness.

The "Special Privileges"

We agree with the ALJ that the "special privileges" for domestic and transshipped/rehandled cargoes and for the handling of empty containers and the "stuffing/stripping" activity are unwarranted. As NYSA/ILA recognize, the standard justification for special treatment is the likelihood that the cargo or work involved will be diverted away from a port. On exception, NYSA/ILA argue for the first time that "fairness" is also a justification, and PRMSA/PRMMI criticizes such approach as improperly timed. (See page 46, *supra*). We are inclined to agree with PRMSA/PRMMI, but need not decide the question. Assuming, *arguendo,* that the justification is properly raised at this time, it adds nothing to NYSA/ILA's case. "Fairness" in the context of these proceedings means a proper allocation of benefits and burdens, a matter which must be reached in any case. (See pages 57–61, *supra*).

It must be borne in mind that under the present formula, the carriers engaged in handling of empty containers and the "stuffing/stripping" activity pay nothing toward the fringe benefits of their employees who perform such activities. This is so because the present formula is based on tonnage, and these activities involve no cargo transportation. The consequence of

[35] We find that the ALJ properly admitted Exhibit 48 (Mr. Sclar's West Coast case testimony) for impeachment purposes, and that the Respondents had adequate opportunity to rehabilitate Mr. Sclar, both on oral examination, which they declined, and on brief. We further find that although points of difference between the West Coast case and this one were pointed out by Respondents on brief, they did not adequately rebut Mr. Sclar's basic admission in the West Coast case that there is a "substantial overkill potential" in assessment on a tonnage basis during times of declining man-hours. (See I.D. 111).

this is that because all deep-sea employees are covered by the assessment formula agreement, including those involved in handling empty containers and stuffing/stripping, other employers must pay for the benefits due the employees of those carriers who engage in such activities. NYSA/ILA's assertion that the handling of empties and the stuffing/stripping of containers are "assessed under the NYSA–ILA formula" (Excep. 21) is merely a euphemistic way of saying that carriers who do not engaged in these activities pay for all of the fringe benefit expenses of those who do, including employee wage-type benefits.

There is no showing that either the handling of empty containers or the "stuffing/stripping" activities will be diverted away from the Port of New York/New Jersey if the special privilege they now enjoy is removed. Removal of the privilege will result in their paying the man-hour portion of the man-hour tonnage assessment found by the ALJ to be proper. The man-hour rate at the other ports is considerably higher than the approximately $6.35 per man-hour rate which would apply at New York/New Jersey under the modified formula. (See I.D. 81, finding 20). Similarly, the "stuffing/stripping" activity is required under the Rules on Containers in the Master Contract in effect at all relevant ports. One cannot evade the Rules by diverting cargo to other ports.[36]

Nor is there anything "unfair" or "unjustly discriminatory" in making the carriers for whom these activities are performed bear the cost of paying for the fringe benefits of the longshoremen they actually use in these activities. The fact that, as NYSA/ILA point out, the increase in empty containers is due to trade imbalance refers to a peculiarity of certain carriers' operations, the direct, wage-type expenses of which should not be borne by carriers not engaging in those operations. We agree with NYSA/ILA that so far as GAI and related activities are concerned, there should be no assessment against the handling of empty containers and "stuffing/stripping". As NYSA/ILA assert, with respect to transporting empties, stuffing/stripping, and maintenance work, containerization is irrelevant. (See NYSA/ILA brief on Excep. 45–48). These activities do not involve the transportation of cargo and are in effect in no different position now from that which would have obtained in pre-containerization days. Stuffing/stripping is like breakbulk cargo handling (NYSA/ILA brief on Excep. 48), and "the repositioning of empties is not a benefit the carriers secured at the bargaining table". (NYSA/ILA Brief on Excep. 47–48).

[36] NYSA/ILA contend that PRMSA does not comply with the Rules on Containers and therefore enjoys a special privilege its competitors do not. The record appears to indicate that the ILA may have granted some concession to PRMSA with respect to compliance with the Rules on Containers. (See Ex. 14, Att. E, pp. 44–45; Tr. 244–248). If this is true, it is hardly free to complain about the consequences of its actions. The Rules themselves provide for no such exception. The question of the Rules' validity under the labor laws is now pending before the Supreme Court (Docket No. 84–861, *NLRB v. ILA*), and the Commission is presently investigating their lawfulness under the shipping laws in Docket No. 81–11, "*50 Mile Container Rules*." Their existence is, however, a fact of transportation life, and their necessary embodiment in tariffs renders compliance with them, until their validity has ultimately been determined, a necessity.

The man-hour component of the assessment formula is, however, so constructed that no assessment will be levied under it for anything other than benefits due employees actually working. This frees those carriers handling empty containers, and engaged in "stuffing/stripping" from paying for GAI and other industry costs related to containerization. It also provides another very significant advantage to such carriers. It frees such carriers from paying for industry wide expenses not related in any tangible way to containerization—*i.e.*, welfare and clinic benefits for retirees and their dependents and the unfunded liability for pension benefits for already retired longshoremen. (See pages 76–80, *supra*). If in fact some special recognition should be given employers engaged in these activities because of the man-hours which they add and hence reduce port-wide GAI obligation, surely this additional privilege provides sizeable special recognition.[37] We therefore concur that a man-hour assessment on these activities for Type I benefits is proper.

We also agree with the ALJ that the likelihood of diversion to ILA "Metro" labor for maintenance work justifies the retention of the exemption of such activity from assessment. There is no requirement that deep-sea labor be used for such work, and PRMSA in fact already uses "Metro" labor for maintenance work. Its willingness to bear the cost of other carriers' maintenance work in the interests of reducing GAI is indeed commendable.

Transshipment and Domestic Cargoes

At this point some preliminary discussion seems appropriate with respect to a contention that runs through NYSA/ILA's position with respect to the "exceptions" generally—that no assessment should be made for GAI and GAI-related benefits for transportation services on which man-hours are expanding. It is not true that the mere fact that man-hours are increasing means that an activity should be excepted from the responsibility to pay for an increasing GAI obligation. This is precisely the argument made by the Puerto Rican carriers in *Agreement No. T–2336* and rejected by the Commission and the Court of Appeals. See 15 F.M.C. at 255–270; see also *TTT* at 625–628. The obligation to pay for GAI is unrelated to the question of whether or not man-hours are expanding or contracting on an absolute basis. The critical question is the relationship of the man-hours utilized in the involved activities before and after the advent of containerization. The fact that man-hours are expanding fails to take into account the much greater extent to which man-hours for those activities would expand if such operations were not containerized.

[37] The Port Authority, which seeks man-hour assessment which would include industry wide costs not related to containerization, computes such assessment as in the neighborhood of $9.00 per man-hour. (See Excep., 11–12). The man-hour assessment which would have obtained during 1982–1983 under the modifications we require would have been about $6.35 per man-hour. Thus the additional saving to carriers engaged in handling of empty containers and performing "stuffing/stripping" activities over and above what they receive from the freedom of paying for expenses related to containerization would appear to be around $2.65 per man-hour.

Insofar as transshipment is concerned, NYSA/ILA themselves recognize that "The ability to transship cargoes is not a benefit provided by the NYSA–ILA labor contract. The benefit received by the carriers was the union's permission allowing them to transport cargo in containers * * * Transshipment is not synonymous with containerization. Breakbulk carriers can transship." (NYSA/ILA Brief on Excep., 45, 46). It is the use of transshipment in connection with containerization rather than for breakbulk transportation that creates a GAI problem for which carriers utilizing the containersized service are responsible. There is no "unfairness" in making them bear the burden of such operation. As NYSA/ILA continuously point out, all carriers are free (at least theoretically) to engage in any particular type of transportation service. Those choosing to engage in containerized transshipment should not make carriers not so choosing bear the increase in GAI due to their containerized, as opposed to breakbulk, operations.[38]

The more difficult issue relates to the likelihood of diversion which will be created if the "exception" for transshipped/rehandled cargo is removed. Sea-Land claims that it will occur because it cannot be expected to bear the additional $8.3 million which will be assessed against it as a result of the removal of the exception. (See I.D. 138). The ALJ found that removal of the exception will cause Sea-Land to bear an additional $6 or so per ton under the modified assessment formula, and that there is no showing that it cannot afford to do so without leaving New York/New Jersey. (See I.D. 140–141). The matter comes down to one of drawing inferences from the available evidence. (See *Svenska,* 390 U.S. at 249). On the one hand, it is not at all clear that transshipped cargo will be lost if the exception is removed. Although Sea-Land's witness stated in prepared testimony that Sea-Land would "seriously consider" leaving the Port of New York/New Jersey if the transshipment/relay exception were removed, on cross-examination the "seriously consider" was rendered virtually meaningless by testimony that even a $.05 increase would cause "consideration." (Tr. 725–726).[39] Moreover, as the ALJ found, Sea-Land's operations are such that a shift away from New York/New Jersey as its primary transshipment center is neither likely nor feasible.[40]

Removal of the transshipment exception does not cause inconsistency between the treatment of the likelihood of diversion in the Port Authority's case and such likelihood in PRMSA/PRMMI's case. On the other hand, the ALJ finds that the assessment differential between New York/New

[38] The fact that transshipment services pay assessment costs at one port should not, as Massport alleges (see page 53, *supra),* relieve them of the obligation of paying such costs at the other port they utilize. Carriers engaging in containerized transshipments operate, for their own reasons, in a fashion which utilizes labor (and creates GAI and related problems) at both ports and should bear the responsibility for their actions.

[39] Sea-Land's testimony here should be contrasted with the admissions of the carriers in the Port Authority's case, which ware unequivocal and not undermined by cross-examination.

[40] The case of possible diversion for U.S. Lines because of the removal of the transshipment exception is even weaker, and is adequately and correctly dealt with by the ALJ. (See I.D. 142–143). In this connection, we agree with PRMSA/PRMMI that the ALJ's figures with respect to the increase of U.S. Line's assessment burden because of the removal of the exception for transshipped cargo are correct. (See pages 34, 50, *supra).*

Jersey and other ports is responsible for diversion of cargo from New York/New Jersey. On the other hand, he finds that the removal of the "excepted" treatment for transshipped cargo will not result in diversion of such cargo from New York/New Jersey. The inconsistency is apparent rather than real. First of all, the removal of the exception would result in an average assessment cost for throughput containers of about $203.75 ($6.15 per ton × 29 tons per container plus $6.35 per man-hour × 4 man-hours), or an increase in per container assessment cost of about $178.35 ($6.15 per ton × 29 tons per container). This is far removed from the $300–$500 per container assessment cost which Sea-Land indicated would cause a diversion from the Port. Moreover, the ALJ's factual finding of diversion in the Port Authority's case was made in quite a different context from his finding of lack of diversion in the transshipment situation. It is one thing to divert containers from the Port of New York/New Jersey to avoid an assessment differential. It is something entirely different to change one's entire operations to avoid an increased cost, which, as shown, would be less per container than the assessment differential under the present formula.

The Port of New York/New Jersey is presently the *only* Atlantic Coast port served by both Sea-Land's European services and its Central American/Caribbean service and the *only* North Atlantic port with more than one Sea-Land service of any type. (Tr. 687–694, 715). The only other North Atlantic call, at Portsmouth, presently produces only small amounts of cargo (under 320 weekly units) compared to the 2200 weekly slots available in Sea-Land's North Atlantic operation. (Tr. 688–689). Sea-Land's existing terminal facility in Portsmouth consists of only 20–22 acres (Tr. 703) and is insubstantial in comparison to its 194 acres of space, 5,383 trailer spaces, and six cranes in Elizabeth, New Jersey. (Ex. 49 at 15). Its feeder vessels from Baltimore do not stop at Portsmouth because they must go up to New York to connect with the three line-haul vessels which serve that port. (Tr. 688–689). Under these circumstances, any substantial shifting of Sea-Land's relayed cargoes away from the Port of New York/New Jersey is extremely unlikely.[41]

The ALJ, although finding that a general transshipment exception was not justified, found that a special transshipment exception was justified for services between New York-New Jersey/Boston-Providence. (See I.D. 155–159). As we have shown above, the mere addition of man-hours does not justify an exception from paying for GAI and related expenses. The exception of the New York-New Jersey/Boston-Providence service must rest upon something else. The ALJ justified the exception on the basis

[41] Contrary to Sea-Land's contention on exceptions (page 13), there is no evidence of record that it has previously used its Portsmouth facility as a relay point. Such relay activity does not show up in Sea-Land cargo carrying evidence. (Ex. 23, Att. D at 000012–14). Sea-Land's witness (Mr. Sutherland) testified that Baltimore cargoes are moved through Portsmouth "only on an exceptional basis, force majeure, or misconnection, something like that." (Ex. 14d, Att. A at 38).

of the injury its removal would cause to McAllister, the Port of Boston, and shippers. It is clear that McAllister will be forced out of its present transshipment service if the exception is removed. It is also clear that removal of the exception will aggravate the GAI problem at Boston. There was no shipper testimony on the matter, but, as a theoretical matter, it is always to a shipper's advantage to have alternative forms of service. The problem is whether it is "fair" to preserve the exception based on these considerations. We find that it is not. McAllister is able to perform its transshipment service only by virtue of its exception. If there is, as we have found, no justification for the transshipment exception for Sea-Land and U.S. Lines, it should follow that there should be no exception for the same transshipment when performed by McAllister. McAllister is not a member of NYSA and does not directly pay assessments. (Ex. 27, Att. A, 21–23; Ex. 30, Att. D, 2). It performs its service for NYSA members who reap the benefit of the exception. U.S. Lines itself uses McAllister's barge service (Tr. 810), and Sea-Land alleges that it uses McAllister's tugs for some of its transshipments. (See Sea-Land Excep., 17). The result of the removal of the exception for Sea-Land and U.S. Lines but its preservation for McAllister would be the expanded use of McAllister's service for Sea-Land and U.S. Lines. Massport informs us that new towing and barge services similar to that of McAllister are entering the market. (See Excep. of Massport, 7). The result of all of this will be that what the ALJ intended to be a limited exception will be turned into a broad exception allowing carriers to do indirectly what they cannot do directly.

The sole justification for the ALJ's treatment was his well-intentioned desire to protect McAllister. The possible desire of shippers to use an alternative service and the protection of the Port of Boston against increasing GAI liability were not deemed sufficient to grant an exception to Sea-Land and U.S. Lines. The ALJ recognized that "[O]ne can argue, as may PRMSA, that private industry at New York, which has its own costs and problems, ought not to be called upon to subsidize McAllister or the Port of Boston, and there is no evidence on this record that any New England shippers are asking for a choice between truck and water service through Boston." (I.D. 158). The exception was given because "McAllister is not Sea-Land nor U.S.L. but a single-operation carrier. . . ." (I.D. 158) and because fairness required that an exception be given to competing carriers. (I.D. 159, fn. 43). The basic reason for the exception was the ALJ's determination that "Although PRMSA's evidence and logic is, for the most part, appealing, I cannot find under a standard of fairness and unjust discrimination that killing McAllister is the right thing to do." (I.D. 157.)

We cannot allow the "McAllister type" exception to remain. There is no record shipper support for it, and if shipper support exists the service may continue without such exception. Moreover, the carriers at New York

cannot be called upon to protect against industry problems at Boston, so long as the formula itself is reasonable and fair. See *BSA*, 706 F.2d at 1240–1241. Finally, McAllister should not be allowed to retain the cargo, as the record clearly shows it does, solely because of the existence of the exception, in the absence of which "All the Boston/Providence container traffic would be diverted to competing truck transport." (Ex. 30, Att. D, 3–4; see also Ex. 46 at 26; I.D. 156.) The exception provides an economically artificial prop, the expense of which must be borne by other carriers.[42]

We recognize that our conclusion with respect to the lawfulness of excepted treatment may cause a peculiar problem for the McAllister service. Unlike the other transshipment services, there is a clear showing that but for the man-hour exception for transshipped cargo, the McAllister service will not survive. This places McAllister in a special situation. Although one should not be allowed to profit from activities which are found to be unlawful, it seems unfair to impose a sudden shift in assessment burden, the result of which would be to drive a carrier apparently operating in good faith reliance upon an existing exception to the tonnage formula, out of a particular service. PRMSA/PRMMI itself recognizes the peculiarity of McAllister's situation and suggests that some method might be used to protect it against sudden great shifts in financial burdens. (PRMSA/PRMMI Exceptions 26–27.)

The Commission finds one of the suggestions of PRMSA/PRMMI appealing. We agree that a gradual phasing out of the man-hour assessment and a phasing in of a man-hour/tonnage assessment of the type prescribed will act as a cushion against too sudden a shift in cost burdens.[43] Such an approach is similar to the approach proposed in the past with respect to credits granted to those due assessment adjustments. Partial credits spread over a larger period of time have been deemed proper if a grant of full credits at once might create too sudden a shift in costs. See *Agreement*

[42] The contention that the transshipment exception should be preserved because it provides additional work for longshoremen is without merit. As noted above (see pages 89–90), the transshipment exception improperly removes the obligation to pay for GAI-related expenses, which should be borne by containerized transshipment operators. Moreover, the contention that more man-hours may be consumed in barge transportation as compared to truck transportation (a contention which may be presumed but is certainly not proved in the record—see Tr. 404, 408) does not justify the exception. The record shows, for example, that even assuming a loss at the Port of New York/New Jersey of all man-hours for McAllister's service to man-hours for truck transport, the assessments would be fully funded. (See Excep. of PRMSA/PRMMI, 21–22, and computations there made). The contention that the ILA wishes jobs rather than GAI because GAI is based only on a minimum hourly guarantee (Oral Argument, Tr. 54–55, 58–59) is of course true. However, insofar as assessment agreements are concerned, the courts have observed that the union has no "proper interest" in how assessments are funded so long as they are funded. See *e.g.*, Judge Friendly's opinion in *NYSA & ILA* v. *FMC*, 495 F.2d 1215, 1222 (2d Cir. 1974), and Justice Harlan's concurrence in *Volkswagen* v. *FMC*, 390 U.S. 261, 290 (1968). NYSA and ILA themselves recognize that it is not the function of the assessment formula agreement here in issue to provide full work opportunity as opposed to the GAI guarantee. As they themselves state, "a fringe benefit assessment has one objective—to ensure that the collective bargaining contractual obligations are funded and the benefits provided." (See NYSA/ILA Opening Brief, 73–74; see also Ex. 29, VI–2). An assessment formula could well provide for a guarantee in excess of an hourly minimum, but this one did not do so.

[43] We reject the other PRMSA/PRMMI suggestion, that a cap could be placed on the assessment payments of McAllister and competing services at present levels, as too much akin to an award for unlawful operations.

No. 2336, 19 F.M.C. 248, 263 (1976), *aff'd sub nom., New York Shipping Association* v. *F.M.C.*, 571 F.2d 1231 (D.C. Cir. 1978).

The choices of phasing out the man-hour "excepted" treatment are many, and could range from complete exception for a certain time period, with a shift to regular man-hour/tonnage assessment at the end of the period, to a gradual increase by small increments over that period. We leave the choice to NYSA/ILA and the parties involved in such services. Only three conditions will be imposed with respect to the phasing out process. First, the phasing out ought not to extend beyond September 30, 1986, the expiration date of LM–86, the agreement upon which a carrier's good faith reliance may be presumed to be founded. Secondly, although the phasing out is intended to protect the McAllister service from sudden shifts in costs and to allow it an opportunity of finding other means of operating, it would be unfair to competing services not to allow them the ability to compete with McAllister on an equal basis. Therefore the "phasing out" must be made available to all competing carriers.[44] Lastly, to protect against unfairness and the possible expansion during the phasing out period of services at Boston/Providence at the expense of such services at other ports, the phasing out of the excepted treatment will apply to all transshipment services. With these three limitations, the parties are free to fashion a means of gradually removing the unfairness and unlawful discrimination caused by the special treatment of the transshipment services.

The Commission recognizes, of course, that the remainder of the present collective bargaining period may not in fact be sufficient to permit accommodation of transshipment operations to a man-hour/tonnage assessment. We cannot presume, however, that commitments or capital expenditures have been made, or operational difficulties exist, which would prevent the phasing-out of the "special privilege" within the period remaining under the present collective bargaining agreement. If in fact such is the case, and data is submitted to us to support such commitments, expenditures, or operational difficulties, we would, pursuant to our authority under the MLAA (see page 110, *infra*), permit an additional period up to and including September 30, 1987, to allow such "phasing out." Those supporting a "phasing out beyond September 30, 1986 should, however, so advise us, together with supporting data, within the time set herein for implementation of our Order.

Insofar as the exception for domestic cargoes is concerned, we agree with the ALJ's disposition of the matter. (See. I.D. 143–148). The only data that NYSA/ILA are able to muster in support of the need for the continuance of this "exception," besides the discredited argument that expanding man-hours should result in the relief of GAI responsibility, are the isolated "statistic" that the domestic trade has experienced a decline

[44] The necessity for equality of treatment of McAllister and its competitors in the interests of fairness was recognized by both PRMSA/PRMMI (Exceptions 26–27) and the ALJ. (I.D. 159, fn. 43).

in volume since 1973 and the fact that the Commission at one time found the exception lawful. (See NYSA/ILA Brief on Excep., 49; Excep. 50). NYSA's own statistics, however, show a steady increase in domestic container carryings from 1980 to 1983. (Ex. 51). Moreover, whatever the situation may have been when the Commission last examined the assessment burden on the domestic trade,[45] it is clear, as found by the ALJ (I.D. 143–148), that the trade is now healthy and expanding.

Respondents accuse the ALJ of inconsistency with respect to the treatment of certain activities for which continued special treatment was allowed—*i.e.*, breakbulk cargoes, maintenance work, and the New York-New Jersey/Boston-Providence transshipment service. They claim that activities such as handling of empties, stuffing/stripping, and transshipment in general, like the activities for which special treatment was sanctioned, add manhours and thus should be given special treatment. What respondents fail to consider, however, is that the ALJ did not base his conclusions with respect to the special treatment which is preserved merely upon the addition of manhours. A reading of his decision will show that each special assessment sanctioned is based upon special consideration—*i.e.*, breakbulk cargoes' inability to bear the consequences of a straight man-hour assessment (I.D. 184–185; and page 77, *supra*), and the clear possibility of driving maintenance work away from deep-sea ILA labor if an assessment were imposed on such work (I.D. 154–155, and page 89, *supra*).[46]

There is no inconsistency in our treatment of handling of empty containers and "stuffing/stripping," which will be assessed on a man-hour basis, breakbulk cargo, which will be assessed on a "capped" man-hour basis, and transshipped/rehandled and domestic cargoes, which will be assessed on a man-hour/tonnage basis. The assessment of transshipped/rehandled and domestic cargoes on a man-hour basis alone would allow them to escape liability for GAI-related expenses, which in light of the containerized nature of these operations would be unfair (see pages 89–90, 100–101, *supra*). Handling empty containers and "stuffing/stripping," however, bear no GAI-type responsibility and should be relieved from such obligation. (See pages 85–88, *supra*). The additional relief of handling of "empties" and "stuffing/stripping" from industry expenses not related to containerization in any definable way (*i.e.*, welfare and clinic benefits for retirees and their dependents, and unfunded liability for pension benefits for those now retired) acts to reward those activities for reduction of port-wide GAI expenses.

Similarly, it would be unfair to tax breakbulk cargoes on a straight man-hour basis in light of the substantial disparity between man-hours

[45] The record before the Commission during its last examination showed a small and declining domestic trade. See *Agreement No. T-2336*, 15 F.M.C. at 274.

[46] The ALJ's exception for the New York-New Jersey/Boston-Providence transshipment was also based on a circumstance apart from the addition of man-hours—the certainty of the demise of a transshipment carrier, so far as the subject transshipment is concerned, if excepted treatment were not granted to such carrier. We have disallowed this exception because it is based upon an inequity of cost burdens, but have permitted a phasing out of the transshipment exception to cushion the impact of our decision. (See pages 97–100, *supra*).

of labor employed and amount of cargo moved. (See page 77, *supra*). The cap adopted by the ALJ is a sensible and equitable solution which at the same time preserves the essential soundness of the man-hour/tonnage type formula and protects against inequities which could arise from a too-rigid application of that formula. On the other hand, transshipped/rehandled and domestic cargoes, like containerized cargoes in general, bear some responsibility for industry-wide expenses not directly related to containerization. The removal from breakbulk, "empties", and "stuffing/stripping" of the burden of these industry wide expenses relates not to the mere fact that man-hours are expanding on those activities, but to the fact that they are expanding in ways which are not related in any way to "benefits" of containerization. Breakbulk is a "pre-containerization" operation, "stuffing/stripping" is a surrogate for breakbulk operations, and handling of "empties" is really a "burden", rather than a "benefit" of containerization. On the other hand, as the ALJ explained, the fact that there are more pension beneficiaries than employees actively working or available for work in the New York/New Jersey longshore industry is attributable to some extent to containerization and consequent incentives to men to retire. (I.D. 181/ see also Ex. 36, Att. A, at 3, 5–6). The "indirect" containerization expenses are and should be borne by carriers which, as NYSA–ILA notes, could perform their operations in a non-containerized fashion (Brief on Ex. 45–46) and choose to take advantage of containerization in connection with their operations.

NYSA/ILA's contentions that the assessment is fair to PRMSA/PRMMI because it could engage in the activities for which special treatment is granted under their current assessment formula (Brief on Excep. 42–44), and that over-all PRMSA/PRMMI is as well off as other carriers (Brief on Excep., 50–53), are without merit. PRMSA/PRMMI bears the burden under the current assessment formula of other carriers' lesser productivities not the result of the containerization expansion, which was the problem which the assessments were designed to solve. As we have noted, a uniform assessment is improper where responsibilities and productivities vary, even within a single transportation sector. (See pages 79–81, *supra,* and *TTT*, 492 F.2d at 525–629; *Agreement No. T–2336,* 15 F.M.C. at 265–272.[47] Nor can it be seriously argued that PRMSA/PRMMI is as well off as other containerized carriers when wages and container royalties are factored into the equation. Wages and container royalties are not funded under the assessment agreement. Their validity does not depend upon the lawfullness of the assessment formula agreement, and the Commission has been upheld in making a separate decision relating to container royalties without reference to the assessment agreement. See *BSA,* 706 F. 2d.

[47] The full extent of the inequities caused to PRMSA by the special privileges is seen graphically in the comparisons set forth at pages 125–126 of the Initial Decision.

We need not reach PRMSA/PRMMI's diversion arguments in light of our resolution of its complaint. Since the Commission finds that the formula is unfair and unjustly discriminatory to PRMSA/PRMMI and must be modified on the basis of PRMSA/PRMMI's "benefits/burdens" arguments, it is unnecessary to go on to determine if it has also made out a case of unlawful diversion. The exceptions to the Initial Decision based on PRMSA/PRMMI's diversion theory are therefore rendered moot.

The Specific Type I/Type II Allocations

We concur with the ALJ's determinations with respect to the specific allocations of assessment expenses between Type I and Type II costs. (See I.D. 169–187). We find them to be well reasoned and correct and adopt them as our own.

The 25% Reduction On The Tonnage Assessment For The Puerto Rican Trade

The Commission agrees with the ALJ's conclusion that an additional 25% reduction in the tonnage portion of the assessment for the Puerto Rican trade is not warranted. First, the 25% figure is admittedly merely the product of an expert's opinion. (See Excep. of PRMSA/PRMMI, 16–18; Ex. 46 at 28). This in itself might not be fatal, but there seems to be no practical way to quantify how much relief the trade needs or how much any relief granted will actually find its way to the citizens of the Commonwealth.[48] Moreover, even were we able to make such quantifications, relief of the type here sought for the Puerto Rican Trade does not appear to be appropriate in these cases.

In part PRMSA/PRMMI'S position rests on its contention that it should be taxed no more heavily with assessment burdens than the domestic trades because it has similar expenses, *e.g.*, the employment of ILA labor at both water terminals for its transportation. (See Exc. 5). Our modification of the assessment formula agreement to remove the excepted treatment for domestic cargoes, however, places the Puerto Rican trade on an equal footing with the domestic trades.

The main legal argument raised by PRMSA/PRMMI in support of its requested 25% reduction is that the reduction is in keeping with the special treatment given the Puerto Rican trade in our earlier consideration of Puerto Rico's position vis-a-vis assessments in *Agreement No. 2336,* 15 F.M.C., which was affirmed by the Court of Appeals in *TTT.* Examination of our action in the earlier proceeding, however, reveals that the relief there granted the Puerto Rican trade from a particular man-hour assessment was based on its lack of responsibility for the short-fall in man-hours funded by that assessment. See 15 F.M.C. at 265–272; TTT at 525–628; and page 60, *supra.* Although the Commission and the Court noted the beneficial

[48] It us quite possible that none of any special relief we did grant would reach Puerto Rican citizens because of PRMSA's financial situation. (See I.D. 162, 166–168).

effect of cushioning the Puerto Rican economy from severe shifts in assessment burdens, no greater relief was granted the Puerto Rican trade than that based solely on its lack of responsibility for man-hour shortfall. Therefore, *Agreement No. 2336* and *TTT* do not offer a precedent for the 25% reduction over and above the assessment burden which PRMSA/PRMMI would otherwise bear. On the other hand, the effect of such reduction would be to make other carriers bear the Puerto Rican trade's responsibility for GAI, precisely the approach rejected in *Agreement No. 2336.* See 15 F.M.C. at 255–270; see also *TTT* at 625–628.

The requirement that carriers be made to bear other carriers GAI burden is precisely that to which PRMSA/PRMMI, rightly we have found, objects with respect to the McAllister barge service. That a broader interest is represented by the Puerto Rican trade than is represented by the McAllister service is undoubtedly true. It is not, however, the type of interest which an organization like NYSA should be made to bear in proceedings of this type. We assume, *arguendo,* that the removal of the "public interest" standard from the MLAA would not prevent the Commission from considering public interest factors in making determinations under the "unfair" and "unjustly discriminatory" standards. *Cf. Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico,* 8 F.M.C. 404 (1965) (*Automobiles*). The situation presented in a rate case like *Automobiles* is, however, far different from that presented here. Although, as PRMSA/PRMMI correctly observes, NYSA's members are profit making entities, NYSA itself is not, and its objective here is only to pay the employers' obligations to the longshoremen to whom they are due. These obligations do not involve any "profit," but are merely necessary business expenses which are paid under the collective bargaining agreement. It would be unfair to require that these expenses be shifted to force carriers to pick up other carriers' GAI type responsibilities, a course of action which, as noted above, was explicitly rejected in *Agreement No. 2336* in requiring the Puerto Rican trade to pay its own GAI expenses.[49]

The Remedies

Modification and Assessment Adjustments

If, as we have found, the present Agreement is unlawful, the MLAA requires both disapproval/modification and assessment adjustments.[50] Such adjustments are due only Complainant PRMSA/PRMMI, since it is the only complainant which has paid them. The Port asks only for, and would

[49] As the court in TTT noted, ". . . even the Commonwealth's economic witness properly conceded that Puerto Rico must be prepared to bear some fair share of the common burden." (at 628).

[50] The MLAA states that the Commission "shall . . . *disapprove,* cancel or *modify* any [assessment] . . . agreement, or charge or assessment pursuant thereto, that it finds . . . to be unjustly discriminatory or unfair as between carriers, shippers, or ports . . . [and] *shall remedy* the unjust discrimination or unfairness [caused by an assessment of charge] for the period of time between the filing of the complaint and the final decision *by means of assessment adjustments.*" (Emphasis supplied).

be entitled only to, modification/disapproval. In the context of these proceedings, direct modification by the Commission is preferable to a simple disapproval to be followed by negotiation, or conditional type Commission action for several reasons. Mere disapproval, or in the alternative conditional modification, could result in a lapse in the funding of the Agreement, which would be contrary to the public interest in maintaining continuous funding of such agreements which lay behind the MLAA. (S. Rep. No. 854, 96th Cong., 2nd Sess. 14 (1980). Moreover, Justice Harlan made clear, in his concurrence in *Vokswagen,* that the Commission should not reject an assessment formula "when there are no preferable alternative routes to collection of the necessary amount." (at 290). This implies a requirement that there be some minimal determination by the Commission of what preferable alternative routes exist. The time constraints of MLAA, which mandate that the Commission's proceeding end by February 27, 1985, require a final form of agreement by that date. (S. Rep. No. 854 at 11, 14; Amend the Shipping Act, 1916: Hearing on H.R. 6613 Before the Subcommittee on Merchant Marine and Tourism of the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 2d Sess. 20–22 (1980) (Statement of Peter Lambos, Counsel, NYSA)]. As a practical matter, the parties to these proceedings do not have the usual option of rejecting a conditional modification, since there is an existing obligation to fund agreements independent of the shipping statutes. Lastly, direct modification is the traditional form of Commission action for assessment agreements shown to be unlawful. See *Agreement No. T–2336,* 15 F.M.C. at 287.

While the Commission is required by the MLAA to issue its "final decision" within one year of the date of filing of the complaint, PRMSA/PRMMI, as a successful complainant, is entitled to assessment adjustments "for the period of time between the filing of the complaint and the final decision . . . ." Therefore, if the "period of adjustments" extends to the final day of decision, the Commission cannot as a practical matter issue an order on that day finally disposing of the case. Until the final day, the total of adjustments due does not even exist, and of necessity its value will not be known until some time thereafter. We find therefore that the "final decision" language relates to the substantive modifications of the assessment formula, and not to the necessary assessment adjustments. Congress expressly recognized the "complexity" of the assessment adjustment process, and advised that the "Commission [has] broad discretion, unfettered by the constraints of . . . other provisions of the Shipping Act, to fashion appropriate remedies for unfair or discriminatory assessments." S. Rep. No. 854 at 14.

This "broad discretion . . . to fashion appropriate remedies" allows us to resolve another quandary posed by the assessment adjustment process. Since the present formula is unlawful, it must be modified, and since the Commission's "final decision" must be issued by February 27, 1985,

the modification must be effective on that day. We realize, however, that as a practical matter this may be difficult. Moreover, insofar as the assessment adjustments are concerned, as noted above, the effectuation of a remedy on the "final decision" date is impossible. The flexibility granted us to fashion a remedy for unlawful assessment adjustments, however, provides a solution to the quandary, and one which permits Respondents sufficient time in which to implement the mixed man-hour/tonnage method of assessment here mandated without undue disruption to their operations. We will, as we must, modify LM–86 as of February 27, 1985. We will, however, permit NYSA/ILA 61 days from the date, *i.e.*, until April 29, 1985, to make the adjustments to effectuate any necessary changes. By that date of modified LM–86 conforming to the requirements here set down as well as a statement of the adjustments made in PRMSA/PRMMI's favor must be filed. To the extent such adjustments cannot be made until after February 27, 1985, additional adjustments must be made to insure that PRMSA/PRMMI receives credits for any portion of the period between February 27 and April 29 during which it may have been assessed at the rate applicable under the formula which we here modify. NYSA and PRMSA/PRMMI are directed to exchange any information necessary for the computation and verification of any credits due PRMSA/PRMMI during the 61-day period.

The Commission urges the parties to act reasonably in carrying out this computation and verification process. If, for example, it can be shown that holiday payments for GAI recipients for the period following February 27, 1984 in fact were properly accounted for in the Vacation and Holiday Fund (see pages 22–23, *supra*), we would expect PRMSA/PRMMI to accept this showing. Tonnages and man-hours should, in most instances, be easily verified from NYSA/ILA, carrier, and terminal operator records, and the parties are expected not to demand extended verification of such data. We believe that the parties here best understand their own operations and trust that they will act intelligently and reasonably in implementing our Order.

Additional Remedies Sought by PRMSA/PRMMI

Although we find that PRMSA/PRMMI is entitled to assessment adjustments, we do not agree that it is entitled to the additional relief it seeks, namely, interest on the assessment adjustments or reparation from the time of the formation of LM–86 to the date of the filing of its complaint.

It seems clear that, as a matter of law, a cause of action exists for interest on assessment adjustments, and that the grant of such interest is discretionary. Although the Commission may decide to deny such interest on equitable grounds as it has done in the past (see *Agreement No. T–2336,* 19 F.M.C. 248, 261–262 (1976), *affirmed sub nom. New York Shipping Ass'n* v. *FMC,* 571 F.2d 1231, 1241–1242 (D.C. Cir. 1978)), the MLAA makes clear that the Commission's broad discretion with respect

to assessment adjustments is preserved. S. Rep. No. 854 at 14. There was no specific grant of authority in section 22 of the Shipping Act, 1916 (46 U.S.C. § 821) to grant interest, yet this was routinely done in the agency's discretion. Although the MLAA says the Commission "shall" remedy "unjust discrimination" and "fairness", it does not state how, and the legislative history indicates the statute is to "*permit*", not require, "full restitution". See S. Rep. No. 854 at 11 (emphasis supplied). The fact that the word "full" is used in connection with restitution is to be compared to the words "full reparation" in section 22, where it has frequently been held, as in *Agreement No. T-2336*, that an award of interest is discretionary. We believe the ALJ properly denied interest here and adopt his decision in that regard.[51]

PRMSA/PRMMI contends that the remedies existing prior to the MLAA were presented under the rationale of *CalCartage*, which indicated that, at least for standing purposes, section 22 of the Shipping Act, 1916 was applicable to actions under the MLAA. On the other hand, supporters of the present formula assert that the holding in *CalCartage* was restricted to "standing" and did not reach the question of remedies available to one who had standing. It could also be contended that the reparation remedies which were preserved were only those which related to interests other than carriers, shippers, or ports, with respect to which specifically named interests the adjustment remedy was intended to be exclusive.[52] The Shipping Act of 1984 removed any damage remedy for assessment agreements other than adjustments. See Conf. Rep. No. 600, 98th Cong., 2d Sess. 30 (1984).[53] We find that the best reading of the legislative history of the MLAA as originally enacted is that the statute was intended to provide assessment adjustments as the exclusive remedy for unfair or discriminatory type treatment of shippers, carriers, and ports, because such interests are specifically mentioned, a remedy with respect to them for

[51] The fact that the Commission has awarded interest more or less as a matter of course in reparation actions does not control our action here. As noted in our report and order in 19 F.M.C. on the adjustments due carriers which had been over-assessed, adjustment actions are factually different from ordinary reparation actions and somewhat different considerations necessarily apply. The most significant differences are that, as we noted in 19 F.M.C. (at 260–262), and as the ALJ noted here (see I.D. 188–189; see also 136, 125, fn. 36), neither the fact of overcharge nor the amount could have been expected to have been determined prior to conclusion of the Commission's proceedings. The ALJ correctly applied the standards used in the earlier case, and correctly limited those standards to consideration of the period in question since, as PRMSA/PRMMI recognizes (see page 54, *supra*), each assessment period (and actions relating to it) must be considered on its own. The fact that generally reparations are mandatory under the MLAA as revised by section 11(g) of the Shipping Act of 1984 (46 U.S.C. app. § 1710(g)) (the 1984 Act) once violation and causal connection between it and the claimed injury has been shown, is irrelevant for our purposes here, both because it is clear, as PRMSA admits (Except., 36), that under the 1984 Act the only substantive and remedial provisions applicable to cases involving assessments are those of the MLAA, and because it would in any case create "manifest injustice" to apply such standard retroactively. See FMC Notice, 49 Fed. Reg. 21798 (May 23, 1984).

[52] The complainants to whom standing was granted in *CalCartage* are off-dock container freight station operators, *i.e.*, not shippers, carriers, or ports.

[53] Although Conference Report No. 600 states that assessment adjustments were always the exclusive damage remedy under the MLAA, as noted above, *CalCartage* could be read to the contrary.

such treatment detailed (*i.e.*, adjustments), and a clear conflict would be created by supplementing such remedy with an additional remedy.[54] We need not here reach the question of whether remedies under section 22 exist for the complainants in *CalCartage,* a matter which is before us on remand in that proceeding.[55]

Even were we to find that a reparation remedy were preserved to PRMSA/PRMMI under the MLAA, in this particular case, that conclusion would not affect the result. The agreement in issue, LM–86, was not filed until February 15, 1984 and did not become legally effective until that day. As PRMSA acknowledges, each filing must be treated as a separate agreement, and its claim is only against LM–86. PRMSA/PRMMI's complaint was filed February 27, 1984. In the circumstances of PRMSA/PRMMI's complaint, we would deny reparations.[56] If PRMSA/PRMMI is correct, then a complainant could wait up to two years to file its complaint under section 22 and recover reparation, an action plainly inconsistent with the one-year statute of limitations in the MLAA. Even if such action were deemed too inconsistent with the MLAA to prevail, a complainant could wait 11 months and 30 days before filing a complaint, and recover reparation for such period. This would plainly be inconsistent with the MLAA remedy and procedures provided, at least for shippers, carriers, and ports (see fn. 54, *supra*), and would clearly be improper. All of this is really also another way of proving the intent of Congress to make assessment adjustments the exclusive remedy for assessment claimants like PRMSA/PRMMI.[57]

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[54] See *e.q.*: "To the extent that complainant has borne, either directly or indirectly, assessment charges ultimately set aside or modified by the FMC, complainant shall be entitled to, and the FMC shall award assessment adjustments from the date of the filing of the complaint." S. Rep. No. 854 at 11;

> "The remedy for an assessment found unfair or discriminatory by the Commission shall be in the form of adjustments to future assessments, except for a complainant who has ceased the shipping activity subject to assessment." *Ibid,* at 14.

The language of the legislative history stating "the bill retains 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" must be read in context. The full quote is:

> "By enlarging the number of such agreements which will be exempt from filing and approval, and by providing expedited procedures for those assessment agreements which remain subject to FMC jurisdiction, the bill should significantly reduce the costs of regulation. At the same time, the bill retains 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." *Ibid,* at 13.

The "existing protection' language clearly is intended to refer to things "required to be set forth in tariffs," rather than to assessment agreements. See §5, MLAA, Section 45, Shipping Act, 1916, 46 U.S.C. 841c.

[55] We also need not here reach the question of what separate remedies might have been applicable under the "detriment to commerce" standard when it appeared in the MLAA since such standard is not an issue here. (See I.D. 70).

[56] Section 11(g) of the 1984 Act makes reparations, like interest, mandatory in the case of violation and injury caused thereby. We find, for the reasons stated with respect to the mandatory award of interest, that were 11(g) of the 1984 Act applicable here, it would not be equitable to apply it. (See page 113, *supra*).

[57] PRMSA/PRMMI does raise a valid point with respect to LM–86, albeit one outside of the scope of these proceedings. We do not know under what authority NYSA/ILA claimed to operate between October 1, 1983 and February 15, 1984 for collection of assessments. This is a matter we will pursue independently of these proceedings.

CONCLUSION

In concluding, we wish to emphasize several points about our decision and the procedures employed in reaching it. First, the modifications here required will in no way adversely affect the funding of the fringe benefits required under the collective bargaining agreements between NYSA and ILA. In fact, the modifications would, had they been in effect during the 1982–1983 contract year, have fully funded all benefits, unlike the present formula, which in fact underfunded the benefits. (Ex. 41, Table II). Moreover, the changes from the present formula are relatively small. Over two-thirds of the benefit costs will continue to be funded on a tonnage basis under the combination man-hour/tonnage formula. The cap on breakbulk cargoes will ensure that they continue to pay no more than their present assessment costs. All exceptions and special privileges are preserved except those for handling empty containers, "stuffing/stripping," domestic cargo, and transshipments, which we find on the record to be unjustified. To the extent that financial difficulty may arise from the removal of exceptions, a gradual phasing-in of the new assessment treatment has been provided.

The Commission has not been able to treat specifically and in detail every exception to the Initial Decision. Nevertheless, we have considered all the exceptions and those not specifically treated have been disposed of otherwise in the decision, either by rulings on their merits or by rulings which rendered such exceptions moot or immaterial for purposes of the decision. This decision is, after all, substantially an adoption of the Initial Decision, and the discussions, factual findings, reasoning, and conclusions of the ALJ are those we have utilized, unless explicitly overruled or unless such use would create an obvious inconsistency.

An order will be entered, requiring that the necessary modifications to Agreement No. LM–86 be made, along with assessment adjustments in favor of PRMSA/PRMMI, and establishing a time period and procedures for such modifications and adjustments.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

Commissioner Moakley, dissenting in part

While I concur in the majority's decision that many aspects of the subject assessment formula are unfair and unlawful, I cannot concur with their conclusions and rationale with respect to transshipped cargo. Unlike the decision of the majority or the initial decision, I would not find that complainants have carried their burden of demonstrating the unlawfulness of the exception of transshipped cargo from the tonnage assessment. In order to do so, they would have had to establish that breakbulk cargo was routinely transshipped in the port of New York prior to containerization, a conclusion which is contrary to economic logic as well as the limited evidence of record in this proceeding. Therefore, I would leave transshipped

cargo as we found it, free from a tonnage assessment designed to compensate the union for a problem to which transshipped cargo does not contribute and which, in fact, it may help to alleviate.

Commissioner Robert Setrakian concurring in part and dissenting in part

I concur in every aspect of the majority's Report except for its departure from Administrative Law Judge Kline's treatment of the transshipment issue.

The majority's decision considers but rejects several factors critical to the administrative law judge's determination not to remove the special transshipment exception. Removal of the exception, he reasoned, would have a fatal impact on the McAllister operation; would be detrimental to the ports of Boston/Providence; and would eliminate a service option for shippers. I am swayed by these considerations and would adopt the Initial Decision on this issue.

The Maritime Labor Agreements Act charges the Commission to consider whether an assessment agreement is unjustly discriminatory or unfair to carriers, shippers, or ports, or operates to the detriment of the commerce of the United States. I fear that the desirability of providing uniform treatment for three essentially unequal carriers (McAllister vis-a-vis U.S. Lines and Sea-Land) does not outweigh the resulting deleterious effects on this small, single-operation carrier, the shippers who have chosen this means of transport, and not least, this small port and its work force, now dependent in part on cargo transshipped via a major load center, as well as the negative impact of all of these factors on U.S. commerce generally.

Therefore, to the extent the majority's decision modifies the Initial Decision on this issue, I respectfully dissent. In all other respects I fully concur with the majority's Report.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–6

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

NEW YORK SHIPPING ASSOCIATION, ET AL.

DOCKET NO. 84–8

PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO MARINE MANAGEMENT, INC.

v.

NEW YORK SHIPPING ASSOCIATION

Respondents New York Shipping Association and its members utilize a formula to fund all fringe benefits under a collective bargaining agreement which, unlike that at any other port, is based on assessment rates per ton but also allows lower excepted man-hour rates or other special charges on certain types of activities and even no charges whatsoever on other activities. The Port of New York Authority complains that the formula is unfair and unjustly discriminatory as to New York because it imposes higher assessments per container than are necessary. PRMSA, the main carrier serving the Puerto Rican trade, also complains that the formula is unfair and unjustly discriminatory as it affects PRMSA and the Puerto Rican trade, in violation of the Maritime Labor Agreements Act of 1980 (MLAA), and other provisions of the Shipping Act, 1916. Both complainants urge adoption of alternative formulas and PRMSA seeks monetary adjustments and reparation. Respondents and other parties defend the formula, contending that complainants have not carried their burden of proof. Additionally, respondents ask that PRMSA's complaint be summarily dismissed on various legal grounds and argue that its remedies have been limited by law. It is held:

(1) Respondents' legal defenses have no basis in law or fact and cannot preclude the Commission from considering the merits of the complaints;

(2) The applicable standard of proof is "preponderance of the evidence," and the substantive standard is whether the current assessment agreement is unfair or unjustly discriminatory. As to PRMSA, this standard employs the "benefits-burdens" test, and, as to the Port Authority, this standard employs the test of unfair competitive disadvantage to a port. The MLAA excludes sections 16, 17, 18(a), and 22 of the 1916 Act and limits monetary remedies to prospective adjustments for PRMSA. The 1916 and 1984 Acts are essentially unchanged in this regard;

(3) As to the merits of its case, the Port Authority has shown competitive harm and disadvantage resulting from the type of formula currently in use. PRMSA has similarly shown an unfair and discriminatory shift of cost burdens among containerized carriers caused by unjustified favoritisms to certain carriers and by a conceptually unsound formula which lumps different types of costs together and taxes individual carriers' efficiencies unfairly;

(4) Alternative formulas modifying the current tonnage formula have been proposed which would alleviate the unfairness and unjustly discriminatory aspects of the current formula. PRMSA's proposed formula, based on credible expert testimony and supporting evidence, is the most carefully fashioned and with certain modifications, which would eliminate its excessive discount for the Puerto Rican trade, should be ordered adopted under the Commission's express authority to modify an unfair or unjustly discriminatory agreement. Appropriate prospective credits for PRMSA should likewise be ordered, as provided by law.

Paul M. Donovan, Jean C. Godwin, and *Lauren V. Kessler* for complaint Port Authority of New York and New Jersey.

Amy Loeserman Klein, William E. Cohen, and *Marc A. Berstein* for complaints PRMSA and PRMMI.

C.P. Lambos, Donato Caruso, and *William M. Spelman* for respondents NYSA and 89 of its members.

Thomas W. Gleason and Ernest L. Mathews, Jr. for intervenor ILA.

Robert S. Zuckerman, Eldered N. Bell, Jr., and *Ann E. Isaac* for respondent/intervenor Sea-Land Service, Inc.

Richard A. Lidinsky, Jr. and *Thomas K. Farley* for intervenor Maryland Port Administration.

Dorothy Sanders and *R. Moriconi* for intervenor Massachusetts Port Authority.

John Robert Ewers, Aaron W. Reese, Stuart James, and *Janet F. Katz* for Hearing Counsel.

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

Partially Adopted February 27, 1985

This proceeding involves the question as to whether a formula devised by respondents New York Shipping Association, Inc., (NYSA), its members, and the International Longshoremen's Association (ILA) and incorporated into a collective bargaining agreement for the purpose of funding various fringe benefits to labor at the Port of New York violates standards set forth in the Maritime Labor Agreements Act of 1980, P.L. 96–325, 94 Stat. 1021 (MLAA), which Act, as relevant here, was codified as section 15 of the Act, 1916, 46 U.S.C. sec. 814, fifth paragraph, and, effective June 18, 1984, as section 5(d) of the Shipping Act of 1984, 46 U.S.C. app. 1704. The proceeding was initiated by the filing of two complaints. The first complaint was filed on February 22, 1984, by the Port Authority of New York and New Jersey (Port Authority) and the second compliant, on February 27, 1984, by the Puerto Rico Maritime Shipping Authority (PRMSA) and by Puerto Rico Marine Management, Inc. (PRMMI). The Port Authority alleged that the agreement between the NYSA and the ILA filed with the Commission as Agreement LM–86 is unjustly discriminatory and unfair as between carriers, shippers and ports and operates to

[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).

the detriment of the commerce of the United States because it imposes assessments on containerized cargo which are much higher at the Port of New York than at competing ports, in violation of section 15, fifth paragraph, of the 1916 Act. The Port Authority asked that the Commission modify the allegedly harmful assessment agreement so as to establish some basis for the assessments which would be nondiscriminatory and fair as between carriers, shippers, and ports.

The second complaint was filed by an ocean carrier, PRMSA, which is also a public corporation created by the Legislative Assembly of the Commonwealth of Puerto Rico on June 10, 1974, to provide reliable shipping services to the citizens of Puerto Rico at the lowest possible cost, and by its operating agent, PRMMI, which, incidentally, is a member of the NYSA. PRMSA/PRMMI alleged that the subject assessment agreement is unlawful in a number of respect, not only under section 15 of the 1916 Act but under sections 16, 17, and 18(a) of that Act as well. More specifically, PRMSA/PRMMI alleged that the subject assessment agreement treats Puerto Rican-trade carriers unfairly and with unjust discrimination by assessing that trade as a foreign trade and unduly burdening it with costs not reasonably related to any benefits received under the labor contract or related to any responsibility for decrease in man-hours worked at the Port of New York. PRMSA/PRMMI also alleged that shippers and ports suffered unfair or unjust discriminatory treatment because the assessments imposed under the subject agreement are higher than those imposed on other domestic trade cargoes and lead to diversion of cargoes away from the port of New York in favor of other competing mainload ports, which cargoes are tributary to the Port of New York. This unfavorable situation to the Puerto Rican trade, furthermore, allegedly ignores prior Commission recognition that special and less detrimental treatment is required for Puerto Rico in the light of the Island's economy and extreme dependence upon maritime commerce with the U.S. Mainland. Therefore, PRMSA alleged that the assessment agreement is unjustly discriminatory and unfair in violation of section 15 of the 1916 Act, and also confers undue and unreasonable preference and advantage and creates undue and unreasonable disadvantages among carriers, localities and cargoes, unjustly discriminatory rates and charges, and unjust and unreasonable rates and charges and practices, in violation of sections 16, 17, and 18(a) of the 1916 Act, 46 U.S.C. secs. 815, 816, and 817. PRMSA/PRMMI accordingly ask the Commission to order Agreement LM–86 modified to remove the various violations alleged and to order appropriate assessment adjustments and full reparations to remedy the past impact of the alleged violations. On May 15, 1984, PRMSA/PRMMI filed an amended compliant which repeated the essential allegations of the original complaint but modified portions of it to emphasize that the essential basis of the complaint was not related to PRMSA's financial situation or ability to pay assessments in relation to PRMSA's profitability or to loss of cargo to a non-ILA

carrier although diversion of cargo to that carrier was still a factor indicating harm to PRMSA and the Port of New York resulting from the assessments. PRMSA/PRMMI also clarified their original complaint by specifying that they sought "full reparations with interest" back to October 1, 1983, i.e., the beginning of the labor contract year rather than the date of filing of the assessment agreement (LM–86), which was February 15, 1984.

Respondents NYSA, Inc. and its members answered the two complaints, denying any violations of law. In addition, respondents raised a number of affirmative defenses having to do with the possible lack of Commission jurisdiction over the assessment agreement because of previous Commission approval of the assessment formula, the conduct of PRMSA/PRMMI in failing to file their complaint earlier, doctrines of laches, estoppel, waiver, the statute of limitations, or the applicability of doctrines of labor law as they affect PRMSA's ability to maintain such a complaint before the Commission, and the nonapplicability of sections 16, 17, 18(a) or 22 of the 1916 Act. These defenses all deal with matters other than the merits of the complaints and, if valid, would preclude the Commission from considering whether the assessment agreement is unfair or unjustly discriminatory. As I discuss later, however, I find that almost all of them have no validity and that there is no legal impediment to a full consideration of the merits of the complaints.

In addition to three complainants (Port Authority, PRMSA, and PRMMI) and the more than 100 respondents (NYSA, Inc. and 102 or so member companies, including steamship carriers, agents, marine terminal operators, stevedores, and others), four parties have been granted permission to intervene in the proceedings. These are: the ILA, the unincorporated labor organization which is the collective bargaining representative for longshoremen and other dockworkers employed on the Atlantic and Gulf Coasts and in Puerto Rico; the Maryland Port Administration (MPA), a state governmental agency responsible for the development and promotion of maritime commerce in Maryland, principally in the Port of Baltimore; the Massachusetts Port Authority (Massport), a state governmental agency responsible for the development and promotion of the Port of Boston; Sea-Land Service, Inc. (Sea-Land), a respondent in No. 84–6 who wished to become an intervenor in No. 84–8 as a carrier operating in the Puerto Rican trade; and the Bureau of Hearing Counsel, who stated that the issues in the case concerned possible unfairness among carriers, shippers, and ports, all of which issues are of general public interest and further stated that Hearing Counsel's participation might reasonably be expected to assist in the development of a sound record.

Because the complaints were filed under governing provisions of the MLAA, which requires a decision of the Commission within one year of the filing of a complaint and Commission Rule 75, 46 CFR 502.75, the corresponding regulation implementing the statute, which requires an *Initial Decision* in eight months, it was necessary to establish a schedule

which would enable all the parties to conduct necessary prehearing inspection and discovery, develop and present their evidence and cases, allow sufficient time to file post-hearing briefs, and to allow the presiding judge to issue a comprehensive Initial Decision. To achieve these objectives, the parties established appropriate schedules which I approved and conducted extensive discovery (depositions, interrogatories, documents production, requests for admissions), from the inception of the proceedings to shortly before the filing of written testimony, which testimony was filed in four stages (complainants' opening testimony, respondents' opening testimony, complainants' rebuttal testimony, and respondents' surrebuttal testimony). All of these matters were accomplished between late February when the complaints were filed through August 14, 1984, when the final surrebuttal testimony was filed by respondents. To facilitate the completion of discovery and the filing of the written cases, furthermore, 10 informal telephonic conferences were conducted together with two formal, on-the-record prehearing conferences. Oral hearings were held commencing on August 16 for seven days, during which 14 witnesses were cross-examined in accordance with specific designations for cross-examination by the various parties. The hearings were concluded on August 29, 1984. At the conclusion of the hearings, the evidentiary record consisted of some 50 volumes of written testimony and supporting documentary materials as well as the oral testimony of the 14 witnesses. Because of the size of the record and the complexity and great importance of the case, the parties were granted permission to file opening briefs on September 28 and reply briefs on October 12, 1984.[2] This schedule would thereafter permit me only 15 calendar days to prepare and issue my Initial Decision, which, as provided by Rule 75, would have been due on October 27, 1984, eight months after the filing of the second complaint. Relief was obviously warranted, and, in response to my request to the Commission for a waiver of Rule 75, the Commission granted me an additional 13 calendar days beyond October 27, i.e., until November 9, 1984, to issue my Initial Decision. (See Enlargement of Time to Issue Initial Decision, September 11, 1984; my memorandum to the Commission, September 4, 1984.)

RULINGS AS TO RESPONDENTS' AFFIRMATIVE DEFENSES

As seen from the complaints, the ultimate issue raised by both of them is whether the subject assessment formula embodied in the current collective bargaining agreement between the NYSA and ILA is unfair or unjustly discriminatory among shippers, carriers, or ports, and, if so, whether the formula should be modified to eliminate the unfairness and unjust discrimination and whether the carrier, PRMSA, should receive compensation in the form of assessment adjustments or otherwise. However, before I can

[2] This schedule was later modified to permit opening and reply briefs to be filed on October 3 and 15, respectively.

decide these ultimate issues, I must first determine whether any of respondents' affirmative defenses are valid because, if they are, the Commission cannot or should not even consider whether the formula is harmful and ought to be modified.

Respondents' Affirmative Defenses

As mentioned briefly earlier, NYSA and its members raised a number of affirmative defenses in their answers to the complaints. There were eleven of them. The first four had to do with the Commission's previous "approval" of the subject formula in 1974 and the involvement of PRMSA or its predecessor or subsidiary carrier in the proceedings leading to the 1974 settlement which the Commission approved. It was contended by NYSA that the Commission's order of approval of the 1974 settlement has resolved the issues now before the Commission in these proceedings and, furthermore, because of the participation of PRMSA's predecessor or subsidiary carrier in the settlement proceeding, PRMSA is not barred from challenging the formula under the doctrines of *res judicata,* estoppel, and waiver.

NYSA's next three affirmative defenses concerned the alleged untimeliness of the complaints. NYSA contended that the assessment formula under attack in these proceedings was first filed with the Commission in 1974 as Agreement No. T–3007 and was last filed on September 30, 1980, as Agreement No. LM–66. Therefore, the two complaints, which were not filed until more than three years after the filing of LM–66, are time-barred by the two-year statute of limitations set forth in the MLAA (section 15, fifth paragraph of the 1916 Act; section 5(d) of the 1984 Act.) Furthermore, because the formula under challenge now was "approved" as of September 30, 1974, the complaints have been filed over nine years later and should be dismissed under the doctrine of laches.

NYSA's next two affirmative defenses stated that the PRMSA/PRMMI complaint should be dismissed because complainants utilized arbitration procedures provided by the labor contract and because complainants failed to resign from the NYSA before the filing of the subject Agreement LM–86. NYSA contended that under labor law, the policies favoring arbitration of disputes arising out of labor contracts, and policies favoring the results of collective bargaining, PRMSA and PRMMI cannot now challenge the assessment formula incorporated into the labor contract. Also, complainants' utilization of the arbitration procedures before filing their complaint and their failure to withdraw from the bargaining unit may have constituted a voluntary and knowing waiver of their rights under federal shipping laws.

Finally, NYSA raised affirmative defenses alleging that the relief requested by complainants would itself be unjustly discriminatory and unfair, that complainants are not entitled to reparations for any period prior to

the filing of the complaints, and that sections 16, 17, 18(a), and 22 of the 1916 Act do not apply under the MLAA.

I find that none of the affirmative defenses, except those concerning the limitation on reparations and exclusion of sections other than section 15 of the 1916 Act, have merit. Accordingly, there is no legal obstacle preventing the Commission from deciding the merits of the complaints.

In their post-hearing brief, respondents (NYSA, joined by the ILA) again raise these affirmative defenses under five categories: (1) that the complaints are time-barred; (2) that PRMSA and PRMMI cannot now withdraw from the collective bargaining agreement under principles of labor law which must also be considered under shipping law; (3) that the formula under attack has been found to be lawful by the Commission in 1974, which finding binds PRMSA and PRMMI under the principle of *res judicata*; (4) that PRMSA has invoked the labor contract's grievance and arbitration machinery and cannot now seek relief before agencies or courts; and (5) that PRMSA's predecessor carrier, TTT, entered into a settlement agreement in 1974, promising not to challenge the subject assessment formula in the future, which agreement is also binding on PRMSA under the principle of estoppel.

I find that these defenses have no more validity now that the record has been more completely developed than they did when I indicated at an earlier stage of the proceeding on the limited record before me at the time, that they did not appear to have merit.[3]

Respondents' arguments that the complaints are time-barred and should be dismissed because of the two-year period of limitations in the MLAA or because of laches are unsound because, as both the Port Authority and PRMSA/PRMMI have noted, respondents are asking the Commission to find, contrary to fact, that complainants are not challenging Agreement LM–86 which was filed on February 15, 1984, but are actually challenging a formula first incorporated into Agreement No. T–3007 and filed in 1974. Furthermore, respondents wish the Commission to find that the filing of

[3] On May 29, 1984, PRMSA and PRMMI filed a motion asking me to strike nine of respondent's affirmative defenses, including all of these discussed above. Complainants had argued persuasively in the motion that seven of the grounds for affirmative defenses regarding the question of the timing of the filing of the complaints mistakenly assumed that complainants were challenging Agreement No. T–3007, which first incorporated the subject assessment formula and was effective from 1974 to 1977. Complainants contended that they were challenging the current agreement, LM–86, which was filed and deemed approved under law on February 1984. Complainants also contended that they could not be barred from filing complaints under shipping law because of arbitration principles and denied that they had invoked arbitration procedures under the labor contract or that they had waived their rights to file complaints under the MLAA. Although I indicated that I was not impressed by the affirmative defenses and recognized that motions to strike invalid defenses could save time later, I refrained from issuing a final ruling because of the incomplete state of the factual record, the complexity of the legal issues raised, and the need for more developed arguments. Courts often refrain from deciding jurisdictional-type issues on a summary basis until the record becomes clearer. See, e.g., *EEOC* v. *Ford Motor Co.*, 529 F. Supp. 643 (D. Col. 1982); *United States* v. *729,773 Acres of Land*, 531 F. Supp. 967, 971 (D.Haw. 1982). The record is now clear enough to decide that the defenses in question lack merit.

Agreement No. LM–86 was only a technicality and did not trigger any rights regarding the filing of complaints challenging its lawfulness.

The fact, however, is that Agreement No. LM–86 was filed and, as the MLAA provides, was "deemed approved" by the Commission on February 15, 1984. Although NYSA and the ILA had adopted essentially the same tonnage formula as of October 1, 1974, which was designated as Agreement No. T–3007, and which was approved as part of a settlement of three pending proceedings, the settlement agreement approved by the Commission being Agreement No. T–3017, there were subsequent filings of agreements inasmuch as the labor contracts at New York run for only three years apiece. Thus, it was necessary to file the assessment agreement to cover each new contract year period. Agreement No. LM–66, including the assessment formula, was filed on September 30, 1980, and extensions of that agreement were filed as Agreement Nos. LM–83 and LM–86. The MLAA grants carriers, shippers, or ports the right to challenge the lawfulness of assessment agreements and to obtain relief provided that the complaint is filed "within 2 years of the date of filing of the agreement . . ." MLAA, sec. 4, section 15, fifth paragraph, 1916 Act, 46 U.S.C. sec. 814.[4] Furthermore, since the MLAA removed from the Commission its previous authority under section 15 of the 1916 Act to investigate assessment agreements on the Commission's own motion, the interests adversely affected by assessment agreements and given the right to file complaints would have no other remedy under shipping law if they cannot now challenge LM–86. This means that although NYSA and the ILA agree on three-year labor contracts and file something with the Commission every three years extending their agreements as far as the assessment formulae are concerned, complaining parties would be required to file complaints within two years of the original formula, first effective in 1974. There is no basis in logic, the language or legislative history of the MLAA to impose such a requirement on complaining parties.

The MLAA, as I discuss later, was a compromise between industry interests who desired removal of the Commission from jurisdiction over collective bargaining agreements, including those portions of the agreements concerning assessments used to fund fringe benefits, and other interests who were fearful that total removal of the Commission would leave affected persons with no protection against possible abuses, more specifically, the possibility that affected parties would not be paying a fair share of fringe benefit obligations. See Sen. Rep. No. 96–854, 96th Cong., 2d Sess. (1980)

[4]The MLAA was recodified as sections 5 (d) and (e) of the Shipping Act of 1984, 46 U.S.C. app. 1704(d),(e). There were essentially no changes from the 1916 Act except that assessment agreements "become effective on filing," complaints must be filed "within 2 years after the date of the agreement," the "detriment to the commerce of the United States" standards was removed, and the language of section 45 of the 1916 Act regarding applicability of the 1916 and 1933 Acts to tariff practices as opposed to assessment agreements was rewritten. I agree with complainant Port Authority (opening brief, p. 4) that the 1984 Act made no significant changes to the 1916 Act as far as this case is concerned. Therefore, my findings apply under section 15 of the 1916 Act or section 5(d) of the 1984 Act.

at 1–2, 14. As even respondents concede, the MLAA was enacted "against the backdrop of more than ten years of decisional law." (NYSA op. br. 123.) The backdrop consisted of a number of Commission proceedings determining whether assessment agreements violated the standards set forth in section 15 of the 1916 Act and other sections of that Act incorporated by then section 15, and implementing certain tests such as the "benefits-burdens" test which was first enunciated by the Supreme Court in *Volkswagenwerk Aktiengesellschaft* v. *F.M.C.*, 390 U.S. 261 (1968). Since Congress was aware of the ten-year history of Commission proceedings, it presumably was aware of long-established Commission decisions holding that extensions of agreements were considered to be the same as new agreements as far as approval was concerned and that such extensions had to be filed and processed notwithstanding approval of the basic agreements previously. See, e.g., *Agreement Nos. 8200, 8200–1, 8200–2, etc.*, 21 F.M.C. 959, 962 (1979) (each extension of an agreement must stand alone and be judged in light of present circumstances); *Investigation of Passenger Steamship Conferences Regarding Travel Agents*, 10 F.M.C. 27, 34 n. 6 (1966), aff'd sub nom. *F.M.C.* v. *Svenska*, 390 U.S. 238 (1968) (prior approval of an agreement under section 15 may not be converted into a vested right of continued approval simply because the parties to the agreement desire continued approval.); cf. *New York Shipping Association—NYSA–ILA Man-Hour Tonnage Method of Assessment*, 16 FM.C. 381, 396–397 (1973), aff'd sub nom. *New York Shipping Association* v. *F.M.C.*, 495 F. 2d 1215 (2d Cir. 1974) (determination of lawfulness of current formula depends upon current circumstances and conditions, not upon previous circumstances and conditions which warranted findings against a previous agreement.).

In the light of this backdrop it makes no sense to contend that Congress gave affected persons the right to file complaints within two years of the filing of agreements with the Commission but this right did not apply to extensions of assessment agreements which are filed every three years and, as the above discussion illustrates, were a type traditionally treated as new agreements requiring independent processing under section 15 of the 1916 Act. If NYSA really wants immunity from the filing of complaints for ten years or more, it can obtain it within the mechanism of the MLAA merely by entering into labor contracts which do not expire for ten years and require only one filing of the assessment portion of the labor agreement every ten years. If, however, NYSA and the ILA believe that circumstances and conditions change in three years and therefore wish to devise new labor contracts every three years, they should not object to the fact that some persons claiming to suffer adverse effects from assessment agreements might wish to claim that changes in circumstances and conditions in the

last few years necessitate their seeking relief from an assessment formula which keeps getting renewed and refiled every three years.[5]

The second category of affirmative defense set forth in NYSA's opening brief is the argument that PRMSA and PRMMI cannot withdraw from the collective bargaining agreement at this time because they failed to observe requirements imposed by federal labor law concerning notice, union consent, bargaining impasse, unusual circumstances, good faith, etc. Many cases are cited for the proposition that federal labor law prohibits an employer who has failed to withdraw or disassociate itself from the bargaining unit from later disavowing the labor accord. (See NYSA's op. brief at 98–101). NYSA contends that PRMSA has been a member of the multi-employer bargaining unit, the NYSA, that labor policy embodied in the case law cited must form a part of shipping law analysis and that PRMSA, by being bound to the labor contract, has waived its rights under the MLAA. I cannot agree.

As far as I am aware, PRMSA and PRMMI are living up to the terms of the collective bargaining agreement and are paying assessments under that agreement. Furthermore, I am not aware that PRMMI has withdrawn its membership in the NYSA.[6] What is happening is that, although complying with the terms of the agreement with respect to paying the assessments, PRMSA and PRMMI are challenging the lawfulness of the assessment agreement, not under labor law, but under shipping law which has applicability, limited though that may be by the MLAA. NYSA would have the Commission refuse even to consider whether their assessment agreement is unjustly discriminatory or unfair as to PRMSA, a carrier paying under the agreement notwithstanding the clear right given to carriers under the MLAA to seek relief from the Commission. Indeed, as the Senate Report to the MLAA stated, the Act retained Commission jurisdiction "to assure equal treatment of shippers, cargo and localities, and to prevent abuses made possible by concerted activity of ocean carriers and others" and to ensure that "all affected parties pay only their fair share of fringe benefit obligations." S. Rep. No. 96–854, cited above, at 10, 14. If a carrier paying assessments under the agreements cannot even seek relief under the MLAA when the MLAA expressly refers to "carriers, shippers, or ports" as parties to be protected, one might ask who then, can seek relief, only non-affected carriers who do not pay assessments or carriers

[5] NYSA's reliance on Commission cases arising under tariff over-charge claims illustrates the weakness of their contentions. NYSA attempt to liken the right to file a complaint within two years after the filing of an assessment agreement (or its extension, as discussed) with the right to seek recovery of tariff overcharges within two years after the shipper paid the freight and suffered pecuniary injury. See, e.g., *Aleutian Homes, Inc.* v. *Coastwise Lines*, 5 F.M.B. 602, 611 (1959). Shippers are held to that standard because section 22 of the 1916 Act required their complaints to be filed "within two years after the cause of action accrued." Under the MLAA, it is not accrual of the cause of action or suffering of pecuniary injury which triggers the running of the two-year period but simply the filing of the assessment agreement.

[6] The record shows, as PRMSA advises, that PRMII stated its reservations to the assessment formula contained in the collective bargaining agreements and expressly dissented from the agreement as regards that formula even though otherwise signing the collective bargaining agreement. (PRMSA r. br. at 74.)

who pay but who were not part of collective bargaining units that negotiated the contract? If Congress was aware of Commission involvement with previous assessment agreements, it was presumably also aware that members of the NYSA have in the past challenged the very agreements which their association devised notwithstanding NYSA by-laws which purported to bind the carrier members to the will of the other members. See *New York Shipping Association* v. *Federal Maritime Commission,* 571 F. 2d 1231, 1239, n. 18 (D.C. Cir. 1978); *Agreement No. T-2336; TTT et al.* v. *NYSA, Inc.,* 15 F.M.C. 259 (1972), affirmed, *TTT* v. *F.M.C.,* 492 F. 2d 617 (D.C. Cir. 1974) (Puerto Rican carrier members of NYSA challenging lawfulness of NYSA agreement voted by majority of members of NYSA). There is no indication that Congress, in allowing the Commission to retain limited jurisdiction over collective bargaining agreements intended to bar affected carriers from challenging the unfairness of assessment agreements merely because the affected carriers had been represented at the bargaining table by an association. Moreover, since the MLAA does not authorize the Commission to investigate such agreements on its own motion, barring affected carriers could also insulate a possibly unfair agreement from any scrutiny under the MLAA if carriers were adversely affected.

What all of this defense really seems to be saying is that the rights of PRMSA and PRMMI are governed by labor law, not shipping law, and that having consented to be represented by the NYSA in collective bargaining with the ILA, PRMSA and PRMMI must shut up as far as the MLAA and Commission are concerned no matter how harmful or unfair they believe the assessment agreement to be and must confine their efforts to seek relief to appeals to the very people who negotiated the agreement in the first place. I know of no doctrine of law that holds that an activity can never be subject to two bodies of law or, in this context, holding that because the NYSA and ILA reached agreement and complied with labor law, shipping law has been totally ousted. On the contrary, from the very beginning of the many shipping-labor cases before the Commission and the courts, it has been seen that shipping law can and does apply and it seems clear that the MLAA codified the principle that, under certain circumstances, shipping act standards can apply notwithstanding the genesis of an agreement or practice in collective bargaining.[7]

[7] Thus, from the very first of these combined labor-shipping cases, *Volkswagenwekaktiengesellschaft* v. *F.M.C.,* cited above, 390 U.S. 261, it was recognized that an agreement among carrier and other employers of longshore labor could raise problems of concern to the National Labor Relations Board and of concern to the Federal Maritime Commission. 390 U.S. at 291 n. 7. From this beginning the Commission has been involved continually in determining the lawfulness under Shipping Act standards of arrangements devised to fund fringe benefit obligations, which arrangements were contained in various collective bargaining agreements. Many of these cases are discussed in PRMSA/PRMMI's opening brief at 49–59. See also *New York Shipping Association* v. *F.M.C.,* 495 F. 2d 1215 (2nd cir.), cert. denied, 419 U.S. 964 (1974) affirming Commission jurisdiction over the 1971–1974 collective bargaining agreement insofar as the assessment formula embodied therein was concerned notwithstanding the presence of the ILA and its concern that the assessment formula be workable and reliable. Probably the high-water mark of Commission jurisdiction over collective bargaining agreements prior to the enactment of the MLAA was *F.M.C.* v. *Pacific Maritime Association,* 435

Nor does NYSA's citation of *Council of North Atlantic Shipping Assocations* v. *F.M.C.*, 672 F. 2d 171 (D.C. Cir.), cert. denied, 459 U.S. 830 (1982), persuade me that the Commission cannot consider PRMSA's complaint on the merits. All that that decision seems to say, insofar as relevant here, is that the Commission is supposed to consider and weigh labor factors when deciding whether certain practices affecting certain shippers of containerized cargo are undue or unreasonable in violation of sections 16 or 17 of the 1916 Act, in accordance with another section of the MLAA, section 5, codified in section 45, 1916 Act, 46 U.S.C. sec. 841c. No one is questioning in this proceeding that the NYSA has to fund the fringe benefit obligations fully and that the ILA has a legitimate concern that these obligations are fulfilled. The court in *NTSA* v. *F.M.C.*, cited above, 495 F. 2d at 1215, recognized that the ILA had a concern that the fringe benefit payments be made but "no proper concern over who makes the payments as long as they are forthcoming" and that the union's concern was also primarily with enforcement of the agreement rather than the allocation formula. The court further advised the Commission to "weigh the Shipping Act and labor interests" and "move with caution in areas of greater collective bargaining concern." It appears from the present record that the ILA as well as NYSA are concerned that assessment rates may on some occasion lead to loss of cargo and further decline of work at the Port of New York. However, the real question in this case is not whether the funding will be accomplished but rather whether each carrier or other party paying assessments is paying its fair share and whether the method of allocation burdens carriers unduly so that they are motivated to leave the Port of New York.

As I mentioned below, finally, NYSA's argument that PRMSA has waived its rights to complain about the assessment agreement requires a firm factual basis showing the existence of a voluntary, intentional relinquishment of a known right by express statement or clear conduct. The fact that PRMSA or PRMMI was nominally part of the NYSA bargaining unit and that labor law requires employers to adhere to labor contracts or remain in bargaining units absent special circumstances does not demonstrate the existence of a waiver of rights granted under shipping law.

The third category of affirmative defense raised by NYSA is that the Commission approved the formula which is now under attack in this proceeding in 1974 and that PRMSA is bound by the Commission's decision under the principle of *res judicata*. NYSA argues that the formula was the subject of three prior Commission proceedings, Docket Nos. 69–57,

U.S. 40 (1978), holding such agreements subject to the filing requirements of section 15 of the 1916 Act notwithstanding possible disruption of collective bargaining. The MLAA was enacted partially in response to the *PMA* decision, retaining limited Commission jurisdiction over collective bargaining agreements and establishing special procedures and standards to determine the lawfulness of portions of such agreements devoted to assessments. Commission jurisdiction over other portions of collective bargaining agreements relating to furnishing of containers has been upheld under another section of the MLAA in *Council of North Atlantic Shipping Associations* v. *F.M.C.*, 672 F. 2d 171 (D.C. Cir.), cert. denied, 459 U.S. 830 (1982).

73–34, and 74–49, and that PRMSA's principal, the Commonwealth of Puerto Rico, was a party to the first two proceedings while PRMSA was a party to the third. NYSA further argues that the first two of these proceedings were settled with the filing of Agreement No. T–3017, which the Commission approved, and the last of them was concluded when the Commission issued an order approving the assessment formula (Agreement No. T–3007) on June 16, 1975. NYSA contends that PRMSA had an adequate opportunity to litigate the legality of the assessment formula in these three proceedings and ought therefore to be barred from relitigating the lawfulness of the same formula.

As NYSA correctly argues, the doctrine of *res judicata* holds that when a court has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound as to every matter which was offered and received to sustain or defeat the claim and as to any other admissible matter which might have been offered for that purpose. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597–98 (1948); *Montana* v. *United States*, 440 U.S. 147 (1979). As the cases cited by NYSA show, the doctrine is based upon policy considerations of judicial economy, the establishment of certainty in legal relations, and applies to administrative agencies as well as to the courts. *St. Louis Typographical Union* v. *Herald Co.*, 402 F. 2d 553, 556 (8th Cir. 1968); *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966). However, the doctrine applies only when the agency acts "in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *United States* v. *Utah Construction and Mining Co.*, cited above, 384 U.S. at 421–422. Furthermore, it applies only when the *same issue* has been adjudicated in the prior proceeding. *Cargill* v. *F.M.C.*, 530 F. 2d 1062, 1067–1068 (D.C. Cir.), cert. denied, 429 U.S. 868 (1976); *Marine Terminal* v. *Rederi. Transatlantic*, 400 U.S. 62, 71–72 (1970).

In short, NYSA is arguing that the Commission issued a final judgment in a judicial capacity as to the merits of the formula embodied in the 1974–1977 labor contract which is essentially the same tonnage formula (with exceptions) as exists today and is under attack in this proceeding. However, all that seems to have occurred is that the various parties involved in the three proceedings, i.e., NYSA, ILA, Puerto Rican carriers, automobile, and newsprint interests, entered into settlement agreements in an effort to bring an end to three proceedings involving assessment agreements for the contract years 1971–1974, 1974–1977, and assist in ending litigation which ensued as a result of the Commission's orders modifying the labor agreement of 1969–1971. Despite NYSA's contention that the Commission expressly approved the present assessment formula in Agreement No. T–3007 applicable to the contract year 1974–1977, it does not appear that what the Commission did constitutes a final judgment on the merits so as to invoke the doctrine of *res judicata*. First, I would have to assume

that the Commission's approval of Agreement No. T–3007, which expired in 1977, is the same thing as approval of LM–86 which runs from 1983–1986 and, as discussed above, is the precise agreement under attack in this proceeding. Next, I would have to find that the Commission issued a final judgment on the merits of the agreement formula and resolved factual disputes and matters which were brought before it or could have been brought before it during the course of the litigation. However, there was no litigation. The earlier cases terminated in settlements and the Commission built no record on which findings could be made as to whether the assessment agreements in issue met the standards set forth in section 15 of the 1916 Act regarding unfairness and unjust discrimination among carriers using the "benefits-burdens" test. The Commission itself indicated quite clearly that its approval of the assessment formulas for the 1971–1974 and 1974–1977 period was an approval of settlement agreements, not determinations under section 15 of the merits of the agreement formulas. Thus, in its decision in *Agreement No. T–2336–N.Y. Shipping Assn.*, 19 F.M.C. 248 (1976), aff'd *sub. nom. NYSA* v. *F.M.C.*, 571 F. 2d 1231 (D.C. Cir. 1978), in which the Commission ordered certain claims of carriers who had overpaid under the 1969–1971 assessment agreement to be honored, the Commission commented on its so-called "approval" of the assessment formulas as regards Puerto Rican cargo, which approval NYSA now claims to have binding effect as a final judgment, as follows:

> The context in which the assessment formulas for Puerto Rican cargo for the 1971–1974 and 1974–1977 periods were approved was one of settlement. As stated in our order of conditional approval of the agreement between NYSA, the ILA, and the Puerto Rican carriers for assessments for those periods, we approved that agreement because "the parties' approach to settlement of the rights and obligations between and among themselves does not appear to be improper. . . ." *Considerations underlying settlements do not necessarily coincide with the process of making findings on a record in a litigated proceeding.* (Citation omitted.) 19 F.M.C. at 256. (Emphasis added.)

The Commission proceeded to distinguish between full litigation and approval of a settlement agreement in the footnote to the above quotation, stating:

> Nothing we say herein is to be construed as casting doubt upon the validity of the Puerto Rican carrier or other approved settlement agreements as between the parties thereto. By virtue of those agreements, the parties have resolved their differences in a manner which we have found to be proper. Regardless of *how the issues with regard to the assessments for the 1971–1974 and 1974–1977 periods may have been resolved if they had been fully litigated,* the parties to the settlement agreements exercised good faith in attempting to predict rights and liabilities and cannot

> be faulted in desiring that, as between themselves, assessment litigation should cease. *Id.*, n. 8. (Emphasis added.)

As if these statements were not enough to make the point, the Commission stated also:

> We take no position as to what Puerto Rican assessment formula would have been approved for the 1971–1974 and 1974–1977 periods if these matters had been litigated. We wish only to highlight the highly speculative nature of predictions in this regard. *Id.*, n. 10.

Moreover, even if the Commission had issued a final judgment on the merits of the assessment formula applicable to the years 1974–1977 in Agreement No. T-3007, it is doubtful if the Commission would refuse to hear any challenge to such formula based on changed circumstances and conditions, which would raise different issues, even if the MLAA did not give carriers the right to file complaints within two years after each agreement was filed with the Commission. The Commission was careful to point out that even when it decided the merits of a previous formula, such decision rested upon the facts, circumstances, and labor contract existing at the time of the decision and the decision "has . . . significance only to the extent that the facts and circumstances are the same in the 'future' (i.e., 1971–1974, 1974–1977) as they were in 1969–1971." *Id.* But, as the Commission stated:

> We cannot assume, absent findings on a record, that conditions are the same now as they were with respect to Agreement No. T–2390. . . . *Id.* (footnote citation showing that this quotation came from the Order of Investigation in Docket No. 74–49, *Agreement No. T–3007*, covering the 1974–1977 assessment period, omitted.) *Id.*

In the court proceeding reviewing the Commission's order in *Agreement No. T–2336*, cited above, *NYSA* v. *F.M.C.*, cited above, 571 F. 2d at 1239, the court commented on the Commission's representation that its "approval" of the settlements did not rest upon findings under the "benefits-burdens" test established in *Volkswagenwerk-aktiengesellschaft*, cited above, but rather on the finding that each party to the settlement agreements had received "valuable compensation" from the compromises. The court did not dispute the Commission's representations as to the standard it used in approving the settlements although not specifically endorsing the standard. 571 F. 2d at 1239–1240 n. 20.[8]

[8] In the footnote citation, the court further emphasized that in approving the agreements to settle, the Commission had not made findings as to at least one significant group of carriers under the "benefits-burdens" test, namely, the twelve breakbulk carriers known as the States Marine Group. See footnote 20, last paragraph, p. 1240.

The fourth category of affirmative defense raised by NYSA in its brief is that PRMSA has on several occasions sought relief from the assessment formula under the labor contract's grievance and arbitration machinery and should have pursued the matter further with the NYSA–ILA Contract Board or in negotiations with the ILA before filing its complaint with the Commission. NYSA cites case authority holding that parties to contracts must pursue contractual grievance procedures and restricting the role of courts in hearing disputes arising under contracts. See, e.g., *General Drivers Local 89* v. *Riss & Co.*, 372 U.S. 517 (1963); *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967); *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 546, 569 (1960).

The record shows that PRMSA sought relief in the form of reduced assessments on at least three occasions under the contractual machinery, in 1979, 1982, and 1983.[9] In 1979 and 1982, a special committee designated to hear the requests recommended that the PRMSA requests be turned down. In 1983, the Assessment Committee, because of pending labor negotiations, recommended that PRMSA bargain directly with the ILA for its requested relief. The 1979 Assessment Committee report indicates that it was worried that a significant change in assessment for PRMSA could have serious, disruptive effects and that "[u]nder these circumstances, a request for reduced assessments for a major trade route will only be granted upon the most compelling evidentiary showing. PRMMI and PRMSA have not met this heavy burden of proof." (Ex. 30, Att. I, Committee Report of 1979, p. 3.) The case presented to the Committee was based largely upon PRMSA's alleged financial losses and projected diversion to Southern ports because of a competing barge service operating down there. The Committee was not persuaded although stating that "we are sympathetic to the serious financial difficulties currently afflicting PRMSA." (Report, cited above, p. 4.)

In the 1982 Assessment Committee Report, the Committee again considered PRMSA's case, which again was largely based upon financial losses but also upon alleged nearby diversion by a non-ILA competing carrier as well as low revenue compared to longer-distance foreign trades. The Committee considered these factors but found them unpersuasive for a number of reasons. It again expressed concern that changing the assessment for PRMSA or the Puerto Rican trade would seriously interfere with the ability to fund obligations and require increasing the tonnage assessment. It states that the Puerto Rican matter "was taken up in negotiations preceding the 1980 NYSA–ILA Collective Bargaining Agreement and that the end result was the determination to continue the Puerto Rican Trade under the same assessment arrangements as are applicable to all other trades. This Committee feels that in the light of such history it should not rec-

[9] The record also shows that PRMSA or PRMMI had brought up the Puerto Rican problem on earlier occasions at least as early as 1976. See Ex. 1, testimony of Allan J. Lonschein, pp. 28–29, and minutes of NYSA–ILA Contract Board, December 16, 1976, Ex. 8, Att. L.

ommend a change from the position taken by the parties to the Collective Bargaining Agreement except under the strongest change in circumstances. Such a change has not been shown to exist." Significantly, however, the Assessment Committee, citing the portion of the Tonnage Assessment Agreement which authorized a Contract Board to hear grievances and to modify tonnage definitions so as to lower costs of the assessments on petitioning parties, doubted that the Contract Board could give relief to the Puerto Rican trade without amending the labor contract. Thus, the Committee stated:

> The above clear language [i.e., regarding authority of the Contract Board to modify tonnage definitions] conditions the authority of the Contract Board to modify the tonnage definition. It is apparent that the above requirement does not refer to an exemption to be given to an entire trade. The Committee doubts that it has the power, absent contractual amendment, to recommend a trade-wide form of relief. (Ex. 30, Att. I, 1982 Committee Report, pp. 5–6.) [10]

The most recent efforts of PRMSA to obtain relief from the tonnage assessment began on August 30, 1983, when Mr. Roberto Lugo D'Acosta, PRMSA's Executive Director and PRMMI's Chief Executive Officer, wrote to Messrs. Dickman and Gleason, co-chairmen of the NYSA–ILA Contract Board, advising that the Governor of the Commonwealth had directed PRMSA to seek parity of treatment with other domestic trades, and asked for a meeting.[11] At the meeting held on the following day, PRMSA/PRMMI were advised that NYSA was then engaged in negotiations with the ILA for a contract covering the period October 1, 1983, through September 30, 1986, that the request would be referred to the Assessment Committee and then to the Contract Board for consideration, and that to dispel arguments that PRMSA/PRMMI had waived their rights to object to the tonnage/agreement for 1983–1986, PRMSA/PRMMI should request a view by NYSA and, following that review, commencement of specific negotiations with the ILA. As advised, Mr. Lugo D'Acosta wrote a letter to NYSA President Dickman requesting the appointment of a subcommittee to consider the report to NYSA's Negotiating Committee on PRMSA/PRMMI's proposals. On October 26, 1983, Mr Dickman appointed a three-man subcommittee which was suppose to report to NYSA's Negotiating Committee. Mr. Lugo

[10] Interestingly, at a meeting of the NYSA–ILA Contract Board held on December 16, 1976, at which meeting the "Puerto Rican problem" was discussed, which Mr. Dickman of NYSA stated "had been discussed by his Board on at least four separate occasions," counsel for NYSA advised that the Contract Board had the right to increase or decrease certain assessment rates without filing with the F.M.C. "However, should one carrier or shipper file a complaint with the FMC that body may decide to hold hearings. It should be remembered that we are still involved in 1969 litigations." Ex. 8, Att. L. NYSA–ILA Contract Board minutes.

[11] The following detailed findings of fact relating to these most recent efforts by PRMSA/PRMMI are based upon the testimony of Mr. Lugo D'Acosta and supporting documents and the testimony of Mr. Whitehouse. (Exs. 42 and 30, Att. I.)

D'Acosta wrote the subcommission on November 10, 1983, requesting that they establish a schedule and report to the NYSA Negotiating Committee by December 15, 1983, and requesting that representatives of PRMSA/PRMMI be permitted to appear before the subcommittee. However, the subcommittee never met through the completion of NYSA/ILA negotiations on January 25, 1984, and through the followup actions taken to secure ratification of the labor contracts by ILA members and subscription by the employer members of NYSA, which continued through February and March of 1984. The subcommittee's assignment ended when PRMSA/PRMMI filed their complaint with the Commission on February 27, 1985. It was suggested, however, that PRMSA/PRMMI seek relief by going to the bargaining table and presenting their proposal directly to the ILA on a one-to-one basis. The suggestion was not considerd feasible or practical by PRMSA/PRMMI because of the nature of multi-employer negotiations in the industry and the lack of sponsorship of their proposals by NYSA, and PRMSA/PRMMI did not therefore act upon it. Instead, PRMSA/PRMMI felt it necessary to seek relief before the Commission.

In view of this factual history of PRMSA/PRMMI's continued futile efforts to obtain relief within the mechanisms of the labor contract or from the NYSA–ILA Contract Board, NYSA's arguments that PRMSA/PRMMI's complaint before the Commission brought under the MLAA should be thrown out without considering the merits are singularly unimpressive and audacious. It may be true that under labor law, parties to labor contracts ought to resort to arbitration and grievance machinery to obtain relief under the terms of the contracts and should not seek the same relief from courts or agencies before exhausting their remedies under the contract. However, not only did PRMSA/PRMMI continually seek relief under the contracts without success but even the NYSA's Assessment Committee did not believe that it or the Contract Board could grant the type of relief which PRMSA was requesting, i.e., trade-wide reduction of assessments, and believed that such relief would require a totally new assessment agreement. Moreover, as discussed above, when PRMSA/PRMMI tried for the last time to obtain relief through the contract mechanism, they were told to negotiate with the ILA themselves. Why, then, should PRMSA/PRMMI have continued their futile efforts to obtain relief under the labor contract machinery and why can they not seek relief which is provided under an overriding federal statute, the MLAA?

It has often been held by the courts that the rights granted under federal law cannot be supplanted by arbitration procedures contained in contracts because those procedures concern relief within the terms of the contract and are not capable of affording relief under the supervening statutory standards. Furthermore, even if a party has lost in an arbitration proceeding, that party still has the right to bring suit in court under the supervening statute. For example, in *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974), the plaintiff, after losing before an arbitrator under the provisions

of a collective bargaining agreement, who found that he had been discharged from employment for cause, brought suit in federal court under Title VII of the Civil Rights Act of 1964. The Supreme Court held that he had the right to bring suit notwithstanding the decision in the arbitration proceeding. The Court made clear that a person's rights under a separate federal law are not supplanted by arbitration procedures under a contract and that an arbitrator is limited in the scope of his authority and by the procedures he follows, which are not comparable to judicial proceedings brought under the federal law. Furthermore, an arbitrator is confined to interpreting rights under a contract, not rights under the federal law. Thus, the Court stated:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties: "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement . . ." 415 U.S. at 53.
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> Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitration must follow the agreement. To be sure, the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land . . . [T]he resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts. Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. 415 U.S. at 56–58.

Courts have rendered similar decisions holding that persons cannot be barred from seeking relief under federal laws merely because of arbitration procedures established in contracts. See, e.g., *Breyer* v. *First Nat. Monetary Corp.*, 548 F. Supp. 955 (D. N.J. 1982) (arbitral forum not adequate to effectuate the policies of the Commodity Exchange Act); *McDonald* v. *City of West Branch, Michigan et al.*, ____ U.S. ____, 80 L. Ed. 2d 302, 309–310 (1984) (arbitration award against employee not given *res judicata* effect in his suit in court under the federal civil rights law; giving preclusive effect to arbitration awards would severely undermine the protection of federal rights that the statute is designed to provide); *Applied Digital Tech., Inc.* v. *Continental Cas. Co.*, 576 F. 2d 116 (7th Cir. 1978) (arbitration proceedings enjoined to allow suit to proceed in court under antitrust laws which are more appropriately enforced in courts than in arbitration).

In a case involving the Commission's own authority under the Shipping Act to determine the validity of a dual-rate contract notwithstanding a decision by an arbitrator, and to award reparation, *Swift & Co.* v. *F.M.C.*, 306 F. 2d 272 (D.C. Cir. 1962), the court held that the Commission was not precluded from exercising its jurisdiction under the Shipping Act because of the arbitration decision. The court held for the Commission, stating (306 F. 2d at 282):

> No private arbitration could negate the Board's statutory power to determine the validity of the dual-rate agreement. The more serious issue is whether the Board is precluded by the arbitration from awarding Swift reparations. We think not, for the arbitration opinion decided only the meaning of the Freighting Agreement, as garnered from the intent of the parties and the surrounding circumstances. That may have been appropriate for the arbitration, but, as we have pointed out, the Board's function is to interpret the rule on the legality of the agreement's language and effect in the light of the public interest.

The fifth category of affirmative defense raised by NYSA in its brief is that PRMSA or its subsidiaries or principal were parties to settlement agreements which terminated three previous proceedings and by which PRMSA or its subsidiary agreed not to challenge the assessment formula embodied in the 1974–1977 assessment agreement, essentially the tonnage formula now contained in LM–86. In its third and fourth affirmative defenses to PRMSA/PRMMI's amended complaint contained in NYSA's answer to that complaint, served May 17, 1984, NYSA provides more details. According to NYSA, the Commission approved the settlement agreements as Agreement No. T–3017 in 1974, and no Puerto Rican carrier or interest raised any objection to such approval. Furthermore, according to NYSA, NYSA carried out the terms of the settlements by paying substantial sums of money to other carriers not engaged in the Puerto Rican trade. Therefore, according to NYSA, PRMSA and PRMMI are estopped and precluded

from challenging the assessment formula in this proceeding. Furthermore, because TTT, a wholly-owned subsidiary of PRMSA in 1974, accepted the settlement, this action constitutes a waiver binding upon PRMSA and PRMMI of the right to challenge the assessment formula in this proceeding.

I have found above that the so-called "approval" of the tonnage formula contained in Agreement No. T–3007, which agreement was effective for the contract years 1974–1977, was in reality only an approval of a settlement without litigation or a full record and without findings under the standards set forth in section 15 of the 1916 Act. Indeed, as I noted, the Commission specifically commented that it had taken "no position as to what Puerto Rican assessment formula would have been approved for the 1971–1974 and 1974–1977 periods if these matters had been litigated" and further remarked on the "highly speculative nature of predictions in this regard." *Agreement No. T–2336,* cited above, 19 F.M.C. at 256 n. 10. NYSA now relies on the settlement agreement and on a written statement of the President of TTT, a subsidiary of PRMSA at the time, that TTT "accepts the full tonnage formula set forth in the 1974–1977 NYSA–ILA collective bargaining agreement as it relates to the New York-Puerto Rico trade and that it does not intend to initiate FMC or other proceedings contrary thereto." (Ex. 34, Att. F, last page.)

If TTT made the above representation and was a party to the settlement, and these appear to be the facts, and if PRMSA was its owner at the time, as also appears to be the fact, PRMSA might be found to have waived its rights to file the present complaint against Agreement LM–86 if it could be found that there was a voluntary, intentional relinquishment of a known right or privilege manifested either by express statement or by conduct which can only reasonably be considered consistent with such relinquishment. See *Buffum* v. *Chase Nat. Bank,* 192 F. 2d 58, 60–61 (7th Cir. 1951), cert. denied, 342 U.S. 944 (1952); *Williams* v. *State of Alabama,* 341 F. 2d 777, 780–781 (5th Cir. 1965). If PRMSA is to be estopped from filing the present complaint, I must also find misleading conduct on PRMSA's behalf, reliance on such conduct by NYSA, and detriment to NYSA as a result of such reliance. See, e.g., *Matsuo Yoshida* v. *Liberty Mutual Ins. Co.,* 240 F. 2d 824, 829–830 (9th Cir. 1957); *Upper Columbia River Towing Co.* v. *Maryland Casualty Co.,* 313 F. 2d 702, 706–707 (9th Cir. 1963); *District of Columbia* v. *Chevrah Tefereth Israel,* 280 F. 2d 61 (D.C. Cir. 1960). I have no basis in fact to make such findings.

Nothing in the Commission orders of approval, either that of January 16, 1975, approving Agreement No. T–3017, or that of June 16, 1975, approving Agreement No. T–3007, indicates that any assessment agreement extending beyond contract years 1974–1977 was "approved." On the contrary, both orders of the Commission specify no period beyond "1971–1974 and 1974–1977" (Agreement No. T–3017, Approval with Condition, January 16, 1975, p. 3) or "the three-year period beginning October 1,

1974" (Agreement No. T–3007, Order of Approval, June 16, 1975, p. 1). (Ex. 34, Atts. F, I.) The text of Agreement No. T–3017, which embodies the Puerto Rican settlement, states that "[t]he P.R. Carriers hereby withdraw from the proceedings in Docket No. 73–34 and hereby waive any and all rights to any recovery from NYSA, ILA or any NYSA–ILA fringe benefit funds pursuant to the issues involved in said Docket and agree that they shall not seek any such recoveries without regard to the ultimate disposition of said proceeding by the Federal Maritime Commission." (Ex. 34, Att. F, Agreement No. T–3017, paragraph 3.) The letter of TTT's President, quoted above, stated that TTT accepted the full tonnage assessment formula set forth in the 1974–1977 collective bargaining agreement (Agreement No. T–3007), and that TTT "does not intend to initiate FMC or other proceedings contrary thereto."

The history of the various settlements among the members of the NYSA is rather complicated. They were the result of the efforts of NYSA members "to adjust their rights and liabilities under two subsequent and successive collective bargaining agreements fixing the level of benefits that they would have to fund for the 1971–1974 and 1974–1977 periods respectively." *NYSA* v. *F.M.C.*, cited above, 571 F. 2d at 1235–1236. As far as the Puerto Rican carriers were concerned, they had been found to have underpaid for the 1969–1971 period but claimed to have overpaid during the 1971–1974 period. However, rather than litigate the merits of the Puerto Rican claims under the 1971–1974 formula period, NYSA agreed to give up its right to recover payments due from the Puerto Rican carriers because of their underpayments during the 1969–1971 period and to offset Puerto Rican claims under the second period in return for the Puerto Rican carriers' agreement not to contest the formula contained in the 1971–1974 period or apparently the 1974–1977 period as well. See *NYSA* v. *F.M.C.*, cited above, 571 F.2d at 1235–1237; letter of TTT's President, October 31, 1974. (Ex. 34, Att. F.) Apparently, the Puerto Rican carriers or their successors paid the NYSA's assessment formula during the 1971–1974 and 1974–1977 periods and for every period thereafter.

From all of the above, NYSA now contends that PRMSA has waived its right to file the present complaint or should be estopped. I can find no intentional relinquishment of a right granted to PRMSA/PRMMI under the MLAA to file a complaint in 1984, either expressly or by clear conduct. At most, I see a letter from TTT's President agreeing to pay under the 1974–1977 agreement without bringing any proceedings against that agreement, and as far as I am aware, Puerto Rican carriers have paid under every agreement's formula from 1971–1974 to the present and did not sue NYSA under the 1974–1977 agreement. Customarily a plaintiff wishing to release a defendant from suit by means of a settlement and for consideration makes clear in a release that the plaintiff is indeed relinquishing all rights and claims arising out of the dispute in unequivocal terms. It is, furthermore, unusual for a person to relinquish all future rights in

perpetuity, but even if a person did wish to take such an extreme step, one would expect to find clear language which courts could enforce. There is no such language here. I cannot therefore find that PRMSA, as successor to TTT, surrendered its rights under the MLAA to file a complaint in 1984, almost ten years after the settlements and the TTT letter.

Nor can I find the essential elements of equitable estoppel to exist so as to bar PRMSA. As discussed, at most, it appears that the Puerto Rican carriers and TTT agreed not to sue under the 1974–1977 agreement. There is therefore no basis for NYSA to rely on TTT's representations by converting its statements regarding the 1974–1977 agreement into a promise never to sue under any subsequent agreement. Furthermore, NYSA has long since made adjustments to carriers such as the States Marine Group and cannot reasonably argue now that its ability to make such payments or give credits was adversely affected by the complaint filed by PRMSA years later in 1984. Finally, in view of the continued lack of success which PRMSA has experienced in its continual efforts to obtain relief from the assessment agreements from at least 1976 to the present time through the agreement grievance mechanisms, it would be rather perverse to invoke the doctrine of estoppel, which is rooted in equity, against PRMSA which has felt compelled to seek relief outside of those contractual mechanisms by presenting evidence of unfairness and unjust discrimination under the standards established by federal law pursuant to independent rights granted to it under that law.

I conclude, therefore, that none of the above affirmative defenses is valid and that the Commission can proceed to determine the merits of the complaint.[12]

DISCUSSION OF APPLICABLE LAW

Contentions of the Parties

The Port Authority contends that the tonnage assessment formula is inherently unfair and unjustly discriminatory because it puts an undue burden on highly productive carriers who pay assessments in inverse proportion to the amount of labor they use and, in some instances, some carriers pay nothing toward fringe benefit obligations for non-cargo handling functions such as movement of empty containers or for maintenance, which functions also require ILA labor. The result of this unfair assessment formula is to cause containerized carriers to avoid using the Port of New York when possible because the comparable tonnage assessment per container at competing ports, such as Baltimore, is so much less. The formula therefore hurts the Port of New York competitively. The Port Authority acknowledges that it has the burden of proof in this case but claims that

[12] Two defenses raised by NYSA concerning the limitation on complainants' rights to reparations and non-applicability of sections of the 1916 Act other than section 15 I find to be correct as matters of law and will discuss them later.

it has met that burden by meeting certain tests as to competitive relationships among ports, proximate causation of injury to the Port, and unreasonable discrimination established by the Commission under sections 16 and 17 of the 1916 Act.[13] It points to evidence that top executives of eleven major carriers have admitted to the Port Authority's Deputy Director that they avoid the Port of New York/New Jersey particularly for Midwest cargo, because of the tonnage assessment at New York, that the Port has suffered a loss in its market share on container traffic in the North Atlantic, and to expert testimony showing that the present assessment formula is inherently unfair and does not relate payments to labor utilization in a fair manner. The Port Authority offers alternative formulas which would, in its opinion, allow carriers to pay only their fair share in the correct proportion to the labor used and to their responsibility for labor displacement while ending special, unjustified privileges of carriers that pay little or nothing for certain activities.

PRMSA/PRMMI contend that their interests as well as those of the Port Authority and the NYSA are actually the same, i.e., to fund the commitment to labor in such a way as does minimum damage to the competitive position of the Port of New York and the competitive position of every member of the NYSA. To achieve that purpose, it is in the interests of all of these parties to find a method to apportion the $200 million or so in fringe benefit obligations under the labor contract in a way that is economically sound, fair and justifiable. Instead of utilizing an assessment formula that would achieve these objectives, PRMSA/PRMMI argue that NYSA has "dug in its heels" and adheres rigidly to a 10-year old assessment formula which is "unjust, discriminatory, and economically counterproductive, riddled with unjustified favoritisms for special carriers, categories of cargo, and labor activities." (PRMSA/PRMMI op. br. at 4.) PRMSA argues further that it has asked NYSA for years to change its formula as regards the Puerto Rico trade without success, contending that it has lost cargo to carriers not serving the Port of New York. However, PRMSA argues that while diversion of traffic from New York is one of a number of factors that must be weighed by the Commission when determining whether the subject assessment formula is fair, reasonable, and non-discriminatory, the evidence which PRMSA has developed and presented shows that the tonnage assessment formula currently in use lumps all fringe benefits into one category, to be funded by tonnage assessments regardless of the type of benefit and of the amount of labor which a paying carrier uses. Therefore, certain carriers are picking up the share of costs that other carriers should be paying, and the problem is aggravated

[13] The Port Authority cites such cases as *Outbound Rates Affecting Export High-Pressure Boilers*, 9 F.M.C. 441 (1966), a case arising under sections 17 and 18(b)(5) of the 1916 Act; *Boston Shipping Association, Inc.* v. *F.M.C.*, 706 F. 2d 1231 (1st Cir. 1983), affirming *Boston Shipping Association* v. *N.Y.S.A. et al.*, 21 SRR 955 (1982), arising under sections 15, 16, 17, and 18 of the 1916 Act; *N.C. State Ports et al.* v. *Dart Containerline*, 21 F.M.C. 1125 (1979), aff'd sub nom. *Dart Containerline Co., Ltd.* v. *F.M.C.*, 639 F.2d 809 (D.C. Cir. 1981), arising under sections 16 and 17 of the 1916 Act.

by the fact that certain carriers and activities pay lower, excepted rates or even nothing at all. For example, transshipped, rehandled, and domestic cargoes constituting 12.9 percent of total loaded containers moving through the Port of New York in contract year 1982–1983 paid less than .016 percent of the total assessment, a special privilege enjoyed by only two carriers, Sea-Land and United States Lines. PRMSA argues further that the reasons for these special privileges, i.e., the alleged fear of diversion if such cargoes pay regular rates, do not stand up and, moreover, there is strong evidence of actual diversion of Puerto Rican cargoes from New York which NYSA fails to acknowledge and instead continues to require PRMSA, a carrier serving an economically disadvantaged trade, to subsidize other carriers like Sea-Land and United States Lines and those carriers not paying their fair share because of the inherently unfair tonnage formula. PRMSA offers an alternative formula, supported by its expert witness, Dr. Silberman, which would, in its opinion, discontinue the unfairness which comes from levying a straight tonnage assessment regardless of type of fringe benefit and would instead restore a proper balance and require carriers to pay their fair shares by correlating certain costs, mainly GAI, to past dislocation of work caused by containerization, and other costs, pensions, clinic, etc. to current-type costs not related to past dislocation, and by funding these two costs on the basis of tons and man-hours, respectively. Furthermore, all unjustified special privileges on domestic cargoes, empty containers, transshipped and rehandled cargoes, etc. would be terminated. Finally, in consideration of the depressed economic situation in Puerto Rico, PRMSA urges that the Puerto Rican trade be given a 25 percent discount from the tonnage assessment under its proposed alternative formula.

Respondents NYSA and 89 of its members represented by the same firm raise a number of affirmative defenses concerning the two-year statute of limitations, estoppel, waiver *res judicata*, failure of PRMSA to withdraw from the bargaining unit, etc., which I have discussed above and have found to be without merit. However, NYSA also argues that complainants have the burden of proof which is a "heavy burden of proof which must be met by clear and convincing 'substantial proof' supported by 'specific evidence.' " (NYSA op. br. at 93.) This allocation of burden, furthermore, is confirmed by the legislative history to the MLAA, which set up the special complaint procedure by which the Commission can hear such a case as the present. NYSA argues that the Port Authority has not produced evidence adequate to support its legal theories as to detriment to commerce and unjust discrimination. NYSA contends that the Port Authority has not identified the particular ports with which the Port of NY competes, nor shown that the assessment formula is the proximate casue of any alleged diversion which may be harming the Port of NY, that the real problem is the rising costs of fringe benefits at New York, not the formula which raises money to pay them, that respondents cannot be found guilty of discriminating against the Port of New York because they do not control

the assessment formulas devised at other ports, that the Port Authority's Director, Port Department, conceded that neither NYSA nor the ILA adopted the challenged formula for the purpose of placing other ports in a better competitive position than New York, and that the Port Authority's case rests upon supposition, argument, and unsubstantiated conclusions. More specifically, NYSA contends that the Port Authority has not shown any cognizable diversion of cargo from New York to other ports, that the Port Authority is erroneously claiming inland territories as being naturally tributary to New York, that shippers are controlling most routing, not carriers, that tonnages are holding up in New York and other Ports are increasing volumes handled relative to New York because the other ports are now experiencing increasing containerization. NYSA contends finally that the Port Authority's alternative formulas are flawed and would cause problems worse than the alleged disease and that, in any event, the present formula has not been shown to be unlawful.

As to PRMSA/PRMMI, NYSA contends that, first of all, their remedies, if any, are limited to section 15 of the 1916 Act, fifth paragraph, and do not extend to sections 16 First, 17, 18(a), or 22 of that Act, which no longer apply in assessment agreement cases. Furthermore, as to remedies, the MLAA authorizes the Commission to make adjustments for the time period after the filing of the complaint and does not authorize "reparations" prior to that time. NYSA does not agree that the so-called "benefits-burdens" test, i.e., that assessment formulas should fairly impose a charge or burden that is reasonable related to the labor contract benefits received by the persons against whom the assessment is levied, still applies to assessment formula cases because of the removal of sections 16 and 17 of the 1916 Act from assessment cases by the MLAA. However, NYSA argues that it is unnecessary to decide whether that test still applies because the NYSA formula satisfies that test. (NYSA op. br. at 127). NYSA contends that PRMSA's case is faulty and legally unsound. First, according to NYSA, PRMSA is seeking to have the formula protect PRMSA against loss of business to competitors, (i.e., the non-ILA carrier who allegedly is pulling business away from New York and from PRMSA in the Puerto Rican trade). But it is not a violation of federal shipping law if the subject agreement formula does not grant "affirmative protection against the vicissitudes of competition." (NYSA op. br. at 128.) NYSA cannot be expected to adjust the formula every time a carrier faced competitive problems. If so, "[t]he potential for claims by dissatisfied carriers would be staggering because every time the formula was adjusted to meet the needs of one, others would be affected." (NYSA op. br. at 128). Moreover, the facts do not show that the formula is causing any diversion of cargo from PRMSA to the non-ILA carrier which is not serving New York.

As to the alternative formula proposed by PRMSA, NYSA argues that it extends the "benefits-burdens" test beyond its intended limits because, according to NYSA, PRMSA is trying to break down benefits and burdens

within the same group of carriers, i.e., containerized carriers, and is claiming that certain of these carriers are receiving different benefits than other carriers within the group, and therefore, seeking special treatment for one of the containerized carriers, PRMSA, which is highly productive and utilizes relatively few hours of labor. All highly productive carriers like PRMSA enjoy full benefits of containerization and are responsible for labor dislocation more or less equally, according to NYSA. Therefore, one such carrier should receive no special reduced assessment rate at the expense of another within the group. Also, PRMSA's attempts to have certain operations such as transshipments pay regular rates is unsound even under the benefits-burdens test because those operations provide increased hours of employment as by-products of containerization and are not responsible for the decline in employment. PRMSA's request for a special 25 percent reduction for the Puerto Rican trade has no legal justification, according to NYSA, and is itself an admission that Dr. Silberman's alternative formula is not even satisfactory to PRMSA. Both the Port Authority's and PRMSA's suggested formulas would bring "disastrous" consequences to New York and would drive cargo away from the Port of New York, states NYSA, and there is no basis for tampering with the current formula which was agreed upon by the parties whose interests are at stake and has functioned for more than a decade.

Sea-Land Service, Inc., an intervenor in No. 84–8 and respondent in No. 84–6, "fully supports and defends the collective bargaining agreement entered into between it (via the NYSA) and the . . . ILA." However, Sea-Land also believes that "the record herein shows that special treatment need be given to cargo moving via [the Port of New York] in the Puerto Rican trade." (Sea-Land op. br. at 2, 3). Sea-Land states that the parties to the collective bargaining agreement and not the Commission or the courts are best suited to make whatever adjustments are required. Having stated these beliefs, Sea-land argues that complainants have not met their burdens of proving that LM-86 violates the Shipping Act. Instead, according to Sea-Land, complainants have offered alternative assessment formulas, which, in the case of PRMSA, merely seeks to accomplish "narrow parochial interests of that Complainant without regard to the interests of the shipping public, the carriers as a group, or the workers . . ." (Sea-Land op. br. at 3.) Even if the alternative formulas proposed are more reasonable or fairer, however, Sea-Land argues that the true test is whether the present formula in LM–86 is unlawful, which Sea-Land contends has not been shown. On legal points, Sea-Land argues that the 1984 Act and the 1916 Act are essentially the same as far as assessment agreement cases are concerned and that the 1984 Act makes clear that sections 16, 17, 18, and 22 of the 1916 Act were not intended to apply to such cases, the exclusive standards and remedies being contained in section 15, fifth paragraph, of the 1916 Act and section 5(d) of the 1984 Act. These limited standards refer to whether an assessment agreement is "unjustly discrimina-

tory or unfair as between carriers, shippers, or ports" and the limited remedy consists of disapproval, cancellation, or modification of such agreements and assessment adjustments for the period of time between filing of the complaint and final Commission decision, "reparation" allowed only if a complainant has ceased activities subject to assessments.

Sea-Land submits that although the MLAA does not define the anti-discriminatory standards, it is proper for the Commission to consult previous case law under the 1916 Act to give meaning to similar-language in the new law. Under previous case law, for example, the Commission has usually required a showing of disparity of treatment among similarly situated entities that results in injury not justified by valid transportation factors. See, e.g., *North Atlantic Mediterranean Freight Conference*, 11 F.M.C. 202 (1967), rev'd on other grounds sub nom. *American Export Isbrandtsen Lines* v. *F.M.C.*, 409 F. 2d 1258 (D.C. Cir. 1967). For preference or prejudice to be proven, again, similarly situated entities must be shown and usually the existence of a competitive relationship between the entities.[14] However, as Sea-land seems to concede, absence of competition is not fatal to proof of a violation of the 1916 anti-discrimination standards. "It can be supplanted by a showing of 'clear comparative disadvantage' causing 'special injury.'" Sea-Land cites *Internationall Trade & Development, Inc.* v. *Sentinel Line and Anchor Shipping Corp.*, 22 F.M.C. 231, 232 (1979). (Sea-Land op. br. at 13). Therefore, Sea-Land contends that complainants must either show that they have been prejudiced with respect to competitors or they have been subjected to a comparative disadvantage causing special injury. Sea-land argues that complainants have failed to make the requisite showings. Thus, it is argued, the higher per-ton assessment at New York than exists at other ports under their man-hour formulas is "totally immaterial in the context of this proceeding." (Sea-Land op. br. at 16.) Assessments at New York are higher simply because costs at New York are higher. Also, since LM–86 applies only at New York, as a matter of law, respondents have not discriminated against the Port of New York because respondents have not treated similarly situated ports differently. But even if alleged harm to the Port of New York can constitute a valid cause of action under law because cargo may be diverted from New York to other ports because of the higher tonnage assessments at New York under the current formula, the Port Authority has not proven that any specific cargo has been diverted solely because of the higher assessments at New York. Sea-Land "lauds the efforts" of the Port Authority to devise some means to help the Port of New York attract intermodal containerized cargoes moving to and from the Midwest, for which cargoes New York competes with other ports such as Baltimore. However, the Port Authority's suggested means, an alternative assessment formula which would lower the tonnage

[14] Sea-Land cites such case authority as *CONASA* v. *American Mail Lines*, 21 F.M.C. 91, 140–141 (1978); *Far East Conference—Inchon Arbitrary*, 21 F.M.C. 522, 524 (1978); *Pacific Westbound Conference*, 21 F.M.C. 834, 838 (1979).

assessment rates, is something that in Sea-Land's opinion, is "best left for commercial negotiations and [is] insufficient to warrant intervention in the assessment process by the FMC." (Sea-land op. br. at 19.)[15]

As for PRMSA, Sea-Land argues that PRMSA makes no showing that the present NYSA formula is unlawful and merely proposes a formula which it argues to be better or fairer. Sea-Land attacks the proposed formula presented by PRMSA's witness, Dr. Silberman, as a proposal which "is clearly intended to benefit only its proponent and is not intended to be fair and equitable to all concerned," being especially unfair to Sea-Land and United States Lines. (Sea-Land op. br. at 19.) Sea-Land expresses regret that the PRMSA formula would affect Sea-Land adversely in certain respects because Sea-Land itself appears to agree with PRMSA that "the Puerto Rico trade should be treated just as other domestic trades are treated rather than the foreign trades with which it is presently placed by the NYSA assessment formula." (Sea-Land op. br. at 19.)[16] In this regard, furthermore, Sea-Land agrees with PRMSA that the Puerto Rican trade is unlike foreign trades, requiring American-flag vessels, using ILA labor at both ends, subject to public utility type rate regulation, etc. Sea-Land states that if PRMSA had merely confined itself to seeking parity between the Puerto Rican and other domestic trades (i.e. by assessing them all under the excepted man-hour rates), it would have perhaps co-signed PRMSA's brief. However, Sea-Land opposes PRMSA's contentions that the entire formula should be revamped, contending that PRMSA's proposed alternative formula is "blatantly biased" and would endanger domestic transshipped, and other cargoes by terminating their special assessment rates, thereby harming all parties at New York by driving away such business. Sea-Land concludes by arguing that the Commission has no authority to "modify" the current assessment formula and that the parties should negotiate a solution.[17]

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[15] In its reply brief, the Port Authority suggests that the Commission might issue an order indicating that it would modify the present assessment formula to eliminate its unfair and discriminatory effects "unless the parties in this proceeding can come to an agreement on a new formula." (Port Authority r. br. at 32.) Although it is not certain, perhaps this suggestion by the Port Authority picks up on the possible suggestion by Sea-Land that the return to a partial man-hour formula as proposed by expert witnesses Donovan and Silberman makes some sense and could form the basis for a settlement among the parties. Even NYSA does not appear to reject the idea of Type I-Type II costs and a man-hour/tonnage formula in principle, at least in its opening brief. Thus, at page 132 of that brief, NYSA states: "While the Type I-Type II analysis is appropriate for allocation between sectors . . ." Does this mean that the Port Authority believes that NYSA may be willing to consider modifying the present formula, at least to this limited extent, and wishes to negotiate and seek possible settlement?

[16] It is interesting to observe that Sea-Land castigates PRMSA for advocating a formula which will benefit PRMSA (and other containerized lines as well, due to the man-hour portion of the proposed formula) but would upset Sea-Land's special treatment (paying nothing on its relay containers). However, Sea-Land, while not filing its own complaint, joins with PRMSA in urging something in its own self-interest, namely, that its domestic service be treated just as other domestic trades are treated.

[17] The MLAA, codified in section 15, fifth paragraph of the 1916 Act and section 5(d) of the 1984 Act, expressly states that the Commission shall . . . "disapprove, cancel, or modify any such agreement . . . if it finds . . ." Notwithstanding the presence of the word "modify" in the statute, Sea-Land argues that all the Commission can really do is approve an agreement on condition that the parties accept certain changes to it. Therefore, Sea-Land argues that only the parties have the power to modify their agreement. (Sea-Land

The three remaining intervenors (Maryland Port Administration (MPA), Massachusetts Port Authority (Massport) and Hearing Counsel) have limited interests. MPA readily acknowledges its participation to protect the competitive interests of Baltimore, argues that the Port Authority has not carried its burden of proof, questions its standing to seek relief, contends that it has not shown that the Port Authority is losing cargo to Baltimore because of the current assessment formula, that there is no basis to change the current New York formula to offset New York's competitive disadvantages if such exist, and that the Commission ought not to do anything that would adversely affect Baltimore such as, for instance, by establishing a "superfund" which would spread New York's labor costs to other ports.[18] Massport does not want any modification of the New York assessment formula to jeopardize the barge service which carries Boston cargo via New York. If anything jeopardizes this barge service through New York, Massport states that "the Port of Boston will immediately lose 50% of the containerized cargo it is presently handling." (Massport op. br. at 3.) This would cause loss of work on barges at Boston and force ILA members in Boston onto GAI rolls. Massport also fears establishment of a so-called "superfund." Hearing Counsel ask that nothing be done to the current assessment formula by the Commission. Hearing Counsel appear to acknowledge that complainants "may have shown that the assessment formula contains some problem areas" but recommend that these problems be left to the parties to negotiate when "it is time to draft a new agreement." Hearing Counsel state that the assessment agreement is not violative of the 1916 Act and that it is not the purpose of this proceeding to decide whether the current formula is the "best" formula possible. (H.C. op. br. at 33.) Hearing Counsel further argue that neither complainant has carried its burden of proof. For example, the Port Authority has not shown that the assessment formula has caused diversion of cargo from New York to other ports under the standards of law enunciated in cargo diversion cases previously before the Commission. PRMSA, according to Hearing Counsel, incorrectly uses the "benefits-burdens" test, its formula would harm domestic and other cargoes enjoying special treatment, it has not shown that the current formula causes PRMSA to lose cargoes to

op. br. at 11 n. 8.) I fail to see any practical difference between "conditional approval" and modification since no one can force parties into an agreement they do not want. Although the Commission may have followed the "conditional approval" approach, it has also clearly enunciated its authority to "modify" agreements and has ordered modifications under section 15 of the 1916 Act. See *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 136 (1965); and *Rates on U.S. Government Cargoes*, 11 F.M.C. 263, 287 (1967). Cf. *Agreement No. 57-96*, 19 F.M.C. 291, 305 (1976); and *Inter-American Freight Conference*, 14 F.M.C. 58, 62 (1970).

[18] This so-called "superfund" idea is, in my opinion, a total red herring. It was also a concern of Massport. Although I tried to put the matter to rest by indicating that the matter of a "superfund" was not in this case and was probably beyond the power of the Commission to establish, certainly in a case of this type concentrating on New York, under principles of due process, the matter has been mentioned on brief. Since it is not an issue in this case, I will not discuss it further and hope that MPA and Massport can finally rest easy.

a non-ILA carrier operating in the Philadelphia area, and there is no basis to give the Puerto Rican trade a 25 percent discount or any reduction to help the Puerto Rican economy because it is not shown how such a reduction would help that economy or how PRMSA is burdened any more than any other container carrier by paying the regular tonnage assessment.

Applicable Standard of Law Regarding Burden of Proof

In view of several arguments by the parties regarding burden of proof and complainant's failure to sustain that burden, I first must establish the prevailing standard of proof in administrative cases. That standard is not "clear and convincing" or "beyond a reasonable doubt" but rather merely a "preponderance of the evidence." *Steadman* v. *S.E.C.*, 450 U.S. 91 (1981); reh. denied, 451 U.S. 933 (1981); *Sanrio Co. Ltd.* v. *Maersk Line*, 23 F.M.C. 154, 160–162 (I.D.), adopted by the Commission, 23 F.M.C. 150 (1980).

The "preponderance of the evidence" standard is not a quantitative standard but a qualitative one. That is to say, the trier of fact does not merely weigh the evidence on a scale or count the number of witnesses on one side or the other. The standard means that the evidence makes the existence of a fact more probable than not. See discussion in *McCormack on Evidence* (3rd Ed. 1984), sec. 339, pp. 956–957.

There is absolutely no question but that complainants have the burden of proof in this case as well as in any other case under prevailing principles of administrative law, as NYSA argues so virgorously, citing numerous authorities. (See NYSA op. br. at 90–93, citing, among other things, the APA, 5 U.S.C. sec. 556(d); Rule 155, 46 C.F.R. sec. 502.155; *Boston Shipping Ass'n* v. *F.M.C.*, 706 F.2d 1231, 1239 (lst Cir. 1983); *Ship's Overseas Service, Inc.* v. *F.M.C.*, 670 F.2d 304, 307 n. 7 (D.C. Cir. 1981); *Steadman* v. *S.E.C.*, cited above, 450 U.S. at 95.) However, contrary to NYSA's arguments, the MLAA does not impose something called a "heavy burden which must be met by clear and convincing 'substantial proof' supported by 'specific evidence.'" (NYSA op. br. at 93.) This "clear and convincing" standard is not only not the standard governing administrative and most civil cases but it appears to have been proposed before by the NYSA to Congress which failed to adopt it when enacting the MLAA.[19]

Complainants must produce a preponderance of reliable and probative evidence under the usual standard. However, this does not mean that complainants must produce a "smoking gun" when seeking to show diversion, harm, loss of traffic, burdens, etc. It has been recognized by the Commission and the courts that the Commission may draw inferences from certain

[19] See Senate Hearing, June 4, 1980, 96th Congr. 2d Sess. on H.R. 6613, at 43 and 44. In commenting on an apparent NYSA proposal to mandate the "clear and convincing standard" in the MLAA, a stevedoring association specifically criticized such standard, which Congress did not enact.

facts when direct evidence is not available because of the Commission's particular knowledge and expertise and even on the basis of inferences that any reasonable person would draw from the facts. See, e.g., *F.M.C.* v. *Svenska,* 390 U.S. 238, 249 (1968) ("Having correctly noted that positive proof . . . was simply not available one way or the other, the Commission was fully entitled to draw inferences on these points from the incomplete evidence that was available. 'Conjecture' of this kind, when based on inferences that are reasonable in light of human experience generally or when based on the Commission's special familiarity with the shipping industry, is fully within the competence of the administrative agency and should be respected by the reviewing courts."); *U.S.* v. *F.M.C.*, 15 SRR 927, 934–935 (D.C. Cir. 1980) hearsay and indirect evidence used to support finding of rebating, there being no direct evidence so that inferences were required to be drawn); *Agreement No. 57–96*, 19 F.M.C. 291, 303 (1976).

The MLAA and the "Benefits-Burdens" Test

Earlier in this decision I referred to the MLAA and its genesis as a compromise between industry interests who wished to be free of Commission jurisdiction in collective bargaining matters and other interests who feared that total ouster of the Commission from such matters would leave them vulnerable to abuse and without adequate protection. The result was that the Commission was given limited jurisdiction under section 15 of the 1916 Act (later, section 5(d) of the 1984 Act) over assessment agreements contained in collective bargaining agreements. The history of the enactment of this compromise as the MLAA is summarized rather well in *CONASA* v. *F.M.C.*, cited above, 672 at 181–182, as follows (footnote citations omitted);

> The Maritime Labor Agreements Act of 1980 was the product of a legislative attempt to clarify jurisdictional boundaries in the area where labor law and shipping law intersect-the provisions of maritime collective bargaining agreements. Historically the FMC had taken the position that none of these agreements were subject to the provisions of Section 15 of the Shipping Act, which requires a wide range of maritime agreements be filed with and approved by the Commission before they may enter into effect. However, beginning in 1968, judicial decisions had held that Section 15 covered certain collective bargaining agreements and multi-employer agreements to implement promises made in collective bargaining. In 1980 the House, citing the national policy of "free collective bargaining without a requirement of prior government approval," adopted a bill which completely exempted collective bargaining agreements from FMC regulations. The House bill removed FMC jurisdiction to review maritime labor agreements, before or after implementation, or to determine their legality under the substantive provisions of the shipping laws. This blanket labor exemption aroused strong opposition.

> At hearings held by the Senate committee, shippers, consolidators and other witnesses objected that the bill "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." In response, the Senate committee drafted a revised bill to assure "that the Federal Maritime Commission jurisdiction is preserved to the extent necessary" to assure equal treatment and to prevent abuses. The bill was adopted by the Senate without debate, and passed the House, again without debate.

As the parties acknowledge on brief, the MLAA restored FMC jurisdiction over assessment agreements after an early attempt to oust FMC jurisdiction had aroused opposition from shippers and other witnesses. Furthermore, the Commission was given jurisdiction to ensure "equal treatment of shippers, cargo, and localities and to prevent abuses made possible by concerted activity of ocean carriers and others." Sen. Rep. No. 96–854, cited above, at 2, 10. This jurisdiction, however, did not extend to assessment agreements based on uniform man-hour rates which were the usual type of industries but only to those agreements based upon something other than uniform man-hours. Sen. Report, cited above, at 11, 13. The Commission was supposed to determine, upon complaint, whether, under such agreements, "all affected parties pay only their fair share of fringe benefit obligations." S. Rep. cited above, at 14.

While all parties discussing this matter agree on the above general parameters, there is some dispute as to what standards are to be employed when determining whether the agreements are "unjustly discriminatory or unfair as between carriers, shippers, or ports," which, if so found, would warrant disapproval or other remedial action by the Commission, whether other sections of the 1916 Act apply besides section 15, fifth paragraph, and whether relief can be granted beyond assessment adjustments to compensate for overpayments under a formula, starting from the date of the filing of the complaint, as provided by section 4 of the MLAA (section 15, fifth paragraph, 1916 Act; section 5(d) 1984 Act,) As discussed, NYSA does not agree that the "benefits-burdens" test still applies when determining unfairness or unjust discrimination, and PRMSA does not agree that its only relief lies under section 15, fifth paragraph, of the 1916 Act, or section 5(d) of the 1984 Act, or that it cannot obtain full "reparations" in the form of money damages plus interest retrospectively, i.e., back to October 1, 1983, the beginning of the current labor contract year.

There is little doubt in determining what is unfair or unjustly discriminatory among carriers under assessment agreements that the "benefits-burdens" test, which was first enunciated in the *Volks-wagenwerk* decision in 1968 and applied in numerous other cases involving such agreements under section 15 as well as 16 and 17 of the 1916 Act, is a proper test to apply. Even NYSA, on brief, acknowledges the numerous cases

which utilized that test and cites them.[20] (NYSA op. br. at 126–127.) PRMSA furnishes a detailed history of these numerous cases staring with *Volkswagenwerk* in 1968 and proceeding beyond enactment of the MLAA. (PRMSA op. br. at 49–58.) These cases show that perfect correlation between benefits and burdens is not possible nor expected but only a reasonable correlation or a "broadly equitable arrangement." (*NYSA* v. *FMC*, 628 F.2d at 257; 571 F. 2d at 1238); cf. also *Volkswagenwerk*, cited above, 390 U.S. at 293 (Harlan, J. concurring) ("must leave room for the implementation of some uniform, practical general rule of assessment even though it have some features that are less desirable than some alternative imperfect rule.") *Wolfsburger* v. *F.M.C.*, 562 F. 2d 827, 829 (D.C. Cir. 1977) ("the question is whether the Agreement . . . is the fairest that could be devised and whether the charge levied is reasonably related to the benefits received by automobile shippers.")

As I mentioned earlier in this decision, NYSA acknowledges that the MLAA was enacted "against the backdrop of more than ten years of decisional law." (NYSA op. br. at 123.) If Congress did not intend to continue to allow the Commission and courts to continue using the "benefits-burdens" test when it restored jurisdiction to the FMC to prevent abuses and ensure "equal treatment" among those paying under such agreement formulas in response to pleas from shippers, what on earth test did the Congress intend? I doubt whether NYSA would prefer a simple dictionary definition of "fair" which would be so broad as to forbid favoritism or less than evenhanded treatment under even a broader standard than the "benefits-burdens" test, in view of the record in this case which shows favoritisms and special privileges aplenty.[21] NYSA, however, rests its argument on the ground that Congress enacted a special limited procedure for assessment agreements, excluding section 22 of the 1916 Act and all other provisions of that Act. I agree that Congress did this. However, the argument overlooks the fact that some of the cases cited relied on section 15, not merely 16 or 17, where NYSA states the "benefits-burdens" test to have arisen in the *Volkswagen* decision. (See, e.g., *Agreement No. T–2336*, cited above, 15 F.M.C. 259.) Furthermore, the "unjustly discriminatory and unfair" language appears not only in section 15, fifth paragraph, as provided by the MLAA, but the same language always appeared in the original section 15 of the 1916 Act as the very first standard authorizing disapproval of agreements. In view of this case history, the retention of the same language of the first standard in section 15, and the express statement of the Senate Report that "the bill retains the existing protections

[20] Among them are: *Wolfsburger* v. *F.M.C.*, 562 F. 2d 827 (D.C. Cir. 1977); *NYSA* v. *F.M.C.*, 571 F. 2d 1231, 1239, n. 20 (D.C. Cir. 1978); *Transamerican Trailer Transport, Inc.* v. *F.M.C.*, 492 F. 2d 617 (D.C. Cir. 1974), affirming *Agreement No. T–2336*, 15 F.M.C. 259 (1972).

[21] Thus, Webster's Third New International Dictionary (1967), p. 815, defines "fair" as follows: "7a—characterized by honesty and justice; free from fraud, injustice, prejudice, or favoritism . . . Fair, the most general of the terms, implies a disposition to achieve a fitting and right balance of claims or considerations that is free from undue favoritism."

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" (Sen. Rep. at 13), NYSA's argument that the exclusion of sections 16, 17, 18, 22 from section 15, fifth paragraph, in assessment agreement cases means that the "benefits-burdens" test has been eliminated, is not tenable.

The MLAA's Limitations on Standards and Remedies

Where I do agree with NYSA is in the matter of the special remedy and procedure which the MLAA established for the protection of persons complaining about the harmful effects of assessment agreements. NYSA explains (NYSA op. br. at 121–126) that section 4 of the MLAA amended section 15 of the 1916 Act by inserting a fifth paragraph to section 15. By this law, Congress permitted persons to file a complaint within two years after the filing of an assessment agreement and to ask the Commission to "disapprove, cancel or modify" that agreement if the Commission finds the agreement 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." If the Commission so finds, the Commission is required to "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." These adjustments are supposed to be implemented by "prospective credits or debits to future assessments or charges," except if the complainant has ceased activities subject to assessments, in which case such person is entitled to "reparation." Section 4, MLAA.

The above language says nothing about the other standards of section 15, namely, "contrary to the public interest," or "to be in violation of this Act," which incorporated sections 16, 17, 18, and other substantive provisions of the 1916 Act, nor of section 22 of that Act which authorized normal private complaints and Commission-instituted investigations. Thus, not only did Congress limit the standards to apply to assessment agreements to only two, it also limited the remedy both in terms of time and in terms of form, i.e., between filing of the complaint and decision as to time, and future credits or debits rather than money "reparation" for persons still operating subject to assessment agreements. To ensure that the other provisions of the 1916 or 1933 Acts did not apply to this special procedure, Congress enacted the so-called "preemption clause" which is the last sentence to section 4 of the MLAA and the last sentence of the fifth paragraph of section 15, 1916 Act (now section 5(d) of the 1984 Act). This "clause" states:

> 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. (Emphasis added.)

Although the language of the "preemption clause" would appear to close debate, PRMSA argues that the other sections of the 1916 Act are still applicable as is section 22 of the 1916 Act, and that, accordingly, PRMSA should be permitted to show undue prejudice under section 16 and unreasonable practices under section 17 of the 1916 Act, and can ask for section 22-type reparation with interest. PRMSA cites a recent court decision, *California Carthage Co.* v. *United States,* 721 F. 2d 1199 (9th Cir. 1983), cert. denied, 53 L.W. 3230 (Oct. 2, 1984), which in turn refers to the Senate Committee Report to the MLAA. According to PRMSA's argument, the court decision means that section 22 as well as the other sections of the 1916 Act cited are still alive and well and can be applied to this case and that PRMSA can seek money damages (reparation) under section 22 retrospectively with interest even in an assessment agreement case. I disagree.

First, the *California Cartage* decision only held that an off-pier consolidator had standing to sue under the MLAA under the "detriment to commerce" standard which was then contained in the fifth paragraph of section 15 of the 1916 Act (but has been deleted from the 1984 Act). In so holding, the court was impressed by the language of the Senate Committee Report which explained that this "preemption clause"

> is intended to give the Commission broad discretion, unfettered by the constraints of sections 18, 22, and other provisions of the Shipping Act, to fashion appropriate remedies for unfair or discriminatory assessments. (Sen. Rep., cited above, at 14, cited at 721 F.2d at 1205.)

PRMSA also cites court language holding that repeals by implication are not favored and that there is no apparent conflict between the fifth paragraph of section 15 and section 22 of the original 1916 Act as far as standing is concerned. (PRMSA op. br. at 59.) Be that as it may, the fact remains that the court's holding goes to the question of standing, not remedies, and that the only standard which the court considered as giving standing to the off-pier consolidator was "detriment to the commerce of the United States," a standard now deleted from the corresponding portion of the 1984 Act, as I have mentioned. Maybe, to repeal the consolidator's standing, previously granted by section 22 of the 1916 Act, by implication is disfavored, but there is no repeal of section 22 or the other provisions of the 1916 or 1933 Act by implication in the "preemption clause." It is express. The MLAA did not delete the substantive standards of the original section 15 by implication. It specifically cut out all of them except "unjustly discriminatory or unfair as between carriers, shippers, or ports" and "detriment to the commerce of the United States." Furthermore, it established a remedy in the form of prospective credits or debits for persons still operating under such agreements and limited the time period for which that remedy would be applicable, i.e., from filing of

the complaint to date of judgment. Such remedy is quite different from the normal section 22 remedy of reparation, i.e., money damages running from the date the "cause of action accrued."

Nor does the language of the Senate Committee Report quoted above demonstrate that Congress intended that section 22 and all the other provisions of the 1916 and 1933 Acts apply to assessment agreement cases in the face of what appears to be clear statutory language excluding those other provisions of law. That Committee's language can be understood in the context of the history of assessment cases before the Commission, especially Docket No. 69–57, *Agreement No. T–2336,* cited Above, 15 F.M.C. 259, and the several cases following that one, concerning adjustments and credits. In that case, as Congress was presumably aware, the Commission had to fashion a unique remedy to make adjustments after a lengthy proceeding so that underpaying and overpaying carriers would be made whole. The Commission did so by ordering prospective credits for carriers still operating and cash for those not operating, although section 22 of the Act made no provision for such adjustments. The MLAA, in effect, not only codified the remedy employed by the Commission in Docket No. 69–57, but clarified the Commission's authority to devise such remedies "unfettered by the constraints of section . . . 22." Thus, seen in this light, Congress wanted the Commission to hear complaints against assessment agreements under limited standards but wished to give the Commission "broad discretion" to devise "appropriate remedies," i.e., to fashion adjustments in the form of credits (or debits if necessary) in whatever manner necessary to remedy unfairness or unjust discrimination as was done in the long aftermath of Docket No. 69–57. This does not mean, however, that the Commission can go outside the clear time limits or the credit, debit limitations such as by ordering payment of money damages with interest retrospectively, as PRMSA argues, under sections 16, 17, and 22 of the 1916 Act.

As if it were not clear enough that Congress intended that the standards and remedies applicable to assessment agreement cases be limited to the fifth paragraph of section 15 of the 1916 Act, the legislative history to the 1984 Act would seem to put the nail in the coffin to PRMSA's arguments. In re-enacting the fifth paragraph of section 15 of the 1916 Act as section 5(d) of the 1984 Act with only one major change, namely, the deletion of the "detriment to commerce" standard, the Joint Conference explained:

> The House and Senate bills both adopt provisions of Section 15 of the Shipping Act, 1916, applicable to assessment agreements. *Under existing law* and under both bills, *the remedies and regulatory standards applicable to assessment agreements are intended to be exclusive.* In making this explicit, the conferees have reconciled the two versions to preclude any inference that the many new and restated provisions in the bill respecting rate, conference,

> and terminal regulation are also to be applied to assessment agreements. Joint Explanatory Statement of the Committee of Conference, Report 98–600, 98th Cong. 2d Sess. 30 (1984). (Emphasis added.)

To illustrate further that the MLAA set up a restricted procedure apart from other provisions of the 1916 and 1933 Acts than section 15, one need only compare the other application of the MLAA to carrier rates, charges, regulations, or practices which are required to be set forth in a tariff, whether or not such things arise out of collective bargaining agreements. Commission jurisdiction over such practices was confirmed by section 5 of the MLAA and codified in section 45 of the 1916 Act (later, section 5(e) of the 1984 Act.) Unlike the preemption clause discussed above, which was intended to confine the Commission to a special procedure under limited standards and remedies as regards assessment agreements, section 5 of the MLAA made clear that all of the relevant sections of the 1916 and 1933 Act still applied to carrier practices though they stemmed from labor agreements. Thus, after referring to the limited grant of jurisdiction to the Commission over assessment agreements, section 5 of the MLAA conferred this broad grant of authority over carrier practices required to be set forth in their tariff as follows:

> Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act [i.e., the 1916 Act] or of the Intercostal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water . . . which are required to be set forth in a tariff, whether or not such rates . . . arise out of, or are otherwise related to a maritime labor agreement.

The legislative history confirms the congressional intention not to limit the Commission's authority over such practices. See Sen. Rep., cited above, at 14.

Finally, in addition to the above, a good argument can be made that, as to assessment agreements, Congress did not intend the savings clause to apply and that, consequently, only the 1984 Act can apply to this case. That is because the last sentence of section 5(d) of the 1984 Act governing assessment agreements states that "[e]xcept for this subsection and section 7(a) of this Act, this Act, the Shipping Act, 1916, and the Intercostal Shipping Act, 1933, do not apply to assessment agreements." This language would exclude section 20(e)(2) of the 1984 Act, the savings clause, from application to assessment agreement cases and leave such cases exclusively under the provisions of section 5(d) of the 1984 Act (and section 7(a) of the 1984 Act regarding antitrust immunity). The omission of reference to section 20(e) must be construed to mean an intended exclusion of that section in a comprehensive statutory enactment. See 2A

Sutherland, *Statutory Construction,* sec. 47.23 (4th ed. 1973); *Feldmand* v. *Philadelphia National Bank,* 408 F. Supp. 24, 34 (E.D. Pa. 1976).

The MLAA's Standard Applicable to the Port Authority's Case

The above discussion emphasizes utilization of the "benefits-burdens" test, which lies at the heart of PRMSA's case. The Port Authority's case, on the other hand, although also criticizing the present assessment formula for not changing to a partial man-hours basis to bring utilization of labor more in line with the burdens imposed on parties paying under the agreement, rests more heavily on the unfair or unjustly discriminatory impact which the Port believes the formula to have on the Port and which adversely affects the Port in its efforts to secure cargo in competition with other ports. The Port bases its case, in other words, on standards of unjust discrimination and unfairness which it believes are separate from the more narrow standards of port "diversion" cases which utilize such concepts as "naturally tributary" cargo, "absorptions," and other artificial inducements utilized by carriers to "divert" cargo from one port to another. The Port Authority is content to rely upon the principles enunciated in *Boston Shipping Association* v. *F.M.C.,* cited above, 706 F. 2d 1240, which in turn relied upon the same standards employed by the Commission in *Port Authority of New York* v. *AB Svenska et al.,* 4 F.M.B. 202 (1953). The Port Authority accepts the burden of proving the criteria set forth in those cases as follows:

(1) The complaining port and the preferred port are in competition;
(2) The discrimination complained of is the proximate cause of injury to the complaining port;
(3) The discrimination is unreasonable.

NYSA and other parties opposing the Port Authority, as noted earlier, answer the Port Authority by arguing that it has not carried its burden of proof. In so arguing, respondents and others contend that the Port Authority has not shown "diversion" of cargo from New York that is proximately caused by the assessment formula nor that whatever cargo the Port Authority believes may have been "diverted" from New York to, say, Baltimore, was cargo "naturally tributary" to New York. NYSA itself cites the three standards set forth in *Boston Shipping Association* as controlling (NYSA op. br. at 7), and the Port Authority, despite citing some cases more relevant to impediment of movement under "detriment to commerce" standards, specifically asks that I apply the 1984 Act, which deleted the "detriment to the commerce of the United States" standard. Consequently, I agree that the basic test for the Port Authority's case is that set forth in *Boston Shipping.* However, although the parties cite numerous cases arising under the cargo "diversion" and "naturally tributary" doctrines, that does not mean that unless a complaining port shows "absorptions," "naturally tributary" cargo, etc., that the port cannot make out a case

under the *Boston Shipping* standards.[22] The court in *Boston Shipping* noted that the section 15 standard retained by the MLAA, i.e., "unjustly discriminatory or unfair as between carriers, shippers, or ports" is separate from the section 16 standard of "undue or unreasonable preference or advantage to any . . . locality" (*Boston Shipping Association* v. *F.M.C.*, 706 F. 2d at 1237). The court also went on to say that Commission cases concerning allegedly unfair discrimination against ports "breathes life into these provisions." (*Id.*) Thus, consideration of port "diversion" cases may serve some purpose. However the court discussed both the "diversion," "naturally tributary," "absorption"-type cases and the plain port disadvantage type case such as *Port of New York Authority* v. *AB Svenska et al.*, cited above, 4 F.M.B. 202 (706 F. 2d at 1238, 1240). Consequently, I believe it is proper to apply the standards of *Boston Shipping Association*, giving consideration to cargo "diversion" cases to the extent they may be useful in determining whether the evidence adduced by the Port Authority meets the standard of "unfair or unjustly discriminatory" retained by the MLAA from the original language of section 15 of the 1916 Act.[23] Furthermore, when determining whether the NYSA's assessment formula discriminates against New York and causes harm, I see no reason why the Commission is precluded from considering the less rigid "intangible limitation of the

[22] NYSA also argues that the Port Authority cannot prevail because prevailing law in discrimination-type cases requires a showing that NYSA members controlled assessments at both New York and at the other ports which the Port Authority claims to have a competitive advantage or a showing of collusive or other affirmative conduct among NYSA members to discriminate against New York in favor of some other port. (NYSA op. br. at 113–114.) The Port Authority replies that a great number of important carrier members of the NYSA serve all or many of the ports up and down the coast and that the Port Authority was precluded from obtaining detailed information about their roles in negotiating assessment formulas at other ports by NYSA's members' recalcitrance to answer questions in prehearing discovery. (Port Authority r. br. at 10, footnote.) The record shows that these carriers do serve the other ports and, accordingly, have something to do with negotiations of formulas at the other ports. However, it is not necessary to show that the same carrier serves both ports to prove discrimination at one port. The law has long since changed in this regard, at least since 1947, when the Supreme Court decided *New York* v. *United States*, 331 U.S. 284 (1947). The Commission has specifically followed this case and refused to adhere to the requirement that a carrier must serve both ports in order to be found guilty of discriminating against one of the ports. See *Reduced Rates on Machinery and Tractors to Puerto Rico*, 9 F.M.C. 465, 479 (1966). In this regard, the Commission stated:

> Some cases of our predecessors suggest that "[u]nude prejudice under section 16 is not shown when the carriers serving the alleged preferred point do not serve or participate in routes from the alleged prejudiced point for the movement of the traffic involved." This suggestions is contrary to the *New York* case, and we will not follow it.

See also *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 139 (1965) (same holding regarding discrimination under section 17 of the 1916 Act.) As the Port Authority states, furthermore, the applicable standard is not limited to unjust discrimination. The MLAA also refers to the word "unfair" in the disjunctive, a broader standard. (Port Authority, r. br. at 10, footnote.)

[23] As I have mentioned earlier, the MLAA retained the first standard of the original section 15 of the 1916 Act, i.e., "unjustly discriminatory or unfair as between carriers, shippers, . . . or ports." However, original section 15 also incorporated the standards of other provisions of the Act in the fourth standard for disapproval(. . ."or to be in violation of this act . . ."). The first original standard, which applies in this case, must therefore mean something more than "undue or unreasonably prejudice or disadvantage" in section 16, which was the usual standard applied in the port "diversion" cases, or even the "unjustly discriminatory" rates and charges standard of section 17 of the 1916 Act. If not, then Congress used surplus language in the original section 15, something which one cannot presume in construing statutes, or, if the first original standard is the exact same thing as the standards of section 16 or 17, then Congress did not really confine the MLAA to the first standard at all, although that is what Congress expressly intended to do.

ability to participate profitably in a market" standard or "clear probability of substantial harm" standard previously utilized in discrimination and "diversion" cases such as *Outbound Rates Affecting Export High-Pressure Boilers,* 9 F.M.C. 442, 456 (1966); and *N.C. State Ports et al.* v. *Dart Containerline,* 21 F.M.C. 1125, 1130 (1930), affirmed sub nom. *Dart Containerline Co., Ltd.* v. *F.M.C.,* 639 F. 2nd 809 (D.C. Cir. 1981). Utilization of less rigid standards would appear to be more consistent with the broad standard of unfairness retained in the MLAA for the protection of parties adversely affected by assessment agreements, whose pleas for protection were answered by the Congress.

Applicability of the 1916 and 1984 Acts

A spin-off issue appears to have arisen out of the above arguments, namely, whether the 1916 or 1984 Act applies to this proceeding. NYSA, PRMSA, and Hearing Counsel appear to believe that the 1916 Act applies. The Port Authority believes that the 1984 Act made no substantial changes to the 1916 Act applicable to this proceeding and asks that I apply the 1984 Act. (Port Authority, op. br. at 4, footnote.) Sea-Land also argues that the 1984 Act should apply and that I should so rule under the Commission's notice authorizing presiding judges to determine the applicability of the 1984 Act on a case-by-case basis using court-developed criteria which would allow application of the 1984 Act unless "manifest injustice would result." See Notice, 49 Fed. Reg. 21798 (May 23, 1984). (Sea-Land op. br. at 4–6.)

In my opinion, this case can be decided under the MLAA, which is essentially the same in both the 1916 and 1984 Acts with the slight exceptions noted above. As PRMSA notes, both section 15, fifth paragraph, of the 1916 Act, and section 5(d) of the 1984 Act authorize the Commission to disapprove, cancel, or modify an assessment agreement which is found to be unjustly discriminatory or unfair as between carriers, shippers, or ports. (PRMSA, r. br. at 60.) As discussed above, furthermore, in both Acts, the procedure is limited to the filing of complaints within a two-year period and the remedies are limited to prospective credits to compensate for the time period between filing of the complaint and date of judgment. The only change that might have been significant is the deletion of the "detriment to commerce" standard in the 1984 Act. However, PRMSA's case is built upon evidence showing unfairness or unjust discrimination as is that of the Port Authority, which has not asked that the "detriment to commerce" standard be applied. Therefore, I see no difference whether I apply the 1916 or 1984 Acts since the evidence presented would show violations under the same standards set forth in both, and the remedies would likewise be the same under either Act.[24]

[24] PRMSA presents an interesting argument that the Commission's Notice which would not retain applicability of the 1916 Act to this proceeding under the so-called "savings" provision of the 1984 Act, sec. 20(e)(2), is wrong. PRMSA believes that the 1916 Act granted complainants the right to seek retrospective

Findings as to the Port Authority's Case

In the following section I provide an overview of the Port Authority's case and make findings of facts relevant to that case. As mentioned, the substantive standards are those of the *Boston Shipping Association* case, namely, a showing of competition among ports, proximate cause of injury, and unreasonable discrimination. However, in adducing proof, the standard is not "beyond a reasonable doubt" or "clear and convincing" but merely a "preponderance of the evidence," i.e., that the existence of the fact is shown to be more probable than its non-existence. Direct evidence is not always available. In other words, complainants cannot always produce the "smoking gun." For that reason, the Commission and courts have recognized that inferences may be drawn from a set of facts, which inferences an expert agency or even a reasonable human being can be expected to draw.

NYSA's, Sea-Land's, MPA's, and Hearing Counsel's answer to the Port Authority's case is that the Port Authority has not carried its burden of proof. However, NYSA, the main opponent to the Port Authority, argues that the burden of proof is so strict that virtually no port could make out a case and obtain the protection which Congress intended to give to parties adversely affected by assessment agreements, whose parties' pleas to Congress that the Commission retain some jurisdiction over such agreements to prevent "abuses," were answered affirmatively. Thus, NYSA as I mentioned earlier, argues that the Port Authority has a "heavy burden which must be met by clear and convincing 'substantial proof' supported by 'specific evidence.'" (NYSA op. br. at 93.) But as I further mentioned, Congress refused to give the NYSA this "clear and convincing" standard when enacting the MLAA. Having lost before the Congress, apparently the NYSA is trying to persuade the Commission to utilize such a standard, which is contrary to all relevant principles of administrative law.

In addition to the above arguments, NYSA and others argue that narrow concepts like "naturally tributary" cargo areas and technical definitions of cargo "diversions" apply, and that the Port Authority has not satisfied those tests.[25] Again, imposing such narrow technical standards and hanging them around the neck of the Port Authority like the proverbial albatross,

reparation whereas the 1984 Act does not grant such a right. (PRMSA r. br. at 61.) As I have discussed, I believe that neither Act gave PRMSA such a right. However, if PRMSA is correct and the 1916 Act did give the right, I would have had to decide whether removal of the 1916 Act would result in "manifest injustice" under the Commission's Notice of May 23, 1984, cited above. I do not need to decide that question for the reasons given above. However, PRMSA argues that the Commission's interpretation of the "savings" provision in the 1984 Act, i.e., limiting applicability of the 1916 Act to "judicial" proceedings rather than to administrative proceedings, is incorrect and unsupported by the legislative history to the 1984 Act. (PRMSA r. br. at 63.) PRMSA cites the House Committee Report, indicating an intent to save all remedies, not just judicial remedies, and shows how the Commission's interpretation could lead to absurd results. (PRMSA r. br. at 64–65.)

[25] Interestingly, as the Port Authority notes (r. br. at 7, footnote), NYSA itself seems to worry about "diversion" of cargoes and uses the term to justify its special reduced assessment (man-hours) on transshipped and rehandled cargoes because these cargoes are "highly divertible to other ports" (NYSA op. br. at 25). No one claims that NYSA must show that these cargoes are "naturally tributary" to the New York.

in my opinion, would be an unreasonable interference with the protective and remedial provisions of the MLAA. Throughout the answering case of respondents, there runs the theme of rigid resistance, of not retreating an inch, and of raising every technical argument on evidence, burden of proof, etc., rather than considering whether the proposals put forth by the Port Authority (or PRMSA) have any merit and can lead to negotiations.[26] Under the standards discussed and, as explained below, I therefore find that the Port Authority has carried its burden of proof and has shown that the current assessment formula has injured and continues to injure the Port Authority by placing it at a competitive disadvantage, especially with regard to Midwest containerized cargo, such disadvantage resulting from a $200–$300 differential on containerized cargo which could be eliminated if NYSA would modify its tonnage formula as suggested by the two expert witnesses. Furthermore, the facts are that the Port of New York/New Jersey competes with other ports, especially with Baltimore, that the differential handicaps the Port in its efforts to attract carriers to serve New York rather than Baltimore, for example, and that the differential is unnecessary, being the product of an unreasonable and unfair formula, which taxes carriers in inverse proportion to the amount of labor used for all costs.

Findings of Facts Relevant to the Port Authority's Case

The voluminous briefs of the parties contain over 400 numbered proposed findings of fact. Most of these are contained in the briefs of the two complainants and respondents NYSA et al. They reflect much effort and also demonstrate the bulky size of the evidentiary record. There is considerable overlapping of certain basic background-type facts and many other instances in which these three parties are proposing essentially the same findings of fact. In order to keep this decision from becoming gargantuan, I have generally attempted to confine the fact-finding in this discussion to material areas and have not attempted to make rulings on every proposed finding of fact. Such conservation of energy is especially warranted in consideration of the time constraints imposed by the governing statute and regulation. However, under applicable principles of administrative law, a

[26] Sea-Land and Hearing Counsel recommend negotiations to settle the problems. This indicates that they recognize that problems exist which should be addressed by the parties through negotiations. It might have been helpful if Hearing Counsel, instead of merely arguing that complainants did not carry their burden of proof, advised everyone exactly what were the "possible inequities" which Hearing Counsel state that the Port Authority has shown (H.C. r. br. at 9) and what are the "problem areas" which Hearing Counsel say that complainants "may have shown" (H.C. op. br. at 33). However, if I were PRMSA, I would not be encouraged by Hearing Counsel's or Sea-Land's advice to resolve these problems through negotiations with the NYSA and ILA after the long history of PRMSA's continual failures to obtain some relief from the NYSA–ILA. Perhaps, the NYSA's publicized "plan" to reduce assessments "early next year," which PRMSA cites in its reply brief (at 2), is an answer, although PRMSA's chief executive, who is also a Director of the NYSA, knows nothing about the "plan." If it offers a solution, this proceeding does not stand in the way, contrary to NYSA's representation. (PRMSA r. br. at 3.) Why does not PRMSA present the "plan" now to the parties and see if the parties can present a settlement to the Commission well in advance of the February 27, 1985 due date for the Commission's decision?

presiding judge need not rewrite every proposed finding or argument or even make findings on every proposal presented. *Adel International Development Inc.* v. *PRMSA*, 20 SRR 687, 690 (1980); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 267 (1966). 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. *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945); *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173 (1959).

Although the largest portion of the record consists of written testimony, depositions, and supporting documentary evidence, there was also considerable oral testimony and cross-examination of 14 witnesses. Thus, my findings of fact and conclusions, especially when they resolve material disputes of fact, are not merely confined to written materials but are based, to the extent applicable, on observation and my conclusions as to credibility of the witnesses. As the presiding judge and finder of fact, it is, of course, my responsibility to evaluate the credibility of witnesses and the weight to be given to their testimony. See, e.g., *N.L.R.B.* v. *Anthony Co.*, 557 F. 2d 692 (9th Cir. 1977). Furthermore, not all of my findings are based on mere analysis of facts and reasonable inferences to be drawn therefrom but rest upon credibility determinations based upon observations and demeanor. See *Ewing* v. *N.L.R.B.*, 732 F. 2d 1117, 1122 (2d Cir. 1984) (must not disregard ALJ's recitation that his findings were based on observation and demeanor of witnesses.)

I therefore find the following facts to be supported by a preponderance of credible evidence as regards the Port Authority's case:

1. Complainant, The Port Authority of New York and New Jersey (The Port Authority) is a "body corporate and politic" created in 1921 by compact between the States of New York and New Jersey with approval of the Congress of the Untied States. The two states established the Port Authority as the joint agency for the purpose of unifying, promoting and developing the New York-New Jersey Port District. The Port Authority's principal office is located at One World Trade Center, New York, New York 10048. The Port Authority compact requires that it "protect and promote" the commerce of the port.

2. Respondent, New York Shipping Association (NYSA) is a corporation organized under the laws of the State of New York having its principal place of business at 80 Broad Street, New York, New York 10004. NYSA is a multi-employer bargaining association consisting of 102 companies and is the employer or management negotiating representative for all collectively bargained longshore labor-management agreements affecting the Port of New York/New Jersey and is the administrator of all fringe benefit funds collected pursuant to such agreements.

3. The respondent members of NYSA are steamship lines, terminal operators, carrier agents, maintenance firms, contracting stevedores, carpentry companies, and other employers of waterfront labor operating in the Port

of New York/New Jersey. Many or most of these members are also members of one or more employers' collective bargaining units representing employers at other ports competing with the Port of New York/New Jersey.

4. Intervenor International Longshoremen's Association, AFL–CIO (ILA) is an unincorporated association and a labor organization within the purview of the Labor Management Relations Act with its principal office located at 17 Battery Place in the City of New York. The ILA represents longshoremen and other waterfront workers in the 36 Atlantic and Gulf Coast ports.

5. Intervenor Maryland Port Administration (MPA) is a State agency charged with the responsibility for developing facilities for the movement of export and import traffic through the Port of Baltimore and elsewhere within the State of Maryland. In carrying out its responsibilities, MPA owns or leases five of the ten major international cargo terminals in the Baltimore Harbor.

6. Intervenor Massachusetts Port Authority (Massport) is a body politic and corporate organized by virtue of the laws of the Commonwealth of Massachusetts with principal offices located at 99 High Street, Boston, MA. Massport is responsible, among other things, for promoting, developing and protecting the waterborne commerce of the Port of Boston. In carrying out these responsibilities, Massport owns, leases and/or operates a number of public marine terminals located within the boundaries of Boston Harbor.

7. The Bureau of Hearing Counsel consists of attorneys employed by the Commission who, from time to time, intervene in complaint cases "in the public interest" and to help develop the record.

8. The longshore labor negotiations on the East and Gulf Coasts are two fold. The ILA negotiates a master contract with 36 ports which sets the hourly wage for longshoremen and pension and welfare benefits which are the same in all ports. In addition, payments of the container royalty fund and job security program are negotiated. The Master Contract is negotiated by NYSA, Council of North Atlantic Shipping Associations (CONASA), West Gulf Maritime Association (WGMA), New Orleans Steamship Association, Inc. (NOSSA), Mobile Steamship Association (MSSA), Southeast Florida Employers Association (SFEA) and South Atlantic Employers Negotiating Committee (SAENC).

9. Local conditions in each port including pension, welfare, medical and clinical services, vacation and guaranteed annual income ("GAI") are negotiated port by port.

10. Thirty-six of the thirty-eight ocean carrier members of NYSA that answered the Port Authority's interrogatories call or are affiliated with carriers that call at a wide variety of ports, ranging from Halifax, Nova Scotia to ports in Alaska on the North American continent. Thus, Sea-Land Service calls at such ports as Boston, Mass., Baltimore, Md., Portsmouth, Va., Wilmington, N.C., and ports on the Gulf and Pacific Coasts plus ports in Alaska and Halifax, Nova Scotia. Grancolumbiana, Inc. calls at such ports as Philadelphia, Pa., Baltimore, Md., Charleston, S.C., and

Gulf and West Coast ports. The overwhelming majority of all of these lines call at Baltimore and usually Philadelphia as well.

11. Eight of the fifteen stevedore or terminal operator members of NYSA that answered interrogatories operate or are affiliated with companies that operate at a similar wide variety of ports, ranging from Halifax to ports in Alaska, and virtually all operate at Baltimore. Examples are Sea-Land Service, Inc., Maersk Container Service Co., Maher Terminals, Inc., and International Terminal Operating Co., Inc.

12. Twenty-one of the 54 NYSA members that answered interrogatories are members of associations at other reports which are the management collective bargaining representatives negotiating with the ILA.

13. The current NYSA–ILA collective bargaining agreement covers the period October 1, 1983 through September 30, 1986. This agreement incorporates by reference "existing contractual provisions," including the tonnage assessment agreement, Attachment B to the local contract negotiated for the three year period ending September 30, 1983.

14. In the Port of New York/New Jersey fringe benefits and accessorial expenses such as the NYSA administrative cost requirements are collected through a tonnage assessment paid directly by the steamship lines. The tonnage assessment is currently $8.90 per assessment ton (weight or measurement ton, whichever is greater). Cargoes excepted from the tonnage assessment currently pay a man-hour rate of $5.50 per man-hour. These include plywood (in lots of 5,000 tons or more); wastepaper and cardboard (in lots of 1,000 tons or more, moving breakbulk); linerboard for export which originates more than 500 miles outside the Port (in lots of 500 tons or more); steel, steel products and raw metals (partial and full loads, minimum of 1,000 tons per ship, non liners); lumber (shiploads, at any port or terminal in the Port); newsprint (not containerized); domestic cargo; bulk cargo; sugar (in bulk); scrap; transshipped cargo and foreign sea to foreign sea cargo. There are also certain special status cargoes with special rates of payment or special status with regard to measurement. These include bananas (5 cents per box measuring 1.8 cu. ft. or less inside measurement); refined sugar (20 cents per box in bags of 50 kilos, bagged in the Port of New York/New Jersey for export breakbulk, on which the applicable assessment was paid on import before bagging); perishable fruit including potatoes and dried dates (assessed at 40% of the tonnage assessment rate effective with a maximum of $2.00 per assessment ton if not carried in containers); bagged coffee and cocoa (assessed at 40 cu. ft. to a 2240 pound per ton); unboxed autos, trucks and buses (assessed on a wright basis, 2240 pounds per ton); and yachts (pleasure boats of 15′ and over assessed at the tonnage rate per lineal foot).

15. Prior to 1974, the assessment formula at the Port of New York/New Jersey was a combination man-hour and tonnage formula, but was converted to a straight tonnage formula (with exceptions) effective October 1, 1974.

16. The tonnage assessment and excepted man-hour assessment rates in the Port of New York/New Jersey from 1974 to present are as follows:

Effective date	Tonnage rate	Excepted man-hour rate
10/1/74	$4.00	$3.52
7/1/75	5.00	
11/15/77	6.85	
1/1/76	8.28	
4/1/76	6.85	
1/1/77	5.85	
4/1/78	.....	3.87
10/1/80	.....	4.29
7/1/82	7.50	5.50
4/4/83	8.90	

The passenger rate has remained at $2.50 per man-hour since October 1, 1974.

17. The amount of fringe benefits required to be raised by the assessment has increased steadily. According to audited records of the NYSA–ILA, these amounts including Waterfront Commission levies and ancillary or administrative costs less container royalties, increased from the 1974/1975 fiscal year to the 1982/1983 fiscal year as follows: 1974/1975 ($129.7 million); 1975/1976 ($132.2 million); 1976/1977 ($136.8 million); 1977/1978 ($139.4 million; 1978/1979 ($147.4 million); 1979/1980 ($153.1 million); 1980/1981 ($166.4 million) 1981/1982 ($193.7 million); 1982/1983 ($219,468,464). It is estimated that this amount will decline to some extent in fiscal years 1984/1985 and 1985/1986.

18. The total number of active longshoremen in the Port of New York/New Jersey during the last ten years (as of the end of each fiscal year) is as follows:

September 30, 1974	14,252
September 30, 1975	130,088
September 30, 1976	12,393
September 30, 1977	11,827
September 30, 1978	11,035
September 30, 1979	11,016
September 30, 1980	10,568
September 30, 1981	9,900
September 30, 1982	9,410
September 30, 1983	9,101

19. Under the tonnage assessment system, fringe benefits are raised by assessing each weight or measurement ton of nonexcepted cargo handled by longshore labor and the amount of assessment collected does not relate to the number of man-hours utilized in handling such cargo. The assessment collected on a tonnage basis is paid directly by the steamship lines.

20. In most other Atlantic and Gulf Coast ports, fringe benefits including pension, welfare, clinics, vacations, holidays, G.A.I. and security funding are collected primarily on a man-hour basis and are paid by the direct employer of longshore labor. The current man-hour assessment at Baltimore is $10.49, at Philadelphia is $12.28 and at Hampton Roads is $12.87 for breakbulk and $13.27 for containers due to higher GAI assessments on containers.

21. Since empty containers, by definition, do not contain any assessable tons, no fringe benefits are collected from the handling or movement of empty containers through the Port of New York/New Jersey. By contrast empty containers moving through ports using a man-hour assessment pay fringe benefits according to the number of man-hours required to handle the container. For example, an empty container at Baltimore, typically utilizing 2 man-hours of labor to handle, would pay a total of $20.98 ($10.49 man-hour rate × 2 man-hours) in fringe benefits.

22. The total number of empty containers handled in the Port of New York has more than doubled over the last 10 years while the tonnage assessment has been in effect. Thus, for the fiscal year ending September 30, 1974, a total of 117,175 empty containers moved through New York while in the fiscal year ending September 30, 1983, total empties were 283,487. (For a more detailed breakdown by year and by direction, see table in NYSA op. br. at 31.) By contrast, the total number of loaded containers handled at the Port increased only 7 percent from 836,207 in fiscal 1974 to 898,179 in fiscal 1983.

23. While the number of full containers handled at the Port of New York has grown only 3% between 1980 and 1983, during that time period there has been a forty-five percent increase in the number of empty containers handled at the Port so that empties have increased from 22% to 32% of all containers. In the Far East trade, the percentage of empties increased from 10% in 1980 to 29% in 1982.

24. In the Port of New York/New Jersey, there is no assessment levied on stuffing and stripping containers. Therefore, containers that are stuffed and stripped pay fringe benefit costs on the same basis as throughput containers even though the handling of a stuffed and stripped container requires significantly more man-hours. For example, at the Port of New York/New Jersey a stuffed and stripped container containing 25 assessment tons and typically requiring 12 man-hours to handle would pay $222.50 in assessment costs—exactly the same amount as a 25 assessment ton throughput container typically requiring only 4 man-hours to handle. By contrast, a container requiring 12 man-hours at Baltimore would pay $125.88 while a container utilizing 4 man-hours of labor would pay $41.96, one-third of that amount, in direct proportion to the number of man-hours used in handling the container.

25. The use of labor for purposes other than handling cargo does not result in the collection of fringe benefit costs at the Port of New York/

New Jersey. For example, a steamship line may utilize longshore labor for purposes such as maintenance without making any contribution to fringe benefits.

26. During 1983, a major carrier employed over a million man-hours. Of these man-hours, between 25 and 30 percent were used for non-cargo handling functions (maintenance and other activities).[27]

27. A tonnage assessment assesses labor costs in inverse proportion to the use of labor. It therefore shifts costs from low productivity operators to high productivity operators because low productivity operators do not pay labor costs in proportion to their use of labor.

28. When the tonnage assessment method was adopted in 1974 there was considerably more low productivity breakbulk cargo in the Port of New York/New Jersey because there were still major trade routes that had not been containerized. Today the vast majority of cargo through the Port of New York/New Jersey moves in containers and all of the major trade routes in the world except for parts of Africa and Latin America are containerized.

29. The Port of New York/New Jersey competes, to some extent, with virtually every U.S. and Canadian port. However, the most competitive cargo is containers to and from the Midwest, particularly the states of Ohio, Indiana, Illinois, Kentucky, western Pennsylvania, Wisconsin, and Michigan, which can move through any number of ports. In addition to competing for Midwest traffic, the Port of New York/New Jersey competes for local traffic with minibridge movements (containers discharged on West Coast ports and shipped east by rail).

30. At the Port of New York/New Jersey the tonnage assessment is a direct cost paid by the steamship lines. At ports using a man-hour formula, the man-hour assessment is paid directly by the employer.

31. A loaded container moving in the European trade contains an average of 23 assessable tons while a container in the Far East trade contains an average of 40 assessable tons.

32. An empty throughput container requires 2–3 man-hours to handle, a loaded throughput container requires 2–4 man-hours to handle, and a stuffed and stripped container requires 10–12 man-hours to handle.

33. Labor productivity is comparable at New York/New Jersey and other North Atlantic ports.

34. An average loaded container from Europe containing 23 assessable tons and requiring 2–4 man-hours to handle would pay $204.70 in assessment costs at the Port of New York/New Jersey (23 assessable tons × $8.90), $20.98 to $41.96 at Baltimore (2–4 man-hours × $10.49) and $24.56 to $49.12 at Philadelphia (2–4 man-hours × $12.28). An average loaded container from the Far East containing 40 assessable tons would pay $356.00

[27] The identity of this carrier and the exact figures have been requested to be treated as confidential. The confidential information is kept in the confidential portion of the record.

at New York/New Jersey while still paying $20.98 to $41.96 at Baltimore and $24.56 to $49.12 at Philadelphia.

35. Several cost studies performed by carriers serving New York and other ports illustrate that fringe benefit costs per container are substantially higher at New York by various measures per container, as percentage of revenue per container, and as percentage of total cost of moving the container. (The identity of the carriers and many of the precise figures are considered sensitive by the carriers and are being treated as confidential. The confidential information, however, is on file in the confidential portion of the record.) Thus, one carrier's cost study performed in 1984 shows that at New York, average assessment per 40-foot container is $391, which is 18.8 percent of the average revenue earned on that container. All other ports were much lower. At Baltimore, the comparable assessment was only $69.74, or only 3.5 percent of revenue per container, and at Norfolk, the figures were $60.10 and 3.1 percent, respectively.

36. Another carrier's cost study performed in late 1983 showed that its assessment cost per 40-foot container at New York was $265 compared to the total cost of handling the container, which was $351. At Baltimore, the assessment cost was only $8! Total cost of handling the average container there was $166.80. (The complete study is seen in the confidential portion of the NYSA op. br. at 37.)

37. A carrier official testified in deposition that he took assessment costs into account in making routing decisions for this line and that the assessment discrepancy, as indicated by his operations people, was $61 at Baltimore and $220 in New York for a 17–18 assessment ton container under the previously existing $7.50 per assessment ton rate. The current assessment differential between Baltimore and New York/New Jersey for Far East cargo is now over $200.

38. Cost studies by another carrier in early 1983 indicated that at that time the NYSA assessment cost at the then existing rate of $7.50 per assessment ton was 68% of the total cost of moving a container with 35 assessment tons through New York. The study also bears the notation: "The killer is NYSA assessment of $7.50/ton compared to: Baltimore $8.10/Manhour; Portsmouth $10.55/Manhour."

39. Cost studies submitted by two other carriers show that for one carrier the tonnage assessment at New York raises the cost of moving a container through New York to $400.11 for a container with 25 assessable tons whereas the total cost of moving a container (including assessment costs) is only $262.43 at Baltimore, $254.54 at Philadelphia, and $122.41 through Charleston. Another carrier's cost studies show that the stevedoring cost (including assessment cost) per revenue ton at the Port of New York is higher than at any other U.S. port. For example, the study shows stevedoring costs in early 1983 per revenue ton of $26.56 at Newark compared to $17.15 at Baltimore, $12.14 at Norfolk, and $19.83 at Los Angeles.

The current tonnage assessment rate of $8.90 is 33.5 percent of the total stevedoring cost for this carrier.

40. Evidence given by carrier and other witnesses is that the assessment cost of moving a container through the Port of New York is significantly higher than to move it through other North Atlantic ports.

41. On average, a loaded container handled at the Port of New York/New Jersey costs from $200–$300 more in assessments than a similar container handled at other U.S ports.[28]

42. If other North Atlantic ports used the NYSA tonnage assessment system for funding fringe benefit requirements, the assessment differential between New York/New Jersey and these ports would be an average of $90 per container.

43. If the Port of New York/New Jersey were to use a man-hour assessment method to collect fringe benefit obligations, the assessment differential between New York/New Jersey and other North Atlantic ports would average less than $50 per container. The man-hour rates at New York/New Jersey would have been $17.73 based on 1983 collection requirements.

44. The fact that fringe benefit packages at Baltimore, Hampton Roads, and Philadelphia are considerably less costly than at New York does not account for the magnitude of the assessment differential per container at New York, as seen from the preceding comparisons.

45. Since the steamship lines pay the tonnage assessment at the Port of New York, to the extent that they can route cargo to a less expensive port, the cost savings directly benefit the lines.

46. The Port Authority of New York/New Jersey's primary competitor for Midwest containers is the Port of Baltimore. The record contains considerable detail about competitive advantages or disadvantages as between New York and Baltimore with respect to inland carriers' rates and services, distances, drayage costs, backhaul opportunities for New York which New York offers to motor carriers. Some factors seem to favor Baltimore and others favor New York so that one cannot find with any degree of assurance that New York is at a competitive disadvantage to Baltimore generally as regards Midwest container cargo. (See NYSA op. br. at 43–46.) Nevertheless, despite the lack of any clear competitive disadvantage overall in inland transportation, the Port of Baltimore has succeeded in attracting Midwest cargo away from the Port of New York. Indeed, the MPA's Port Adminis-

[28] Although NYSA denies that a $200–$300 differential between New York and Baltimore exists, placing it at a $150 level (and, of course, contending that it is the underlying costs of labor fringe benefits that leads to any differential), it bears noting, as the Port Authority has done, that the differential in the $230–250 range was admitted even by NYSA witness Costello at hearings held before New York State Assemblyman Koppell in 1983. Mr. Costello, who now says that he only agreed with the mathematics presented by Mr. Goldmark, the Port's Executive Director, at the Koppell hearings, agreed with Mr. Goldmark's figures, even to a $250 differential. (NYSA op. br. at 79, citing Ex. 11.) NYSA made a fuss about admitting Exhibit 11, but there was adequate evidence of its authenticity and reliability as to the testimony of NYSA personnel made at the Koppell hearings, and the exhibit was admitted to show any previous inconsistent statements by such personnel.

trator acknowledging Baltimore's success, commented that New York is now a "neighborhood port." [29]

47. The Port of New York/New Jersey faces competition from West Coast ports on locally destined Far East minibridge cargo which may be discharged on the West Coast and shipped to the New York area by rail. In some cases, the same ship travels through the Panama Canal and calls at the Port of New York/New Jersey where it picks up the very same container, now empty and not subject to the tonnage assessment.

48. The Shipping Act of 1984 specifically authorizes and encourages intermodal ratemaking by ocean carriers.

49. Sea-Land's intermodal service is of sufficient significance to have been described in great detail in R.J. Reynolds' May 10, 1984 information statement.

50. Under intermodal ratemaking, the steamship line, which pays the tonnage assessment at New York/New Jersey, arranges the inland transportation and can control the routing of cargo. Intermodal ratemaking is the wave of the future and steamship lines are and have been aggressively seeking to control the routing of cargo.

51. Gregory Halpin, Administrator of the Maryland Port Administration, testified in deposition that because of the intermodal trend, MPA has "shifted the emphasis in our sales solicitation to the steamship lines."

52. In addition to establishing point-to-point intermodal rates, steamship lines have controlled routing of cargo in other ways including influencing shippers to choose certain ports, route code systems, port-to-port rates quoted with the understanding that they would not be used through New York/New Jersey, surcharges only on cargo moving through New York/New Jersey, and outright denial of the use of a particular port.

53. Robert Steiner, Deputy Director of the Port Department of the Port Authority, was recently told by a major importer of "Perrier" water that the importer can no longer use the Port of New York because whenever he asks for spots from Europe to New York, the steamship lines consistently tell him that there is no space available to New York, but that they would be glad to handle his cargo through Baltimore or Norfolk. Perrier water is a low-rated commodity that would have approximately 40 revenue tons per container. The importer, whose principal storage facilities are in Connecticut, also told Mr. Steiner that the inland costs from Baltimore and Norfolk are onerous and that the company has been compelled to consider using Canadian ports.

54. In determining how to route cargo, steamship lines take assessment costs into account, and it is their policy to route cargo in the cheapest

[29] This finding is not meant to call into question the success that Baltimore may be having in free and open competition with New York, nor is it the purpose of this proceeding to place New York in an advantageous position over Baltimore. The purpose is to determine if the current assessment formula at New York is unfair or unjustly discriminatory as to New York by imposing unjustified handicaps, such as a $200–$300 container tax differential that Baltimore or other ports do not have to bear, and, if so, whether the formula at New York should be modified to eliminate or ameliorate such handicaps.

manner possible. For example, Hapag-Lloyd's Vice President of Intermodal Services testified in deposition that a $128 assessment differential would make a difference in how the steamship line would route cargo.

55. NYSA–ILA Contract Board Members have frequently expressed concern that too high an assessment will divert cargo away from New York. The record shows numerous examples of this concern. For example, when, in early 1976, the Board reduced the tonnage assessment from $8.28 to $6.85, Mr. James Dickman, NYSA President, states at that time that he hoped the reduction would enable New York to recapture cargo it had lost when the assessment had reached $8.28. Thomas W. Gleason, ILA President, testified in deposition that if the tonnage assessment was increased beyond $8.90, it "would probably drive the freight away." John J. Farrell, Jr., President of ITO Terminal Co., stated in New York State legislative hearings that the present rate of $8.90 was taking business away from New York.

56. Michael Maher, Chairman of the Board of Maher Terminals testified in deposition that he has been told that lines take cargo through other ports to avoid paying the assessment.

57. Gregory Halpin, Administrator of MPA, in discussing whether the assessment costs at New York/New Jersey caused a diversion of cargo to other ports, testified in deposition that "* * * we have had lines and others who have said to us we have to escape the costs in New York and we would like to move more cargo through Baltimore."

58. Robert Steiner, Deputy Director of the Port Department, Port Authority of New York and New Jersey was told by Chairman Chang, the top executive of Evergreen Line, and his senior executive staff in November 1982 and February 1984 that Evergreen handles their Midwest cargo through the Port of Baltimore because the tonnage assessment makes New York noncompetitive for these cargoes. They also indicated generally that the tonnage assessment makes the Port of New York/New Jersey noncompetitive for other than New York area cargo. Evergreen Line is a member of NYSA and a respondent.

59. Mr. Steiner was told by John Hsia, Deputy Managing Director of Orient Overseas Container Line (OOCL) in February 1984 that the tonnage assessment is a major problem for OOCL in New York/New Jersey and that they prefer to put their competitive cargo (i.e., Midwestern cargo) through other ports. Orient Overseas Container Line is a member of NYSA and a respondent.

60. Mr. Steiner has been told by numerous U.S. Lines officials, including Mr. Anthony Scioscia, that the tonnage assessment has forced them to route cargo around New York/New Jersey. U.S. Liens is a member of NYSA and a respondent and presented two witnesses (including Mr. Scioscia) at the hearing.

61. Mr. Steiner was told by Poul Rasmussen, Executive Vice President of Maersk Line in May 1983 that because of the tonnage assessment,

Maersk Line must favor ports to the south for non-New York area origin and destination cargo and that Maersk sees no other solution than to avoid the Port of New York/New Jersey whenever possible. He also indicated an expectation that in the long run there would be an increase in both minibridge and microbridge movements for Maersk's Far East cargo. Maersk Lines is a member of NYSA and a respondent.

62. Mr. Steiner was told by E. Waage-Nielson, President of Barber Blue Sea, in May 1983 that the tonnage assessment forces Barber Line to direct tonnage to ports other than New York. This had been confirmed by other Barber officials in a meeting the year before. Barber Blue Sea is a member of NYSA and a respondent.

63. Mr. Steiner was told by M.Y. Stone, Chairman of Dart Line in May 1983 that Dart, particularly on lower-rated freight, is forced whenever possible to move cargo around the Port of New York/New Jersey due strictly to the tonnage assessment. Dart Line is a member of NYSA and a respondent.

64. Mr. Steiner was told by R. Heim, Director of European Operations for U.S. Lines in May 1983 that the tonnage assessment made it so onerous for U.S. Liens to carry lower-rated freight, particularly during this time of depressed freight rates, that they did all they could to avoid New York/New Jersey.

65. Mr. Steiner was told by H. Bulch, Director of American Australian Services for Columbus Line in May 1983 that the tonnage assessment is costly and that they preferred to handle their general cargo exports through ports other than New York/New Jersey. Columbus Line is a member of NYSA and a respondent.

66. Mr. Steiner was told by Mr. J. deJonge, Manager, North America Services for Nedlloyd Line in May 1983 that since a lot of Nedlloyd's exports can go through many ports, they route around New York because of the assessment formula. Nedlloyd Line is a member of NYSA and a respondent.

67. Mr. Steiner was told by Mr. M. Sportorno, Commercial Director of Italian Line in May 1983 that although he believes that New York/New Jersey labor is better than at other North Atlantic ports, they route around New York/New Jersey whenever possible because of the tonnage assessment. He also indicated that if there were another increase in the tonnage assessment, it would be cheaper to put cargo into Savannah and then truck it to New York. Italian Line is a member of NYSA and a respondent.

68. Mr. Steiner was told by Mr. G. Canera, Director and Mr. P. Hancock, president, U.S.A. of Costa Line, in May 1983 that the cargo they handle in the Port of New York/New Jersey is strictly local and that their competitive cargo to and from the Midwest is handled in other ports because of the tonnage assessment. Costa Line is a member of NYSA and a respondent.

69. Mr. Steiner was told by Captain Parada, Mediterranean Sales Manager for Sea-Land and his staff in May 1983 that even though the service at New York/New Jersey is far superior, principally for Midwest cargo, they are forced to use Portsmouth, VA. for low rated commodities in order to have a revenue return on those boxes. They also indicated that Sea-Land could not afford to pay assessment costs at New York/New Jersey in the $300–$500 range with an average revenue requirement per box of only $2300. Mr. Steiner has also been told on other occasions by Sea-Land officials that as long as New York has a tonnage assessment, Sea-Land will handle as many of their commodities as possible through other ports. Sea-Land is a member of NYSA and a respondent and presented a witness at the hearing.[30]

70. Most of the major shippers who had used the Port of New York/New Jersey from Massachusetts, Connecticut, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Wisconsin, Minnesota and Missouri in 1980 diverted a significant share of their cargo to other ports by 1983 while few have increased usage. The Port of New York/New Jersey has lost market share in all of these ten states since 1980 and the major beneficiaries have been other Atlantic and pacific Coast ports.

71. The number of full container ship arrivals at the Port of New York/New Jersey has declined at a greater rate than at other North Atlantic ports during the past three years.

72. Cargo handling costs (excluding assessment costs) are lower at the Port of New York/New Jersey than at other North Atlantic ports.

73. Transshipped cargo, that is, cargo shipped to or from another U.S. port by water, is excepted from the tonnage assessment and pays $5.50 per man-hour at the Port of New York/New Jersey.

74. Sea-Land has a feeder service for the ports of Baltimore and Boston and its line-haul vessels do make direct calls at New York/New Jersey. Import cargo arriving at New York and transshipped to Baltimore or Boston before being transported to its destination pays the $5.50 excepted man-hour rate at New York/New Jersey. If this import cargo were shipped

[30] NYSA, faced with the evidence of officials of its own member lines, calls the evidence "hearsay testimony of alleged statements made by certain carrier officials . . ." (NYSA op. br. at 59.) Of course, as the Port Authority states, these statements are not hearsay at all (as if that made a difference in an administrative hearing) but are "admissions." The statements are, furthermore, not "alleged" but proven by the testimony of Mr. Steiner who heard them. But, aside from that, NYSA states as a fact that "all but six of the thirteen companies [not 11 as the Port indicated] alleged to have made the statements have actually increased their non-excepted container cargo movements through the . . . Port during the past four complete contract years . . ." (NYSA op. br. at 60.) Another way of stating this fact is that nearly one-half of the 13 decreased their cargo movements. NYSA further states that some of the decreases were negligible and others explainable by conditions pertaining to frozen meat facilities at Philadelphia. (*Id.*. at 60–61.) Whatever the aggregate experience of these carriers may have been, NYSA's statements do not offset the fact that the carrier officials showed that they attempt to avoid New York when possible because of the assessment differential. Aggregate volumes of tonnages moving do not necessarily prove that there has been no impediment to business. See *NARI* v. *F.M.C.*, 658 F. 2d 816 (D.C. Cir. 1980), where the court criticized the Commission and vacated its decision which had found no violation of law and no harm to waste paper exporters because overall volume of movement of waste paper exports had increased over the years.

inland directly from New York, it would pay the $8.90 tonnage assessment. Similarly, export cargo shipped first to Baltimore or Boston and transshipped to New York for loading on the line-haul vessel pays the excepted $5.50 man-hour rate, but if the cargo moved directly to New York/New Jersey for export, it would pay the $8.90/ton assessment.

75. The policy at Sea-Land is to route cargo in the cheapest manner possible.

76. One of the reasons that Sea-Land uses New York/New Jersey as a relay port is that relayed cargoes pay the $5.50 excepted man-hour rate and are excepted from the tonnage assessment.

77. Of all the containers handled in the Port of Boston in 1983, 47.5% were transshipped through the Port of New York/New Jersey. The Port of Boston has encouraged steamship lines to transship by barge rather than truck to and from New York because the NYSA assessment on barge traffic is the excepted $5.50 per man-hour rate resulting in an assessment cost more than $300 less than the tonnage assessment applied to movements by truck.

78. It would be less expensive to move cargo by truck between Boston and New York/New Jersey but for the tonnage assessment.

79. The NYSA–ILA Contract Board is the body that implements the tonnage assessment and is authorized to grant modifications and excepted status to commodities. In making such decisions, the Contract Board is required to consider the "protection of the continued movement in the Port of New York of marginal commodities."

80. The Contract Board, in determining whether to grant a modification or exception, examines whether the change would retain cargo, bring back cargo that once moved through the port, or attract new cargo.

81. Thomas W. Gleason, President of the ILA, stated in his direct testimony that the Contract Board creates excepted and special status for cargoes which would otherwise discontinue coming to the Port of New York.

82. The record contains detailed instances of requests and actions by the Contract Board which sometimes granted special treatment for certain cargoes when carriers or terminal operators have presented such requests. The Contract Board has made decisions based upon the individual presentations and has shown a desire to protect low productivity breakbulk cargoes which maintain work opportunities at the Port. However, several of the presentations made by carriers or terminal operators demonstrate that the high tonnage assessment prevented cargo from moving through New York or even caused cargo to leave New York in favor of other ports. For example, A.G. Escalera, the agent of the Spanish Line, who had requested excepted status for waste paper which was denied, informed the Contract Board that such denial had caused 25,000 tons of waste paper, 98 percent of which had moved through New York, to move via another carrier through Boston. Mr. A.B. Ruhly, President of Maersk Line's agent, wrote to the Contract Board on June 9, 1982, indicating that the increase in

the tonnage assessment rate to $7.50 would cause them to route Canadian cargo through Philadelphia rather than New York. Maher Terminals had requested an exemption for Canadian cargo in September 1981 in order to obtain cargo being routed through Halifax. Maher had indicated that the carrier involved preferred to use New York but that the tonnage assessments in most cases would equal or exceed the costs of diverting the vessel to Halifax. Mr. J.E. Butcher, Vice President of the agent for Hoegh Ugland Auto Liners, wrote to the Contract Board on May 22, 1984, requesting that earth-moving equipment be given a lower assessment. He stated that the current assessment represented 25 percent of the ocean freight on this cargo and that if the assessment were not lowered, the carrier's European offices would book these cargoes for ports other than New York whenever possible. He also noted that automobile shippers were moving vast volumes through other ports because of the assessment at New York. Columbus Line asked for lower assessments on frozen meat in 1979, which request was denied. Thereafter, Philadelphia became the line's first port of call due to the large amount of meat unloaded there.

83. On other commodities, the evidence that the assessment rates were preventing the cargo from moving through New York persuaded the Board to modify the assessment. For example, steel commodities had apparently been lost to Philadelphia, and they were granted excepted cargo status on February 10, 1976. Tonnage assessments on coffee and cocoa were modified by the Contract Board on the basis of evidence that movement of those commodities through New York had been hindered or prevented by the assessments. Favorable modifications to the assessments were also made with respect to dried dates, yachts, and other commodities. Refined sugar in bags for export was granted special status on September 26, 1980, in order to encourage the movement of this labor-intensive cargo through New York.

84. The amount of tonnage handled at the Port of New York/New Jersey has remained relatively stable, New York being an ever-increasing consumption and production area. Thus, in contract year 1975, there were 22,689,696 non-excepted tons and in contract year 1983 there were 22, 659,540 non-excepted tons. It is estimated that the volume will increase to 24.2 million tons in contract year 1984 owing to an increase in the first eight months of that contract year. NYSA has derived figures indicating that non-excepted container tons has increased through New York from 15.9 million in 1975 to 20.1 million in 1983. According to Maritime Administration data, however, since the introduction of the tonnage assessment, the Port of New York/New Jersey has lost a substantial market share to other North Atlantic ports as well as other port ranges in the United States. (Ex. 2, pp. 6–9.) Thus, New York's share of liner cargo in the North Atlantic decline from 57 percent in 1974 to 55 percent in 1983 but the share for the total U.S. market declined from 23 percent to 16 percent. (*Id.*, at 7.) More significantly, New York's share of containerized cargo moving in

the North Atlantic has declined from 69 percent in 1972 to 56 percent in 1982. (*Id.*, at 8.) This indicates that New York has been losing its share to other North Atlantic ports in the container segment. (Ex. 2, p. 9.) Data obtained from port authorities shows, furthermore, that from 1981 to 1983, container vessel calls at New York have declined by 14 percent while such calls at Philadelphia, Baltimore & Hampton Roads declined only 5 percent. (*Id.*) NYSA attributes the increase in container tons at other ports to their later development of container facilities since 1972. (NYSA op. br. at 59, citing Ex. 33, p. II–7.) However, even in New York a good deal of container facilities were not developed until 1975 or later (completion of Sea-Land, Maersk Terminal, Red Hook, South Brooklyn Marine Terminal, etc.) (Ex. 31, pp. 6–7). There was much development of container facilities at other North Atlantic ports by 1970 although it continued to 1975. Also, the same full container ships calling at New York also called at Baltimore and Hampton Roads. (*Id.*)

85. The Contract Board has not seriously considered or evaluated in depth alternative assessment formulas in recent years. However, there has been concern over the raising of tonnage assessment rates and occasional suggestions by interested parties as to possible changes to the formula. For example, Joseph Barbera of Global Terminal & Container Services, Inc., wrote to NYSA on March 15, 1974, suggesting changes in the formula by decreasing the tonnage assessment on containers, increasing it on LCL cargoes, increasing the man-hour assessment on excepted cargoes, and charging a man-hour assessment on empty containers. As to the effects of raising the tonnage assessment rate, Robert B. Murphy of U.S. Lines testified in deposition that choosing the $8.90 per ton level was like choosing a sales price of $8.99 for psychological reasons. David Richman of United Terminals testified in deposition that deciding to what level to raise the assessment was somewhat like playing God because at some level diversion would occur.

86. Various witnesses testified in opposition to any change in the current formula which would cause them to lose the special treatment accorded them under the current formula or which would cause them to bear additional costs. For example, banana shippers wish to have the current rate at 5 cents per box remain untouched, and, if this is done, they would have no interest in this proceeding. Witnesses for U.S. Lines, Sea-Land, and McAllister Brothers, Inc. all testified in favor of preserving certain favorable treatment accorded their interests. Thus, the U.S. Lines witness opposes any change from the excepted man-hour basis for his line's domestic service, Sea-Land opposes any change from the excepted basis for its transshipped cargoes, or any change from its total exemption from any assessment for maintenance and other non-cargo handling functions, and Mr. Mullally of McAllister testified to the effect that he could not afford to pay the regular tonnage rate and remain viable. Mr. James G. Costello of University Maritime Service Corp. does not wish an increase

in the man-hour portion of assessment payments under an alternative formula. Under any such increase, terminal operators like Universal would be affected because they are responsible for paying assessments under the man-hour basis but not the tonnage basis. Universal utilizes a substantial number of man-hours of employment, and under the Port Authority's first suggested alternative formula, Universal would be paying quite a sizeable amount of money. (The figures are confidential but are available in the confidential portion of the record.) (Port Authority op. br. at 78–79.)

87. The Port Authority's expert witness, Mr. Leo Donovan, has presented testimony criticizing the current tonnage assessment formula and proposing alternative formulas based on a combined man-hour/tonnage basis broken down by the type of fringe-benefit cost being funded. He distinguishes between "transition" costs, i.e., those that are attributable to the advent of containerization (GAI) and all other costs, and would fund the first type on a per-container basis and the latter on a man-hour basis. (Ex. 31, pp. 25–30) Mr. Donovan is a Vice President within the Transportation Division of Booz, Allen & Hamilton, Inc., the well-known consulting firm, and in nearly 13 years has conducted or directed over 100 assignments for maritime clients. (Ex. 2, last page.) (A more complete discussion of his alternative formulas will be given below, and the reader is referred to the table of comparisons of the NYSA, Donovan, and PRMSA formulas in the appendix to this section for visual aid.)

88. Mr. Donovan's proposed alternative formulas would fund all fringe benefit costs, be responsive to marketing and competitive situations vis-a-vis other ports, and would assign responsibility for "transition" costs to the container sector which caused them. Mr. Donovan presents three forms of his alternative formula, using 1983 figures. The first would result in a rate of $11.64 per man-hour and $64 per container. The second version of his formula would modify the man-hour rate to retain presently excepted cargo and would result in the same $11.64 per man-hour plus a lower excepted man-hour rate ($5.50 per man-hour in 1983) and retain the per-container rate of $64. The third version of his proposal would consider price sensitivity of different types of containers and would assess full containers at $77 per unit but empty and stuffed and stripped containers a half rate of $38 per unit. (Ex. 31, cited above.) Mr. Donovan's formulas are flexible and can be further changed, according to him, to accommodate domestic, rehandled or transshipped containers, or breakbulk cargoes that might be diverted from the port or into containers. (Ex. 31, p. 29.) He states that breakbulk cargoes are "extremely important to the port's welfare" (*Id.*, at 30) and that "care must be taken to assure that no assessment formula change causes a substantial increase in breakbulk asssements charges." (*Id.*) Moreover, he advocates not changing who is responsible for paying the assessments so as to minimize disruption. Mr. Donovan concludes that the "current system is no longer responsive to market condi-

tions and should be changed" and states that his alternatives "are responsive and result in a pricing structure that the market can accept." (*Id.*)

Conclusions as to the Port Authority's Case

As I have indicated earlier, I conclude that the Port Authority has shown by a preponderance of the evidence that the current assessment formula is harming the Port competitively, especially as regards Baltimore, because it maintains a $200–$300 assessment differential that only New York has to bear and is not present in competing ports, which use man-hour formulas to fund their labor fringe-benefit costs. This showing is made not on the basis of cargo "diversion" under the "naturally-tributary" type cases which NYSA, Hearing Counsel and others seem to believe are controlling. The Port Authority does not claim that it is fundamentally entitled to Midwest container cargo or that such cargo is "naturally tributary" to New York rather than to Baltimore or Philadelphia, and the Port does not claim that NYSA is engaging in artificial monetary inducements like "absorptions" or "equalizations." What the Port is claiming is that it is being hurt in its attempt to attract carriers to route their services primarily to and from the Midwest, because of this unnecessary $200–$300 differential which the current formula at New York imposes on the Port. The Port Authority points to admissions of eleven carrier officials, whose companies are respondents in this case, regarding their efforts to avoid New York because of the assessment differential plus carriers' own cost studies which show the differential and, indeed, in one of which the carrier made the notation: "The killer is NYSA assessment of $7.50/ton compared to: Baltimore $8.10/Manhour; Portsmouth $10.55/Manhour." (Of course, the current rate at New York has since increased to $8.90 per ton.) There is, furthermore, evidence showing that the NYSA–ILA Contract Board members are always apprehensive when they have to raise the tonnage assessment rates about possible loss of cargo to competing ports, that they have tried, on occasion, to lower the rates in hopes of attracting cargo, that at least one NYSA member, Mr. Barbera, suggested that the formula needed revision to pick up contributions from certain specially-treated categories of cargo, and that NYSA hired an expert, Mr. Sclar, whose task initially was to look into the problems with the current formula. Furthermore, as seen by previous actions of the NYSA–ILA Contract Board, the Board often had to grant special reduced treatment to a number of commodities to retain their movement through New York and in some cases, especially that of the Spanish Line and waste paper, the assessment rate caused a loss of that commodity to Boston.

Data accumulated from the Maritime Administration and other sources indicate that although New York maintains its volume of aggregate tons, it is stagnating and has declined in its share of containerized cargo in the North Atlantic from 69 percent in 1972 to 56 percent in 1982. These declines are not explainable simply in terms of other ports' catching up

to New York in containerizing their facilities, notwithstanding NYSA's contentions. However, it is not necessary to point to specific items of cargo that have moved via Baltimore rather than New York solely because of the tonnage assessment at New York, and harm can be shown under law even if the aggregate volume of movement is holding its own or even increasing. That is the lesson of *NARI* v. *F.M.C.*, 658 F. 2d 816 (D.C. Cir. 1980), where the court chastised the Commission for finding no illegality under various sections of the 1916 Act merely because the commodity continued to move in increased volumes. It is also the lesson of *N.C. State Ports et al.* v. *Dart Containerline,* cited above, 21 F.M.C. 1125, affirmed *sub nom. Dart Containerline Co., Ltd.* v. *F.M.C.*, 639 F. 2d 809 (D.C. Cir. 1981). In the *Dart* case there was no "smoking gun," i.e., no specific ton of cargo that moved via Norfolk instead of Wilmington, N.C. that the evidence showed to move that way because of Dart's inland absorptions. Nevertheless, the Commission found competitive harm to Wilmington.

With the above type of evidence, including so many admissions and the additional fact that the Port is not asking for nor is it entitled to specific money damages, one wonders what more the NYSA, Hearing Counsel, and other parties opposing the Port's request for relief want the Port to prove. Nevertheless, NYSA wants the Port to be held to a "clear and convincing" evidentiary standard of proof which does not exist in these proceedings and was rejected by the Congress when NYSA first proposed it prior to enactment of the MLAA. Furthermore, NYSA insists on evidence of the "smoking gun," i.e., it wants specific tons of specific cargoes to be shown to have moved through Baltimore or some other competing port *solely* because of the assessment differential at New York, which NYSA also denies to exist in the magnitude of $200–$300 per container notwithstanding the admission of one of its members, Mr. Costello, before the New York State legislative hearings and its own members carriers' cost studies. Furthermore, NYSA constantly attacks its members' own admissions as "hearsay" and as "alleged" statements made to Mr. Steiner, the Port's Deputy Director. This type of contention undermines NYSA's credibility since, as NYSA counsel must well know, statements of *parties* out of court are not hearsay at all and, even if they were, hearsay is admissible in administrative hearings and can constitute substantial evidence even without corroboration. See Federal Rule 801(d)(2); *Richardson* v. *Perales,* 402 U.S. 389 (1971). The Commission has often relied upon "hearsay" even when finding malpractices and has been chastised by the court when refusing to rely upon probative hearsay. See *U.S.* v. *F.M.C.*, cited above, 15 SRR 927, and *NARI* v. *F.M.C.*, cited above, 658 F.2d at 825.[31] If NYSA had evidence that these eleven carrier officials

[31] The court, after criticizing the Commission for disregarding hearsay evidence of impediment to movement of waste paper to the Far East stated:

never made any such admissions, NYSA could have called them as witnesses, since they are NYSA's own people. Not having done so, it ill behooves NYSA to challenge their statements and the Commission is entitled to infer that their testimony would have been adverse to NYSA's position had they been called. See *Interstate Circuit* v. *United States,* 306 U.S. 208, 226 (1939).

One of the defenses of NYSA, furthermore, is that if there is any assessment differential, it is the fault of the underlying labor costs at New York, which admittedly are much higher than those at any other port, especially the GAI, which reflects the great decline in work opportunities caused by containerization. However, as Mr. Donovan and other evidence[32] has shown, it is not the underlying costs so much but rather the particular type of tonnage formula which competitively disadvantages New York. Mr. Donovan has prepared three alternative formulas which would fully fund these huge underlying costs but without causing the $200–$300 per container differential. Mr. Donovan's formulas would raise money from activities such as handling empty containers, stuffing and stripping, and maintenance at terminals, which enjoy free rides under the current formula, and would increase rates on the presently "excepted" domestic and rehandled cargoes. His formulas are also flexible enough to adjust to accommodate other special cases which may need protection, and would make New York more competitive as regards Midwest throughput containers without seriously disrupting domestic cargoes, according to Mr. Donovan. (Port Authority op. br. at 74–75.) Mr. Donovan's formulas are not perfect, and I believe, in several respects, Dr. Silberman's formula is more refined and is remedial for PRMSA, as well as the Port, since PRMSA, unlike the Port Authority, is a direct payor under the current formula. Nevertheless, I believe his formulas are certainly fairer than the current formula because they would substantially ameliorate the competitive handicap which the Port is facing on account of the current formula. Furthermore, as he notes, unlike the current formula, they would bring the payments of those who use labor in line with their responsibility for port labor dislocation and in line with their current utilization of labor.

But for the existence of Dr. Silberman's alternative formula, which, with modifications to eliminate certain excessive features, I would recommend Mr. Donovan's formula (third alternative) with some modifications. Furthermore, in view of the Port Authority's suggestion that instead of ordering

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The Commission stubbornly insisted on wearing its blinders to judge the available evidence in this case.

The court commented on the use of hearsay evidence in administrative proceedings, calling it not "dispositive" but "suitable and appropriate for inclusion in the context of administrative proceedings and decision-making." *Id.* Later, the court also criticized the Commission for refusing to consider hearsay documentary evidence (letters from shippers) stating that "[t]he Commission displayed an unfortunate, capricious reluctance to assimilate the proffered evidence tending to show detrimental impact on the commerce in waste-paper." 658 F.2d at 825 n. 46.

[32] See findings of facts nos. 42–44, above.

modification of the current agreement, the Commission could suspend such an order for 60 days to allow the parties to settle on a new formula, I refrain from recommending implementation of Mr. Donovan's alternative formula, though recognizing its merits.[33]

Credibility of NYSA's Witnesses

In addition to my findings and conclusions regarding the evidence presented by the Port Authority and NYSA's defenses, I owe some explanation as to the reasons why I find the Port Authority's (and later, PRMSA's) evidence more credible and persuasive than NYSA's. Not only do I find NYSA's technical arguments attacking their own officials' admissions as "hearsay" and their impossibly difficult standard of proof to which they wish to hold the Port Authority untenable but I find that, with all due regard to the eminent positions they hold in industry and in the consulting-firm world, NYSA' witnesses were unduly rigid in adhering to the defense of their problematic formula both during cross-examination and in their written testimony. Certainly no formula can be so wonderful that reasonable concessions cannot be made on cross-examination or when reasonable criticisms are made. However, these witnesses made grudgingly few concessions. Furthermore, the witnesses defending the formula, whose companies enjoy special privileges like Sea-Land with its relay service or United States Lines with its domestic cargoes or McAllister with its "excepted" barges, understandably steadfastly defended the status quo even though they benefit substantially at the expense of the other container lines for these privileges. I do not blame them of course, for adhering to the best interests of their companies, but that does not mean that I have to give as much weight to their testimony as I do to other evidence, especially to parties' evidence against their own interests, such as the admissions of the eleven carrier officials or the carriers' cost studies. Finally, as to the NYSA's expert witness, Mr. Michael L. Sclar, both the Port Authority and PRMSA, through cross-examination and demonstration, have shown that Mr. Sclar has offered inconsistent testimony in a previous Commission proceeding involving an assessment agreement on the West Coast in which he seemed to be attacking the very concepts of the tonnage formula which he here defends. I am not seeking to attack the professional reputation of Mr. Sclar and recognize

[33] The Port Authority initially did not recommend any alternative formula but rather suggested that the parties carefully consider alternatives, admitting that there was no simple solution. (Port Authority r. br. at 31.) Sea-Land had seemed to recognize the existence of problems and suggested extensive negotiations. (*Id.*) However, NYSA took a strong position of resistance and criticized the Port for not presenting an alternative formula, which accounts for Mr. Donovan's proposals. However, the Port Authority is still apparently holding out the olive branch and seems willing to seek an accommodation with NYSA. Why then do not the parties and NYSA which, as I mentioned, announced a "plan" in the *Journal of Commerce*, talk to each other and see if any settlement can be reached well before the February 27 deadline imposed on the Commission. Since the one-year deadline on the Commission seems mandatory under the MLAA, it does not seem feasible for the Commission to issue a decision on February 27, 1985, which would postpone its decision for 60 days. See Sen. Rep. to the MLAA, cited above, at 11, requiring strict adherence to the one-year deadline for Commission decisions ("the time requirements for filing and decision shall be strictly adhered to.")

that he has appeared as an expert witness in various proceedings, not without reason, and is with a reputable consulting firm, Temple, Barker, and Sloane. However, both the Port Authority and PRMSA have, in my opinion, utilized the adversary process to show that, expert or no expert, this witness's credibility in this proceeding has been undermined to such an extent that I can give very little weight to his opinions or conclusions.

For a description of the many ways in which both the Port Authority and PRMSA have demonstrated Mr. Sclar's previous inconsistent statements, his peculiar methodologies and curious reasonings, constricted definitions of cargo "diversion," etc., see the discussion with record citations in the briefs of the Port Authority and of PRMSA (Port Authority op. br. at 81–87; r. br. at 19–29; PRMSA op. br. at 65–71.) A detailed discussion of every point would be unduly excessive and unnecessary. However, some of the highlights are the following: Mr. Sclar's ignoring costs per unit basis when comparing total costs at New York with other ports; his exceedingly narrow definition of "diversion" to such an extent that only local "captive" cargo in New York's backyard would he ever consider as being losable to any other port; his projections as fact although he later testified that the projections did not occur as anticipated; his indication that data were not available for years prior to 1972 but later statement that foreign container cargoes increased from nothing in 1966 to 7.2 million tons in 1983; his change in mission from investigating whether the current formula was appropriate compared to other possible models to all-out defender of the status quo; the inscrutability of much of his reasoning, which even NYSA's witness Scioscia admitted he couldn't understand even as to a relatively simple portion; his advocacy of increased assessments on any employer who introduces efficient devices, thereby penalizing any innovative employer in areas not related to the institution of containerization.

Certainly, a factor which undermines Mr. Sclar's credibility significantly is the inconsistent testimony which he gave in a previous Commission proceeding, involving an assessment formula on the West Coast. (*Standard Fruit and Steamship Co.* v. *PMA*, 20 SRR 909 (ALJ 1981) (settlement providing for mixed man-hour/tonnage formula to be later replaced by man-hour system).) Both the Port Authority and PRMSA cite paragraph after paragraph of inconsistencies between Mr. Sclar's testimony on the West Coast and that given in this proceeding. Whereas Mr. Sclar, testifying for a client with man-hour and mixed man-hour/tonnage assessments on the West Coast, advocated great reluctance in departing from a man-hour basis to a tonnage basis during times of declining man-hours because of a "substantial overkill potential," he fully supports the tonnage formula in New York although these "overkill" potentials have been pointed out by PRMSA in some detail. Furthermore, although now advocating a wholly tonnage-based formula in New York as one that fairly allocates fringe benefit costs among high- and low-productivity carriers, on the West Coast Mr. Sclar testified that a tonnage formula results in "subsidization of low

productivity operators because low productivity operators will not pay labor costs in proportion to their use of the labor." (Ex. 48 at 13, cited in PRMSA op. br. at 71.) Also, Mr. Sclar, on the West Coast, resisted the idea of switching the formula out there from man-hours to tonnage assessments, stating that such a switch "does not modify the current man-hour assessments in a rational manner" and further testified on the West Coast against such a switch to a tonnage basis because operators who were employing large amounts of labor relative to their tonnage "would be relieved of this cost by higher productivity operators who have reduced costs and increased efficiency usually by large capital expenditures." (Ex. 48 at 29, cited in PRMSA op. br. at 71.) Mr. Sclar, on the West Coast, furthermore, challenged the idea that employee benefits should be paid according to revenues derived by tons, stating that "[w]e can find no reasons why labor costs, direct or indirect, for an industry section should be determined and paid on the basis of revenue earned by that sector, particularly since the determination of those costs in this fashion has no relationship to labor utilization within the sector, and obviously subsidizes the labor costs of some sectors." (Ex. 48, App. 6, pp. IV–8 through IV–9, cited by Port Authority op. br. at 84.)

It is not necessary to go on with further examples which are provided by complainants. Even if there are different conditions on the West Coast and factual distinctions, there are so many statements expressing basic principles opposing tonnage assessments in Mr. Sclar's West Coast testimony, which are apparently overridden in Mr. Sclar's testimony in this proceeding, that, at the very least, one must scratch one's head when considering whether to follow the advice of Mr. Sclar on the East Coast where he fully approves tonnage assessments.

NYSA's Motion to Strike Exhibit 48

Respondents NYSA et al. served a motion to strike Exhibit 48 or, in the alternative, to reopen the hearing to afford Mr. Sclar an opportunity to explain or deny his prior statements contained in that exhibit. This motion was served on October 3, 1984, which is 35 days after the close of the hearing (August 29). Respondents argue that the complainants offered Mr. Sclar's prior testimony in another Commission proceeding, which is contained in Exhibit 48, without any attempt to establish its admissibility and without any indication of the portions of the testimony upon which complainants intended to rely. NYSA contends that Mr. Sclar was therefore denied his right to explain the earlier testimony, and NYSA cites much case authority holding that the party attempting to use a prior statement of a witness to impeach the witness must establish that the prior statement is in fact inconsistent with the witness's present testimony, must establish a "foundation," and must give the witness an opportunity to explain or deny the prior statement. Finally, NYSA complains that exhibit 48 is not admissible because complainants had ample opportunity to extract pertinent

portions of the lengthy testimony in advance of the hearing and criticize it in their earlier written cases.

Both complainants strongly oppose the motion. They also furnish ample case authority holding that they did nothing improper. They contend that the testimony in question (Ex. 48) was referred to in Mr. Scalr's written opening testimony (Ex. 29, pp. 1–2), that he identified Exhibit 48 as his testimony in the previous case, and that he was afforded an opportunity to explain or deny it as Federal Rule 613 requires, but that his counsel, after specific advice from the presiding judge, neither asked for a recess to confer with Mr. Sclar, nor sought to conduct redirect examination despite being offered a recess and having a four-day interlude before the hearing was to resume and despite being advised that filing a motion long after the hearing, seeking to reopen the hearing under a tight schedule, while the parties were writing post-hearing briefs, should not be attempted. Furthermore, the Port Authority argues, it is enough if the prior testimony taken as a whole shows inconsistency with the present testimony if the prior testimony is to be admitted for purposes of impeachment, and the Port Authority contends that the prior testimony is, as a whole, inconsistent with Mr. Sclar's present testimony.

Complainant PRMSA opposes NYSA's motion on similar grounds. PRMSA contends that it co-sponsored admission of Exhibit 48 for the purpose of impeaching Mr. Sclar's credibility because Exhibit 48 consists of prior inconsistent testimony, that Mr. Sclar referred to this previous testimony several times, even using it as a means to attack conclusions reached by PRMSA's expert witness, that counsel for NYSA could have requested time to prepare to conduct redirect examination but did not avail himself of that opportunity even when invited to do so by the presiding judge, that the entire testimony was essentially inconsistent with Mr. Sclar's present testimony, not merely portions of it, and that, in the last analysis, counsel for NYSA should have been better prepared but in fact admitted that he had not even read the previous testimony of his expert witness, which that witness had referred to several times in his own written testimony in this proceeding.

The facts of the situation here, in my opinion, show that neither Federal Rule 613 nor the spirit of that rule nor the principles regarding fair hearings have been violated. What happened in point of fact is that on Thursday, August 23, 1984, in mid-afternoon, counsel for the Port authority finished cross-examining Mr. Sclar. At the conclusion of the cross-examination, counsel for the Port Authority showed Mr. Sclar a copy of his testimony in the previous Commission proceeding. Mr. Sclar identified it. (Tr. 595–596.) Port Authority counsel, joined by counsel for PRMSA, moved its admission into evidence without further questions. Counsel for NYSA stated that he had not had an opportunity to review the exhibit, that he questioned the relevance of it, and might move to strike it. (Tr. 597.) I advised counsel that if he wished to file such a motion, he ought to do so timely

because if it were denied, it would be too late to return to a hearing to allow further questioning of Mr. Sclar in the midst of the hectic post-hearing brief-writing period. (Tr. 600.) During subsequent discussion, it became clear that the exhibit was being offered not to prove any facts stated therein but for the purpose of impeaching Mr. Sclar's credibility. Counsel for NYSA, however, stated that he had been surprised and didn't know what the inconsistent statement in the exhibit were supposed to be, and that the matter should have been presented by complainants earlier so that he could have prepared for it, and not by way of cross-examination at the last minute. I advised counsel that there have been cases in which an expert witness has been shown previously inconsistent testimony by counsel trying to impeach the witness's credibility, and the usual result is that the witness's own counsel try to rehabilitate the witness on redirect examination. Nevertheless, the previous testimony is admissible for impeachment purposes. (Tr. 604–605.) The conclusion to this scenario was that NYSA's counsel decided not to conduct redirect examination.

All that the applicable rules and principles of fair hearing require is a fair opportunity for a party to meet evidence adverse to the party's interest in the most appropriate fashion. See *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 140 (1965). Adverse evidence can be countered either by rebuttal evidence, cross-examination or redirect examination, or argument. In this case, despite the fact that Mr. Sclar referred to his previous testimony in his own written testimony (Ex. 29) in support of his qualifications and even to attack PRMSA's case, his counsel apparently had not familiarized himself with that testimony to determine if there could be anything damaging in it which opposing counsel might try to use in cross-examination. Having been alerted to the fact that opposing counsel were using it for impeachment purposes. NYSA's counsel could have accepted the specific suggestions made by myself and counsel for PRMSA that he conduct redirect examination and, as PRMSA's counsel stated, that if he needed time to prepare such examination, he should be granted it and "if there is a necessity to do so . . . then we all have to come back here and do that." (Tr. 599.) As the Port Authority notes, however, there was time for NYSA counsel to prepare for redirect. Cross-examination of Mr. Sclar concluded prior to 3 p.m. on Thursday, August 23. No hearing was scheduled for Friday, and the hearing did not resume until Tuesday of the following week. If NYSA counsel was not familiar with his witness's previous testimony nor with any inconsistencies in that testimony, certainly counsel could have conferred with his witness during the four-day interlude or even the same day and thereupon recall him for redirect examination. Experienced trial counsel certainly must be aware of the fact that, as one authority states:

> The first, and probably the most effective and most frequently employed [line of attack upon the credibility of a witness] is an attack by proof that the witness on a previous occasion has

> made statements inconsistent with his present testimony. *McCormick on Evidence* (3rd Ed. 1984), sec. 33, p. 72.

NYSA counsel sponsored this witness, who stated that he had testified previously in a Commission proceeding in his own written testimony (Ex. 29). Therefore, it is not unreasonable to assume that opposing counsel would seek to obtain a copy of that testimony to see if there were any inconsistent statements, and that the witness's own counsel would have spoken with the witness to ascertain whether there was anything damaging in that previous testimony so that if the blow fell, counsel would be prepared to conduct redirect examination for the purpose of rehabilitating the witness. As the above quoted authority also states:

> The reply on redirect may take the form of explanation, avoidance, or qualification of the new substantive facts or matters of impeachment elicited by the cross-examiner. *McCormick*, cited above, at sec. 32, p. 70.

However, counsel for NYSA (who conceded that he had never read the testimony in question) contends that opposing counsel should have identified portions of the testimony that they considered inconsistent so that the witness would have had a fair opportunity to explain or deny. Complainants, however, state that they believe the entire testimony to be riddled with inconsistencies and that, accordingly, it would serve no purpose to go over every line and identify it as the portion they wished to use to impeach. Even if complainants' counsel should have tried to specify page after page of the 50-page document, this does not explain the witness's counsel's unpreparedness nor would it deprive him of the opportunity of conferring with the witness, whose testimony it was, to find out from the witness what might be damaging in the testimony and how to explain, deny, or qualify it. Then, NYSA counsel could have asked Mr. Sclar to return on the same day or on Friday or the following Monday or Tuesday if NYSA counsel needed the time because of his own unfamiliarity with the previous statements of Mr. Sclar. Indeed, counsel for PRMSA specifically agreed on the record to come back later if necessary to give NYSA counsel time to prepare. Thus, Mr. Sclar's counsel was given the opportunity to question his witness about the inconsistent statements, which Rule 613 and fair procedure require.[34]

[34] According to the authorities, "the requirements of [Rule 613] are met if the witness has an opportunity to explain after the contents of the statement are made known to the jury." 3 Weinstein & Berger, *Weinstein's Evidence*, sec. 613[04], pp. 613–15 and 613–16. The rule does not require the impeaching party to afford the witness the opportunity to explain or deny. The witness must only be given such an opportunity, and the impeaching party does not usually recall the witness to rehabilitate the witness. 3 Weinstein & Berger, cited above, at p. 613–24. Rule 613 does not even require that the cross-examiner display or disclose the previous statement to the witness before questioning him about it, only that he must show it to opposing counsel on request. 3 Louisell & Mueller, *Federal Evidence*, sec. 357, p. 558. "Thus, opposing counsel may pursue the matter on redirect and so bring to light any innocent explanation which the witness may have

Continued

What happened, however, was that NYSA and Mr. Sclar's counsel had not read or apparently familiarized himself with the previous testimony of Mr. Sclar, although Mr. Sclar had specifically referred to it as proof of his expert qualifications. True, as NYSA counsel suggests, complainants could have attacked Mr. Sclar's previous testimony in complainants' own written rebuttal testimony, and Mr. Sclar could have replied in his written surrebuttal testimony under the established procedure. If failure of complainants to follow that procedure meant that NYSA counsel would never have had an opportunity to seek to deny or explain the previous testimony, then NYSA counsel could rightfully complain that Mr. Sclar and NYSA were unfairly treated and prejudiced. However, the parties were also allowed to designate witnesses for cross-examination, and Mr. Sclar was so designated. Therefore, his counsel was aware that he would have the opportunity of redirect examination of Mr. Sclar and, since the purpose of cross-examination is to seek to undermine a witness' credibility, one would think that at least by the time of the designation, his counsel would have thought it prudent to ask Mr. Sclar whether there was anything damaging in the previous testimony which Mr. Sclar himself cited, and, if so, to prepare for redirect examination at the conclusion of the cross-examination. For some reason, NYSA counsel did not do this. Instead, he claims surprise and asks that the previous testimony be stricken or that, at this impossibly late date, he now be allowed to conduct redirect examination.

I conclude, therefore, that NYSA counsel was given a fair opportunity to confer with his witness and conduct redirect examination well before the hearings closed but expressly declined to avail himself of such opportunity. The problem here appears not to be surprise but lack of preparedness and unwillingness to conduct redirect examination, for which counsel cannot blame complainants. NYSA's motion is therefore denied.[35]

Findings as to PRMSA's Case

In the following sections I find and conclude that PRMSA has shown that the current tonnage assessment formula is unfair and unjustly discriminatory as between carriers and must be modified, as provided by applicable law. The bottom line to PRMSA's case is that all containerized carriers benefited more or less the same from the advent of containerization and

. . ." *Id.* In one case, impeaching counsel introduced over 60 apparently multi-page documents without specifying the pertinent portions. The court ordered impeaching counsel to specify the portions and allowed the witness's counsel 15 days to ask to recall the witness for redirect examination. The present proceeding involves one document, albeit 50 pages (with a lengthy report that respondents' counsel, not complainants' counsel furnished), which document the witness had cited and obviously remembered. ("It's very difficult to forget that docket," stated Mr. Sclar, in identifying the previous testimony (Tr. 595).) The 60-document case was *U.S.* v. *IBM*, 432 F. Supp. 138 (S.D.N.Y. 1977), and the ruling was made long before the trial was to conclude.

[35] Of course, another way to rehabilitate a witness whose credibility has been damaged on cross-examination is by argument later on brief. NYSA has availed itself of that opportunity, arguing that Mr. Sclar's prior testimony was not really inconsistent and dealt with different factual circumstances. That is the type of rehabilitation usually found on redirect examination. (See NYSA r. br. at 6–11.)

paid compensation in the form of the GAI program and other ways to the ILA because of the drastic curtailment of work opportunities stemming from the decision to load and unload ships using containers. However, not all containerized carriers are bearing an equal or fair burden and a number of facts showing vast disparities in payments among certain containerized carriers illustrates this fact.

The reasons for the unfairness of the formula and the consequent unequal allocation of burdens among the containerized carriers are several. First, the flat tonnage-type formula which assesses all types of fringe benefit costs, whether they are related to men currently employed or the other type of costs which are related to men displaced from work by containerization, is conceptually unsound and illogical since it makes carriers pay more money to find fringe benefits even if they use less labor for direct-type costs akin to wages. This blunderbuss tonnage formula, not used at any other port in the United States to fund all fringe benefits, not only imposes responsibility on carriers for direct current-type fringe costs where there is no logical nexus but it penalizes such carriers who effectuate efficiencies in their non-vessel loading/unloading activities. In other words, if a carrier operates at a terminal which has reduced the need for handling empty containers, stuffing and stripping containers, or for maintenance by utilizing innovative cost-saving techniques, such carrier gets no credit for such innovations because it must still pay under a tonnage formula toward the extra labor costs of another carrier who has not introduced innovations. Thus, a carrier who ultimately moves more tons per hours of labor used because of internal terminal efficiencies pays more in assessments even for the type of costs which are not the industry-wide responsibility such as GAI, for which all containerized carriers properly share responsibility. Such a formula reduces any incentive to innovate in non-vessel loading/unloading activities.

A second problem with the current assessment formula at New York is that it shows great favoritism to a certain few carriers and activities and, because of such favoritism, those carriers pay little or even nothing towards their own costs or towards industry-wide costs. Such failure to make a fair contribution by such carriers casts burdens on other carriers, especially those like PRMSA, which has become very efficient at its own terminal, and which serves an economically underdeveloped area. The favoritism which PRMSA shows exists for three carriers who operate in domestic trades and rehandle or transship numerous containers. These carriers are "excepted" from paying under the tonnage formula, i.e., they (or their terminal operator) pay only through the much lower man-hour portion of the formula which does not even meet current direct-type labor costs. This favored treatment to the favored few results in their not contributing many millions of dollars to the fringe benefit package although two of the favored three are substantial containerized carriers who benefited by containerization as much as any other carrier. The other favored treatment

under the formula goes to carriers engaging in moving empty containers, stuffing and stripping, and in maintenance work. These carriers not only do not pay under the tonnage formula. They do not even pay under the "excepted" man-hour portion of the current formula. I other words, they pay absolutely nothing toward fringe benefit costs. Such total exemption also results in considerable savings to the few carriers involved and throws the cost burdens on other carriers who do not operate in the same way or to the same degree with empty containers and stuffing and stripping.

To remove these inequities and reallocate the cost burdens more evenly, PRMSA has presented an alternative formula supported by the testimony of an impressive expert witness who relies upon much of NYSA's own data. With some exceptions, I find the formula to be well justified and strongly urge its adoption. My discussion and findings and explanations follow.

Unfairness of the Current Tonnage Formula

In developing its case to prove these assertions by a preponderance of credible evidence, PRMSA has shown a number of amazing facts which illustrate how unfair the current tonnage formula has been operating and how burdensome it has become to containerized operators, especially because of the enormous special privileges shown to three carriers who operate domestic and transshipment services. It appears perhaps that until the record became assembled in this proceeding, no one was really in a position to understand the magnitude of the special privileges nor the extent to which they burden other carriers. However, now that the facts are in, PRMSA registers extreme indignation at the extent of the disparity between what PRMSA has had to pay under the formula and what other preferred carriers have not had to pay, especially when PRMSA serves a trade which is admittedly economically underdeveloped. It is perhaps understandable that PRMSA, upon now learning that in 1982–1983, it paid an average of $272 per container for fringe benefits under the tonnage formula whereas another major carrier paid only $141 per container and another only $168 per container, and these other two carriers were the prime beneficiaries of the special exception for domestic and transshipped cargoes, is indignant. It is not my job, however, to determine cases on the basis of emotion such as that shown by PRMSA which states that "NYSA behaves as a super-power, favoring some members and penalizing others, carrying on its work in secret * * *" (PRMSA r. br. at 5.) I attribute this statement to PRMSA's emotional reaction to the evidence it has adduced. It is my job and that of the Commission, as charged by the Congress in the MLAA, to find out whether the facts do indeed show that the allocation of cost burdens among carriers at New York, who derived more or less the same benefit from containerization initially, is so egregiously out of line that it is unfair and unjustly discriminatory among carriers. I believe the evidence shows that in fact the allocation has failed to distribute the burdens fairly

both because of the continued insistence on utilizing a flat tonnage formula regardless of type of fringe cost and because of enormous special privileges shown to a few carriers and a few operations.

Some of the concepts which PRMSA has shown by the evidence it has adduced are perhaps not easy to comprehend on first reading, but some of the evidence it has also adduced from the records of NYSA members regarding favoritism to certain carriers is rather striking. In order to present my findings and conclusions as to PRMSA's case in the clearest and briefest manner possible, I present my findings and conclusions so that the occasionally startling conclusions and the supporting findings of fact can be found close to one another. Regrettably, although I would have wished to avoid doing so, I find that it is not possible to conceal certain data about certain carriers which was obtained under confidential terms. I believe that even if I attempted to do so, it would become so obvious which carriers were involved that the concealment of names would become meaningless. Also, unless these facts are made known, one might not be able to understand my basic conclusions, namely, that the current formula is terribly unfair as it allocates burdens among the containerized sector of the industry at New York.[36]

To make its point about this unfair distribution of burdens among the containerized carriers under the current tonnage formula at New York, PRMSA points to five somewhat amazing facts that the evidence shows:[37] (1) that in contract year 1982–1983, PRMSA paid $16.1 million under the formula and moved 59,142 containers, an average of $272 per container. However, another carrier moving a third more carriers than PRMSA paid an average of only $141 per container, and still a bigger carrier, moving more than twice the number of containers as PRMSA, paid an average of only $168 per container. Significantly, furthermore, these are two of the carriers enjoying excepted treatment for domestic and transshipped operations; (2) that PRMSA employed 2.5 percent of the NYSA–ILA man-hours in the Port, but paid 8.5 percent of the total NYSA–ILA tonnage and man-hour assessment (even though PRMSA has reduced its non-vessel loading activities at its terminal through internal efficiencies or otherwise, which internal activities are not connected with its initial containerization years ago); (3) that the special treatment for domestic and transshipped operations accorded to only three carriers resulted in their avoiding paying

[36] Rule 167, 46 CFR 502.167, specifically authorizes me or the Commission to use confidential information "if they deem it necessary to a correct decision in this proceeding." As explained, I deem it necessary to use the evidence even if identities and data are revealed, so that my decision can be properly understood, albeit I would have preferred not to have had to reveal particular carrier information which was furnished in confidence. I do add, however, that I am not finding that NYSA or the carriers involved have deliberately intended to harm anyone or that the carriers operated in any way other than what they thought was perfectly legal. As I mention in my decision, it appears that all the facts have been assembled for the first time in one place, and the unfair effects of the current agreement can be quantified for the first time. What would be wrong, in my opinion, is to continue the present unfairness now that all the parties can see the effects in detail.

[37] PRMSA op. br. at 5–7.

some $20 million dollars that they would have paid under the normal tonnage assessment applicable to virtually all other containerized carriers; (4) that the current formula assesses certain activities like stuffing and stripping and handling of empty containers absolutely nothing, not even the man-hour assessment, although carriers employ ILA labor in such activities, the result being that carriers like PMRSA which have reduced such activities, must pay the costs of other carriers, who have greater needs for such labor activities, under the tonnage formula; and (5) during contract year 1982–1983, when comparing its total payments under the current formula to man-hours used, PRMSA shows that it paid an average of $50.74 per man-hour to fund fringe benefits whereas the direct wage rate was only $14 per man-hour.

The above salient facts illustrate PRMSA's main theme, that burdens among the containerized carriers are not apportioned fairly in relation to the benefits which they all received, more or less equally, from containerization.

They also illustrate rather dramatically, as PRMSA argues, that the tonnage formula throws undue burdens on some carriers who must pick up the fringe-benefit costs of currently employed labor (Type I costs) and further aggravates the situation by relieving a few carriers of any share at all in the tonnage portion of the formula and certain other carriers of any share at all under either the tonnage or the man-hour portion.

PRMSA's case as to the unfair effects of the current tonnage formula with its built-in favoritisms and special privileges rests largely on the evidence of Dr. Silberman, its expert witness. (Exs. 41 and 46.) In turn, Dr. Silberman utilized data obtained in large measure from NYSA and its members. Dr. Silberman, as is usually the case with expert witnesses who testify before the Commission, has an impressive background. He is a consulting economist with a B.S. in Accounting (summa cum laude) from New York University, and a Ph.D. in Industrial Economics, from the Massachusetts Institute of Technology. He has had extensive teaching experience, has published in the professional literature, has testified before this Commission and other agencies, and has devoted his research efforts in recent years to the study of transportation economics and finance. (Ex. 41 at 1–2.) The data which he was furnished seem virtually to offer a prima facie case that the current tonnage formula is not operating fairly as among the containerized carrier sector of the industry at New York. However, his analyses, recommendations, and reasoning I find, for the most part, persuasive and certainly more than sufficient on which to base my ultimate findings and conclusions on a "preponderance of the evidence" standard of proof and sometimes even if the standard were "clear and convincing evidence" that respondents erroneously contend it to be. PRMSA's case, then, can be set forth in the following manner based upon Dr. Silberman's testimony, reasoning, and the underlying data which he obtained. The case is as follows:

The current formula, unlike the usual formulas found in other industries (and indeed among virtually all other ports in the United States) departs from the principle that each employer should contribute so as to pay those costs associated with its own direct employment of labor. (This conclusion was shared by the Port Authority's expert witness, Mr. Donovan.) A combination man-hour/tonnage formula, which Dr. Silberman and with some variation (man-hour/container formula) Mr. Donovan also strongly recommends, on the other hand, allocates to each employer those fringe benefit costs attributable to the employer's use of labor and then splits the remaining industry-wide costs (which Dr. Silberman finds to be 67 percent of the total) among all carriers on the basis of tonnage. Thus, the more labor that an employer hires, the greater its responsibility for labor costs, as is clearly seen in the case of direct wages. By relating direct hiring costs to the hours of employment, in contrast to the tonnage method under the current formula, each employer pays for what he hires and uses and does not expect another employer to pick up his share of direct costs merely because the other employer handles more tons and consequently earns more revenue.

PRMSA's Proposed Alternative Formula

PRMSA's proposed alternative formula, therefore, would fund certain costs, related more to wages and to fringe-benefit costs of labor currently employed, by means of man-hours. The remaining costs, which are by far the larger portion of the total package, relate to dislocation of labor because of containerization, i.e., to men who are not working and are drawing GAI payments and related benefits. These are industry-wide obligations which everyone acknowledges, including PRMSA, and the Commission long ago found, in *Agreement No. T–2336,* cited above, 15 F.M.C. 259 (1972). These are shared by containerized carriers who caused the problem and derived the benefits of reducing the use of labor in loading and unloading vessels by the proportion of tons each such carrier moves through New York.

As shown by Dr. Silberman, the direct current-labor costs, known as Type I costs, are either substitutes for direct wages or are deferred compensation. These types of costs are the costs of vacations, holidays, health and welfare benefits for currently employed men, considered as substitutes for direct wage compensation, and pension benefits earned by active employees which are forms of deferred compensation. The second (Type II) costs are the Guaranteed Annual Income (GAI) program and the portion of vacation, holiday, pension, welfare, and clinic attributable to the GAI program. This, then, is the essential breakdown of the Silberman formula. However, as will be seen, he would give protection and different treatment to breakbulk cargo (as would Mr. Donovan), upon which he would place a cap as to contributions, would totally exempt maintenance activities, would continue existing excepted treatment on passenger vessels, bulk cargo,

lumber, and newsprint, which were granted long ago (see *Agreement No. T–2336,* cited above) would terminate all other special privileges which are not justified (domestic, transshipped, empty containers, stuffing and stripping activities) and, finally, would grant the Puerto Rican trade a 25 percent discount from the normal tonnage rate of assessment. In the main, I find his formula would eliminate the inequities and unfair allocations shown to exist under the current tonnage formula and with certain exceptions (the 25 percent discount and the refusal to continue special treatment for barge service between New York and Boston), I strongly urge its adoption.[38]

By dividing types of costs between those associated with currently employed men and those associated with men displaced by containerization, Dr. Silberman's formula offsets the unfairness generally of shifting cost burdens to containerized carriers regardless of their responsibility for the type of costs involved. In addition, it removes the penalty imposed on carriers who create efficiencies in non-vessel loading or unloading activities at their terminals, i.e., maintenance, stuffing and stripping, movement of empty containers. PRMSA, which has lowered its handling of empty containers to 35 percent of all its containers compared to 40.5 percent for the Port as a whole, has lowered its stuffing and stripping of containers to 4.7 percent of its total containers compared to 13.5 percent for the Port as a whole, and who does not use ILA deep-sea labor for maintenance work at all (employing ILA "Metro" labor under a different contract), enjoys no savings for all of this under the tonnage formula but must pay a full tonnage share although these efficiencies at its terminal do not relate to the institution of containerization years ago but to the way PRMSA organizes its terminal, non-vessel loading/unloading operations. As PRMSA argues, why should any carrier attempt to improve its terminal efficiencies if, under the current tonnage formula, such improvements are taxed away in the form of tonnage assessments which help other carriers who, for some reason, do not organize their terminal operations so efficiently or who prefer to position vast numbers of empty containers coming via minibridge from Far East countries for the carriers' own convenience in an unbalanced trade, and who are rewarded by paying absolutely nothing under the current formula toward the ILA fringe benefit costs even though ILA men handle the empties?

The Current Formula's Tax on Efficiencies

The results of the tonnage formula, as noted earlier, is that PRMSA which handled 8.5 percent of the total volume subject to the tonnage assessment, used only 2.5 percent of total deep-sea man-hours (other than

[38] If it is not clear from Dr. Silberman's testimony as to the currently granted special cases which I discussed in the findings of fact in the Port Authority's case (FF No. 14) regarding special tonnage definitions or other special treatment for bananas, coffee, cocoa, steel, refined bagged sugar, perishable fruit, etc., I find that such treatment should be continued. Cases for such treatment were made to the NYSA–ILA Contract Board, and I have seen no evidence showing that any of these needy commodities should lose their protected treatment.

those related to passenger vessels) in the Port. This comes to only .16 man-hours per assessment ton for PRMSA compared to .54 man-hours per assessment ton for the Port as a whole. (See PRMSA op. br. at 41–42; 165; Ex. 41.) PRMSA does not object to paying its fair share under the tonnage portion of its proposed formula for the costs of GAI-related benefits stemming from the original institution of containerization so many years ago, for which ILA bargained for a compensating GAI program. It does object, however, to having to pay for someone else's greater need for terminal-type, non-vessel loading or unloading labor such as handling empties or stuffing and stripping (which pay absolutely nothing under the current formula), which PRMSA is perforce paying under the current tonnage formula. PRMSA and Dr. Silberman readily acknowledge that the industry-wide GAI program is properly funded by tonnage assessments because such assessments properly attribute the greater responsibility to those carriers who have benefited the most form the institution of containerization. However, extending the tonnage assessment beyond Type II industry-wide costs to Type I direct, costs resulting from currently employed men, penalizes more efficient carriers in areas in which the costs are properly those of the hiring employer as much are those of wages, for example. By taxing away any internal improvements in efficiencies in non-vessel loading/unloading activities, PRMSA correctly argues, in my opinion, that the tonnage tax discourages such improvements to the ultimate detriment of the shipping public.[39]

The Argument That All Costs and Labor Are Industry-Wide

At this point, however, it would be helpful to discuss an NYSA defense which Hearing Counsel readily accepts but which I find unconvincing, namely, that ILA men are industry employees and that all fringe benefits should accordingly be funded by tons on an industry-wide basis. This is another way of saying that costs of currently employed ILA men (Type I) are no different from costs of men displaced by containerization (Type II) or that once any carrier has containerized, it is forever reasonable for any change in its operations which reduces hours of labor employed. (For example, suppose a carrier operating its terminal discovered a means to protect containers or its facilities from wear and tear, and consequently used fewer hours of labor for maintenance. Under the NYSA theory, such carrier should pay under a tonnage formula because it has reduced the need for labor in the exact same way that it reduced its needs for labor years ago by loading and unloading its vessels in containers, for which latter reduction in labor, the containerized carrier has long ago agreed to fund a GAI program.)

[39] As I discussed earlier, furthermore, even Mr. Sclar, NYSA's expert witness, when testifying on the West Coast against shifting to a tonnage assessment, argued that such a shift resulted in "potential overkill" and caused more productive operators to subsidize less productive operators. (See quotations from Ex. 48, cited *in PRMSA op. br. at 70–71.*)

According to NYSA's respected witness, Mr. O'Neill, however, ILA men should be considered to be industry men because they work for a variety of employers and shift among industry members as needed. (Ex. 30 at 3–9.) Furthermore, since ILA men accrue fringe benefits by working 700 hours or obtaining equivalent GAI credit hours, they work for the entire industry, and all their fringe benefits are industry-wide benefits. If this were really the case, then why doesn't the industry pay each longshoremen's direct wages (currently $15 per hour straight time) on a tonnage basis regardless of how few hours of labor any direct employer utilizes? No carrier has suggested such nonsense. However, the extension of direct wages, i.e., Type I costs, which are either substitutes for wages (vacations, holidays, health, welfare) or deferred compensation for current employees (pensions), it is now argued by NYSA, (with the apparent agreement of Hearing Counsel), are industry-wide obligations to be funded not by the hours each man is employed but by tons carried by containerized carriers regardless of hours of work utilized by each carrier. Furthermore, as PRMSA contends, if a carrier charters a ship on a short term basis or uses a towing service, does the carrier using the short-term ship or towing service pay the ship or tug on the basis of the hiring carrier's tons carried, i.e., is the chartered ship or towing service also to be considered as industry's ships for which everyone must contribute even if having little or no use for the chartered ship or towing service? (PRMSA op. br. at 64.) Finally, as Mr. O'Neill points out, the ILA man is an industry man because he becomes eligible after working 700 hours for more than one employer. However, because an employee qualifies under an accepted professional rule, why does this mean that the entire profession must pool its revenue or volume of sales to pay the professional regardless of whom he works for? In other words, if a college professor earns his degrees by studying and teaching at various colleges, when he finally lands at one university, do all the colleges and universities pool their earnings and pay his fringe benefits? In short, the rules for eligibility are not necessarily relevant to the rules for determining how to apportion responsibility for labor costs.

The Formula's Favoritism to Certain Carriers

As noted above, PRMSA attacks the unfairness of the current tonnage formula as it affects carriers within the containerized sector not merely because the tonnage formula shifts costs unduly and penalized containerized carriers who manage to effectuate internal, non-vessel loading/unloading economies. More specifically, PRMSA attacks two categories of special privilege under the current formula. The formula category relates to domestic cargoes, rehandled and transshipped cargoes, for which the current formula grants "excepted" treatment, i.e., they are excepted from any payment under the tonnage formula but pay under a much lower man-hour rate (currently $5.50 per man-hour).

The second category of special privilege relates to handling of empty containers, stuffing and stripping, and maintenance, for which carriers pay absolutely nothing toward fringe benefits, not under the man-hour basis nor under the tonnage formula, in other words, a total free ride. PRMSA's evidence shows that the domestic and transshipped activity is substantial and receives substantial monetary subsidies which are cast onto all other containerized operators, and, to a lesser extent, so do the carriers positioning empty containers and engaging in stuffing and stripping activities at their terminals received subsidies. The facts in support of these contentions are rather amazing.

Much as I would have preferred refraining from disclosing identities and data pertaining to any individual carrier's operations, I find that the following facts would obviously disclose the identity of the carriers involved and, furthermore, since the number of carriers enjoying the enormous privileges are only three, as soon as I described the nature of their operations, anyone would quickly understand who they were. I mention, however, that these special privileges and benefits, at least for the domestic services, were granted long ago in *Agreement No. T–2336,* cited above, at a time when these services had not ripened into the substantial operations they are today, and no one had focused on them. Domestic trades, i.e., within the Continental United States, were considered to be marginal because of inland competition, and it was feared that assessing them under the normal tonnage formula would jeopardize their continued movement through New York. However, in 1984, the facts are now in the record to see, and they show that conditions have changed considerably so that continued favoritism for such services cannot withstand scrutiny. I do not blame NYSA or anyone for the many years of favoritism shown to these operations and to the few carriers since it was thought that these domestic operations should be handled with special care. However, as PRMSA has now shown, it appears that three carriers enjoyed a benefit of some $20 million in 1982–1983 which of needs has to be passed onto other containerized carriers and that PRMSA picked up over $3 million in additional payments to make up for these privileges enjoyed by the few carriers involved.

First, as to the transshipped or rehandled cargoes, the record shows that only three carriers participated in these operations and enjoyed the substantial savings in assessments by being excepted from the tonnage assessment. The three carriers are Sea-Land Service, Inc., United States Lines, and the McAllister barge service. These three moved approximately 84,000 transshipped or rehandled containers in 1982–1983. Sea-Land moved 57 percent, U.S.L. moved 23 percent, and McAllister, 20 percent. (PRMSA reported no such containers and only 78.4 excepted man-hours of all kinds.) (PRMSA op. br. at 73.) All together, they paid less than $3,068,089 to the fringe benefit funds in 1982–1983, which figure is the total man-hour assessment raised from all excepted cargoes. (PRMSA op. br. 74, citing Ex. 41 at 31.) These 84,000 containers granted "excepted" treatment,

i.e., free from the tonnage assessment but not the man-hour assessment) comprised 12 percent of the containers which were subject to the tonnage assessments in 1982–1983. (Ex. 46 at 13.) To obtain some idea of how much a savings it was to Sea-Land and U.S.L. not to have to pay under the tonnage assessment and why PRMSA is upset, consider how much per container the two carriers paid in 1982–1983 under this favored treatment. Dividing total payments by containers, Sea-Land paid an average of $23 per container. For U.S.L., the figure is $13.05 per container. (See container and payment data set forth in PRMSA op. br. at 73–74, and record citations to the data.) What does the reader then think was the reaction of PRMSA, which in 1982–1983 paid an average of $272 per container ($16.1 million divided by 59,142 containers)? (PRMSA op. br. at 166 and record citations therein.) PRMSA noted that the burdens allocated to the containerized carriers were in this instance somewhat uneven. PRMSA further points out that had Sea-Land and U.S.L. paid under the tonnage formula, Sea-Land would have paid something like $11.3 million instead of $1 million. U.S.L. would have paid $4.6 million instead of $252,995, which it actually paid. (PRMSA op. br. at 74 and footnotes showing how these estimated figures were derived; note that the $8.20 per ton figure is an average between $7.50 and $8.90 to account for the mid-year increase in the assessment rate.) Thus, PRMSA notes that Sea-Land and U.S.L. did not have to pay some $14 million, being excepted from the tonnage formula, and that, furthermore, as also in the case of domestic cargoes, U.S.L. does not actually pay under the $5.50 per man-hour rate but under a formula which approximates that rate. Under Dr. Silberman's alternative formula, which would reduce the tonnage rate of assessment from $8.90 per ton to $5.90 per ton, PRMSA states that Sea-Land would have had to pay $8.3 million more for its transshipment operations and U.S.L., $3.5 million. PRMSA states that these figures show the degree to which Sea-Land and U.S.L. have been favored in their transshipment operations.

The third carrier enjoying a special privilege is a non-member of NYSA, the McAllister barge service, which operates barges between New York and Boston/Providence. PRMSA shows that this carrier lives off the exception granted to it by NYSA–ILA and also urges removal of this special treatment. As I discuss later, however, I can distinguish between McAllister and Sea-Land/U.S.L. and find offsetting considerations which, in my opinion, warrant continuation of the special treatment for the barge service.

The Justification for Special Treatment

PRMSA contends that every containerized carrier obtained more or less the same benefits from containerization and should therefore share the cost burdens of funding the compensating labor benefits (GAI) equally absent compelling reasons justifying special treatment. Hence, PRMSA argues that the Sea-Land relay operations and the U.S.L. rehandling or transshipment operations have been granted extraordinary favoritism without jus-

tification. Furthermore, not only did those carriers enjoy huge monetary benefits under the "excepted" basis, PRMSA's evidence shows that they did not even pay their own direct Type I costs in 1982–1983, which, according to Dr. Silberman, would have required them to pay at least $6.35 per man-hour instead of the $5.50 provided in the formula. Therefore, other carriers must have contributed toward Sea-Land's and U.S.L.'s direct, Type I costs. (PRMSA op. br. at 76.) No one supports the idea that some other party should pay a part of a first party's direct costs or the costs of fringe benefits associated with the labor that the first party employs. Mr. Scioscia of U.S.L. agreed with such principle, as PRMSA notes. (PRMSA op. br. at 76 n. 41, citing Tr. 808.) What, then, is the justification for such favoritism?

Sea-Land, U.S.L., and McAllister offer evidence in defense of their special treatment to the effect that without such treatment they might leave New York and thereby aggravate the fringe benefit cost situation by removing work opportunities from the Port. A carefully examination of the Sea-Land and U.S.L. defenses shows that such developments are unlikely.

Sea-Land's witness, Mr. Sutherland, testified candidly in the interests of his company. He had submitted written testimony stating that Sea-Land would be forced to "seriously consider" discontinuing its relay operations in New York if a tonnage assessment were to be imposed. (Ex. 30, his testimony, at 2.) Mr. Sutherland, as PRMSA points out, never stated that it *would* discontinue the relay operation, only that it would "seriously consider" doing so. (PRMSA op. br. at 81–82.) However, Mr. Sutherland testified that Sea-Land would also consider a new relay system even if the assessment were raised from $5.50 to $5.55 per man-hour. (Tr. 725–726.) However, Sea-Land has such a well-established relay system which depends upon the present use of ports and terminals in a certain configuration that a shift of relay operations from New York would require major modifications in Sea-Land's operations. Such modifications do not appear likely to occur merely because Sea-Land would have to pay $6.00 or so per ton in assessments at New York.

The facts show that because of the way Sea-Land operates its European and Central American/Caribbean services and the way it calls at ports in its various services with its oceangoing ships, there is no port north of Florida at which Sea-Land could interchange cargoes between any European and Central American/Caribbean service other than the Port of New York, and to avoid New York, Sea-Land would have to make significant changes in its vessel deployment. (PRMSA op. br. at 82–83, citing numerous record references.) This is shown by detailed operational facts about Sea-Land's present services, which facts show that only the Port of New York (through Elizabeth, New Jersey) and Portsmouth, Virginia are served with its line-haul vessels in the North Atlantic, which call at certain South Atlantic ports down to Jacksonville. Sea-Land operates two European services out of Elizabeth as well as its service to Puerto Rico, and calls

at certain South Atlantic ports for one service or the other. (PRMSA op. br. at 82–83 and numerous record citations to Mr. Sutherland's testimony.) To operate these various services, Sea-Land uses Elizabeth as by far its major calling port, utilizing vessels with far more capacity than those calling at Portsmouth, which originate relatively little cargo. Furthermore, its feeder services between Baltimore, Boston, and New York do not stop at Portsmouth because they must connect with the three oceangoing vessels which serve Elizabeth. Sea-Land has an exclusive-use terminal facility in Elizabeth with space and capacity which dwarfs Portsmouth, and Sea-Land advertises its Elizabeth facility as one of its world-wide "principal terminal facilities" in its stock-offering prospectus. To leave New York would require Sea-Land to make major modifications in order to carry on its two European services as well as its Central American/Caribbean service, which the facilities at Elizabeth are capable of handling. Such a change would require Sea-Land to obtain new facilities other than Portsmouth and a substantial rearrangement of its line-haul oceangoing ships and some way to maintain its connections for its Boston or Baltimore relay service. There is, furthermore, no testimony given by Sea-Land that particular cargoes handled in the relay services would be lost to Sea-Land if Sea-Land had to pick up its $6 per ton or so share of GAI-related costs at New York.

As I mentioned earlier in this decision, the Commission is entitled to make certain common-sense inferences from the facts even if there is no concrete evidence as to what might happen. The common-sense inference here is that it is not very likely that Sea-Land would abandon or substantially reduce its use of its vast Elizabeth facilities merely because of a tonnage assessment. The preponderance of the evidence, in other words, indicates that Sea-Land would remain in New York and attempt to maintain its present configuration, relays, and service patterns to the fullest extent possible. (As I mention later, however, the assessment agreement maintains a Contract Board to hear requests regarding particular hardship commodities. Although there is no evidence of any such commodity that needs special treatment to continue under the Sea-Land relay system via New York, the mechanism is there.)

As to United States Lines, there is no credible evidence from which I can infer that if U.S.L. pays its share of industry-wide obligations at New York under Dr. Silberman's reduced tonnage assessment formula, it would cause a significant change in U.S.L.'s operations from New York. The U.S.L. witness, Mr. Scioscia, appears not to have understood accurately the impact of the Silberman formula which would have added approximately $3.5 million in contributions in 1982–83, not $14.5 million which he believed. (PRMSA op. br. at 85–86, and record citations therein.) On cross-examination, Mr. Scioscia, who is U.S.L.'s Executive Vice President, Pacific Service, appeared not to be too familiar with U.S.L.'s East Coast feeder services and knew virtually nothing about possible plans to redeploy U.S.L. vessels in its feeder services, which plans are formulated at a higher com-

pany level. (PRMSA op. br. at 87, and record citations therein.) U.S.L. is in the process of implementing a new eastbound round-the-world service with 12 new huge ECON vessels which will call at only Savannah and New York. On cross-examination, Mr. Scioscia acknowledged that the use of New York by the ECON vessels was not threatened by proposed assessment adjustments. (Tr. 792–793; 797, cited by PRMSA, op. br. at 88.) U.S.L. has also changed some of its transshipment operations as a result of its new ECON service and has changed other operations for reasons unrelated to this proceeding. U.S.L. also has transshipment operations between Europe and South America and Africa which are unlikely to be changed since New York is the only port at which the relevant services cross. Evidence of record also strongly indicates that U.S.L. would not leave New York for Savannah and transship using the new ECON class ships at Savannah because of inland drayage costs and disruption to shipment schedules. Therefore, any significant change in the U.S.L. transshipment operations appears to be unlikely even if U.S.L. were called upon to pay its share of assessments under Dr. Silberman's man-hour/tonnage formula. However, as PRMSA notes, even if two-thirds of U.S.L.'s transshipped or rehandled containers left New York as a result of the Silberman formula, the net result would be that the U.S.L. contribution would be over one and one-half times the increase in GAI caused by the lost hours. (PRMSA op. br. at 90.) The appeal mechanism as to any particular hardship commodity would still remain, as mentioned earlier, although there is no evidence that any particular commodity moving via a U.S.L. transshipment service would be lost to New York if U.S.L. were to pay its share under the Silberman formula.

The other type of cargoes granted favoritism under the current formula by which they are assessed only under the man-hour basis and are "excepted" from the normal tonnage assessment is domestic cargoes, meaning cargoes moving between ports within the continental United States (thereby excluding Puerto Rico). This domestic exception was one of the original exceptions in the previous mixed man-hour tonnage formula approved by the Commission in *Agreement No. T–2336*, cited above, in 1970, which formula was abandoned in favor of the full tonnage basis (with the various special assessments discussed), which formula is currently in use.

Whatever was believed about the relative size of the domestic trades in 1970, the record here shows that it is substantial. In contract year 1982–1983, 20,056 containers moved through New York in the domestic trade, of which almost all were moved by U.S.L. (19,500). It is estimated that the number of tons in this trade carried by U.S.L. was over half a million in the contract year. Under the man-hour "excepted" rate of the current formula, U.S.L. which paid under a formula which approximated the $5.50 per man-hour rate, U.S.L. contributed $195,000 to the total package of labor fringe benefit obligations, i.e., an average of $10 per container. This is contrasted with PRMSA's contribution of $272 per container on

the average. As mentioned earlier, according to Dr. Silberman, payments at $5.50 per man-hour do not even meet costs of fringe benefits associated with current utilization of labor (i.e., Type I costs), must less make any contribution toward the industry-wide GAI-type costs caused by displacement of labor by containerization. Thus, as PRMSA argues, the formula requires other carriers to pay for a share of U.S.L.'s direct-type labor costs and for U.S.L.'s share of funding the industry-wide costs as well. (PRMSA op. br. at 100, citing Ex. 41 and 32.)[40] PRMSA estimates that U.S.L. would have had to pay $4.6 million under the regular tonnage formula in 1982–1983. (PRMSA op. br. at 100). Under the Silberman formula, this would have been about $3.3 million. (PRMSA op. br. at 86 n. 47.)

This special treatment granted U.S.L.'s domestic cargoes is defended by NYSA and U.S.L. in several ways. The obvious first defense is that the cargoes are subject to diversion via inland carriers (truck or rail). U.S.L. also defends against having to pay under the tonnage formula because of the financial impact on the service. However, there is considerable examination of these defenses on the record, and they do not emerge intact after such examination. The original written testimony of the U.S.L. witness seemed rather ominous, indicating a serious possibility that U.S.L. might abandon New York or otherwise curtail its domestic service if asked to pay the tonnage assessment rate. On cross-examination, however, many of these omens evaporated, and the evidence failed to show that the U.S.L. domestic service was instituted in reliance on the "excepted" treatment at New York or that U.S.L. would delete New York as a port of call with its new ECON vessels or that is might abandon its all-water Far East service. (PRMSA op. br. at 101–102, and record citations therein.) As PRMSA notes, what was left were allegations that U.S.L. might cease moving intercoastal cargoes, might reduce its Far East service, or might divert New York intercoastal cargo to Baltimore. However, there is evidence which significantly undermines these allegations. This evidence is described in detail in PRMSA's op. br. at 103–111, with ample citations to the record. The main points are as follows.

U.S.L. operates its intercoastal service as part of its larger all-water service between the Far East and the East Coast, and that service is operating at full capacity throughout the year. Indeed, during peak seasons U.S.L. has been unable to satisfy the demand for eastbound intercoastal space and has even had to turn away business offered by canned goods shippers.

[40] This proceeding involves the lawfulness of the current assessment formula and how it should be modified if shown to be unfair and discriminatory. It appears, however, that for practical reasons related to difficulty in determining some man-hours spent in repositioning containers, U.S.L. pays under a formula which is not quite the same thing as the $5.50 per man-hour rate. For its domestic trade, the formula works out to an average of $5.00 per ton; for its overall "excepted" services, i.e., transshipped as well as domestic, the average worked out to something lower. (See PRMSA op. br. at 77 and 101 n. 56, and record citations shown.) PRMSA calls the use of the U.S.L. formula a "special bonus" or "a favoritism piled on top of a favoritism." *Id.*

U.S.L.'s new ECON vessels will supplement the Far East service and when the first ECON vessel arrived in New York in late July 1984 it was entirely filled so that the U.S.L. chairman and president was reported to have stated that more cargo could not have been placed aboard the ship even with the shoehorn. To prepare for its new ECON vessels in New York, U.S.L. has invested in extensive terminal improvements. The U.S.L. witness acknowledged that the Far East ECON service would not be threatened by assessment adjustments at New York. (Tr. 389–93; 797). It was also acknowledged that even if most of the domestic containers carried during the 1982–1983 contract year by U.S.L. as part of its eastbound Far East service became unavailable, it would be reasonable to expect that U.S.L. could replace those cargoes with additional cargoes from the Far East. Further evidence indicates that the domestic cargoes are essentially an incremental by-product of the U.S.L. Far East service. There is conflicting testimony about how much volume such cargoes comprise compared to the total carried in the Far East vessels. However, there is no conflict that revenue per container for the intercoastal cargoes is much lower than that for the Far East to West or East Coasts. (The exact figures are confidential but can be seen in the confidential portion of the record.) Examination of estimated revenues earned on the various trades strongly indicates that the U.S.L. domestic service, as PRMSA calls it, as far as revenue is concerned, "represents the tail and not the dog which wags it." (PRMSA op. br. at 107.)

What the above seems to indicate is that U.S.L.'s Far East vessels would make their sailings under any circumstance and that the domestic, intercoastal cargoes are what is known as "incremental" or "added traffic." In rate case parlance, incremental traffic is often priced below fully distributed costs, the theory being that if such cargo meets direct handling costs and contributes to indirect overhead-type costs, it is worth carrying. If so, then rates could be lowered to meet possible inland competition so long as they still met the direct-type costs of handling the cargo (Ex. 41 at 37). There is no reliable evidence showing that inland competition would require U.S.L. to reduce its domestic rates below direct costs if U.S.L. became subject to the tonnage assessment at New York. (A somewhat questionable cost study on a per-container profitability basis using fully allocated rather than marginal costs was done by U.S.L. but was not even introduced by U.S.L. It has so many flaws and misunderstandings of the Silberman formula that I cannot rely on it. These flaws are detailed in PRMSA's op. br. at 108–110.)

There is other evidence, furthermore, which seriously undermines U.S.L.'s allegations. This evidence shows that at least for one major customer, U.S.L. already employs incremental pricing per container and that U.S.L. has increased its domestic rates at least once recently, which rate increase its shippers apparently absorbed. (Ex. 58; Tr. 816–817; 818–820; Ex. 60.) Moreover, there is evidence that certain domestic shippers of U.S.L. prefer

the U.S.L. service over that of inland carriers because the water service offers greater security from pilferage and breakage. This would tend to shield U.S.L. from inland rate competition. Diversion to Baltimore seems unlikely since U.S.L.'s vessels already call at Baltimore, yet foreign cargoes continue to New York on these vessels and pay the full tonnage assessment. This indicates that it is still cheaper to carry to New York on those cargoes than to discharge at Baltimore and pay inland drayage from Baltimore. Furthermore, major receivers of U.S.L.'s domestic cargoes are located in the New York city area. It is estimated that under the Silberman formula, U.S.L. would typically pay $183.80 per container at New York whereas drayage from Baltimore would approximate $400 per container. Finally, even if application of the Silberman tonnage formula were to occur, and 75 percent of U.S.L.'s domestic containers ceased to move through New York, PRMSA estimates that there would still be a net increase in contribution to the NYSA–ILA fringe benefit program, something close to twice the increase in GAI that would occur. (PRMSA op. br. at 111–112.)

Comparison With PRMSA's Evidence of Diversion

The above discussion does, however, indicate an interesting paradox. The emphasis of this case is on the current tonnage formula and how it affects the Port of New York and PRMSA, whether it fairly allocates cost burdens, etc. NYSA and the ILA are properly concerned over the loss of cargo to other ports, as the record indicates, and, indeed, the joint NYSA–ILA Contract Board is charged with the duty of protecting marginal cargoes from diversion to other ports. However, when Sea-Land and U.S.L. argue that they might divert to other ports or would seriously consider doing so if they lost their special "expected" treatment for transshipped, rehandled, or domestic cargoes, NYSA defends them and will not alter its current formula. However, when PRMSA presents a virtual "smoking gun" showing diversion in fact to a non-ILA carrier operating out of the Philadelphia area, complete with names and locations of shippers even in New York's backyard, NYSA rejects the evidence and finds all sorts of reasons not to believe that its tonnage formula has anything to do with the diversion. Thus, PRMSA has shown a list of 40 shippers from New York's backyard who have switched their business wholly or partly to the non-ILA carrier in Pennsauken, New Jersey. (PRMSA op. br. at 94, citing Ex. 45 at Ex. BC–4.) Even NYSA's witness, Mr. Sclar, who defined "diversion" to an extremely narrow degree, admitted that cargo to and from Brooklyn which moved via a port other than New York, would be "diverted" cargo. But PRMSA showed four examples of shippers located in Brooklyn who switched from PRMSA to the carrier in Pennsauken, New Jersey, which is in the Philadelphia area. (PRMSA op. br. at 95 n. 52, and record citations therein.)

PRMSA's case, as I have discussed, is based on the gross disparity in burdens among carriers which result from the current tonnage formula

and not essentially on diversion of cargo. (The Port Authority's case, on the other hand, is based primarily on loss of cargo to other ports caused by the competitive handicap of a $200–300 per-container differential at New York resulting from the current formula.) There are other reasons why shippers might choose different carriers, and it is not possible to show that every ton of cargo that moves via one carrier rather than another does so solely because of the tonnage formula. However, PRMSA's evidence of the diversion of business to Pennsauken comes as close to a "smoking gun" as one could expect in proceedings like this.[41] Certainly it is more probable than not that the current formula is significantly responsible (albeit not perhaps solely responsible) for PRMSA's loss of business to the non-ILA carrier. Yet NYSA's last answer to this evidence is to tell PRMSA to go sue the other carrier. (See NYSA r. br. at 15.)

The Exemptions for Empty Containers, Stuffing and Stripping, and Maintenance Activities

The other major category of special treatment under the current formula relates to three activities, namely, the handling of empty containers, the stuffing and stripping of cargo into and out of containers, and maintenance activities. Unlike the previous category, which paid under the "excepted" man-hour basis, these three activities pay absolutely nothing under the current formula, i.e., under either the "excepted" man-hour basis or the normal tonnage rate. Thus, all other carriers paying under the current formula must pick up not only the share these activities would pay toward the industry-wide Type II obligations but the currently employed Type I costs as well in their totality. Such a free ride, it would seem, warrants compelling justification. Yet, except for the maintenance activity, there is little or none. (Indeed, as noted earlier, even NYSA's Mr. Barbera, a terminal operator, questioned why empty containers and LCL cargoes paid nothing under the correct formula.) Furthermore, in the case of stuffing and stripping, NYSA cannot rely upon the defense of possible loss of this activity if it pays something under the formula because the activity is mandated by the 50-mile Rules on Containers which are in effect, albeit under challenge in a separate Commission proceeding, Docket No. 81–11.

For the handling of empty containers and for stuffing and stripping, PRMSA is asking only that they pay under the "excepted" man-hour basis but under Dr. Silberman's calculations, so that they would at least meet their own direct costs of funding fringe benefits of currently employed longshoremen. PRMSA would retain the total exemption for maintenance activities because of the substantial likelihood that any payment for that

[41] For a complete discussion of the evidence showing the connection with the tonnage formula and the diversion to Pennsauken, see PRMSA op. br. at 90–99, and record citations therein; 112–113. I find that PRMSA has made out a case of diversion and that the tonnage formula is a strong contributing factor.

activity would lead to utilization of non-ILA deep-sea labor and consequently aggravate the funding situation.

According to data obtained by PRMSA, there were 283,487 empty containers which moved through New York during contract year 1982–1983. (PRMSA op. br. at 113, and record citations therein.) They, according to those data, accounted for 26 percent of the total number of containers which moved through the port during that time. The presence of so many empty containers is explainable when one considers the Port Authority's case, in which the Port Authority, by the way, also urges an end to these special privileges, without worrying that such treatment may divert cargoes from the Port. The problem seems to be, to some extent, that a minibridge carrier moves loaded containers from the Far East through West Coast ports, discharges the cargo somewhere inland, then moves the empty containers to New York to be loaded onto what could be the same ships for subsequent carriage back to the Far East. Evidently the Far East trade is imbalanced with not enough cargo to fill all the containers returning to the Far East. Freeing such empties from any assessment obviously encourages any such carrier to position its containers in such a way as to move the empties through New York rather than through any other U.S. port which would require a payment under a man-hour formula. But, as PRMSA notes, handling these empty containers requires ILA labor and results in costs to fund the fringe benefits attributable to every hour of labor hired to handle the empties. Therefore, PRMSA argues, why should everyone else pay for the peculiarities of an imbalanced trade and for a carrier's direct, Type I costs? I see no evidence justifying this free ride and agree with PRMSA and Dr. Silberman that it should be terminated.

Stuffing and stripping activities are rather substantial. Approximately 1,139,784 man-hours were utilized for stuffing and stripping in contract year 1982–1983, about 9 percent of total man-hours. (PRMSA op. br. at 115, and record citations therein.) The activity also accrues fringe-benefit costs for every man-hour utilized. It is estimated by Dr. Silberman that these direct costs amounted to over $7.2 million, all of which was thrown onto the backs of the other carriers paying under the tonnage formula. Furthermore, as PRMSA argues, it does no good for a carrier to reduce the need to stuff and strip at the terminal because, under the tonnage formula, such carrier pays according to the volume of tons loaded or unloaded on vessels, and, furthermore, those carriers doing more stuffing and stripping enjoy a subsidy from those doing less. (PRMSA op. br. at 116.)

The justifications offered by NYSA for this free ride are the opinions of Mr. Sclar, which I find to be inscrutable and consistent with my earlier observations that I can give that witness's opinions little weight. As PRMSA notes (PRMSA op. br. at 116–117) Mr. Sclar states that the labor costs associated with the stuffing and stripping are covered by the current formula. So are all fringe benefit costs but that does not answer the question as

to why should the free ride on the activity cause everyone else to pay for it. Mr. Sclar then suggests that making this activity pay even under the lower man-hour basis would not be justified because the hours of labor spent on the activity benefit the whole port by reducing GAI costs. So they do, but they would continue to do that unless the activity would cease as a result of having to pay the lower man-hour rate. There is, however, not only no evidence that paying such a rate would terminate such activity but, as I noted earlier, the activity will continue anyway because it is required under the Rules on Containers. I therefore see no valid reason to continue the free ride on stuffing and stripping and agree with PRMSA (and the Port Authority, and probably NYSA's own Mr. Barbera) that the free ride should come to an end.

As to maintenance activities, PRMSA was faced with a dilemma as to the position to take. Like stuffing and stripping, this activity comprised slightly over 1 million man-hours in 1982–1983, approximately 9 percent of total man-hours at the Port during that time. (PRMSA op. br. at 117, citing Ex. 41.) This activity also resulted in direct Type I fringe benefit costs amounting to approximately $6.9 million in 1982–1983, under Dr. Silberman's calculations. This free ride would require all other carriers to pick up these costs. Since PRMSA does not use ILA deep-sea labor for maintenance, it would not harm PRMSA to argue that the other carriers using ILA deep-sea labor for maintenance work should pay under the man-hour rate. However, here, as in other examples of a statesmanlike position, PRMSA and Dr. Silberman recognize the obvious fact that with the immediate presence in New York of a different labor force not under the ILA deep-sea contract, every carrier or terminal operator would shift to the other labor force (ILA "Metro") which is readily available, at New York, and that this shift would increase GAI costs. This is what PRMSA calls "overriding considerations which justify departing from the general rule." (PRMSA op. br. at 118–119.) (The same alternative labor force, it should be noted, is not available for stuffing and stripping, which require ILA deep-sea labor.) Therefore, even though continuing the free ride means that PRMSA's tonnage assessment increases like everyone else's, PRMSA and Dr. Silberman would leave it untouched.[42] As I have noted, PRMSA and Dr. Silberman also take this statesmanlike position for the good of the Port in another area, namely, by placing a cap on the contribution which breakbulk cargoes should pay at New York in order to preserve the intensive use of labor by such breakbulk operators and thereby help maintain hours of labor at the Port to the benefit of all, even though such a cap places a burden on other carriers paying under the normal tonnage rate. (PRMSA op. br. at 199–122.)

[42] The Port Authority's witness, Mr. Donovan, would, however, assess maintenance under the man-hour portion of his proposed formula. (Ex. 31.)

The McAllister Barge Exception

The other carrier of the first type which receives favored treatment under the current formula (i.e., transshipped/rehandled, domestic) is McAllister Brothers, Inc., which operates barges between New York and Boston/Providence. The favored treatment which McAllister receives is that it is assessed under the man-hour "excepted" rate of $5.50 per man-hour, which is what Sea-Land paid and what U.S.L. approximately paid under its own calculations. Thus, McAllister enjoys no free ride as do the empty containers, stuffing and stripping, and maintenance activities just discussed. However, at $5.50 per man-hour, other containerized carriers pay for its share of the GAI-related costs and some of McAllister's own direct Type I costs, under Dr. Silberman's calculations. PRMSA urges that the special treatment for McAllister terminate and that McAllister pay the normal tonnage assessment under the reduced Silberman rate. (PRMSA op. br. at 77–81.)

PRMSA concedes that the impact on McAllister of removing its excepted treatment "would be substantial." (PRMSA op. br. at 78.) However, PRMSA argues that the McAllister barge service is entirely a creature of this "excepted" treatment and exists solely because of the "exception" and its ability to avoid the tonnage assessment completely. Thus, PRMSA and all other carriers paying under the tonnage assessment are bearing the cost of keeping this barge service alive. Mr. Mullally, McAllister's witness, freely acknowledged that if the formula is changed to require McAllister to pay the tonnage assessment, "all of the Boston/Providence container traffic would be diverted to competing truck transport." (Ex. 30, his testimony at 4.)

McAllister transported more than 17,400 containers between New York and Boston/Providence during 1982–1983. (*Id.* at 3.) Mr. Mullally estimates at least 100,690 man-hours he employs at New York that would be lost if his business at New York terminates. (Ex. 36, his surrebuttal testimony at 3.) Almost half (47.5 percent) of all the containers handled at Boston in 1983 were transshipped via New York, and Massport strongly urges protection and special treatment for this operation. (See Port Authority op. br. at 60–61, and record citations; also Massport's op. br.) Indeed, Massport actively advertises and encourages carriers serving New York to avoid the NYSA tonnage assessment by shifting from truck to barge. (Ex. 44 at Ex. FP–1.)

PRMSA argues that even if man-hours on the barges were lost, they would be made up to some extent by truck-related man-hours, as Mr. Mullally himself conceded. PRMSA presents the argument that even if those hours are lost by McAllister, if 20,000 containers would still move to or from Boston via truck, that would produce over $3.4 million in contributions to the fringe benefit funds which would far offset the increase in GAI. (PRMSA op. br. at 80.)

Although PRMSA is willing to forego any assessment on maintenance activities for the good of the Port and recommends placing a cap on assessments of breakbulk cargoes also for the general good of the Port, although this means that the containerized carriers as a whole must pick up someone else's shares (in the case of maintenance, some $6.9 million) PRMSA objects to having the industry subsidize the barge service. Although PRMSA's evidence and logic is, for the most part, appealing, I cannot find under a standard of fairness and unjust discrimination that killing McAllister is the right thing to do.

The death of McAllister's service at New York may, to some extent or other, be made up by truck-related service, and the Port of New York may thereby not suffer a net loss if the barge service terminates. (The possibility of McAllister's relocating to Halifax was suggested by Mr. Sclar but Mr. Mullally, whose business it is, testified to no such thing.) It seems to me that we are not merely talking about the survival of the McAllister company or service, but the interests of the Port of Boston and Providence and possibly shippers as well. The MLAA asks the Commission to protect the interests of "carriers, shippers or ports." Shifting McAllister from the man-hour payments to the tonnage payments under the formula would admittedly have a lethal effect on McAllister since the containers would move more cheaply by truck to and from Boston. Thus, we would wave goodbye to the carrier, McAllister. Second, since 47.5 percent of the Boston containers handled by longshoremen at Boston are transshipped via New York, the death of McAllister's service and consequent shift to trucks would eliminate substantial work for the Boston longshoremen. Therefore, another port suffers. Third, though there is no shipper testimony, the routing via barge through New York offers Boston-area shippers an alternative service, which would disappear. Therefore, shippers would lose something. True, one can argue, as may PRMSA, that private industry at New York, which has its own costs and problems, ought not to be called upon to subsidize McAllister or the Port of Boston, and there is no evidence on this record that any New England shippers are asking for a choice between truck and water service through Boston. However, McAllister is not Sea-Land nor U.S.L. but a single-operation carrier. Furthermore, if McAllister pays under the man-hour segment of Dr. Silberman's proposed formula, at least no other carrier would have to pick up any share of McAllister's direct Type I costs.

I would call the decision to save McAllister one reached on the basis of what PRMSA calls "overriding considerations which justify departing from the general rule," which PRMSA cited in support of its recommendation that the industry carry some $6.9 million to subsidize direct Type I costs of maintenance labor. In trying to make the current formula more equitable among carriers and eliminate unjustified special treatment and free rides, I do not believe it is also necessary to kill a carrier, which it seems rather obvious from Mr. Mullally's testimony, would happen at

New York unless McAllister can pay under the lower man-hour "excepted" rate.[43]

Special Discount for the Puerto Rican Trade

After presenting formidable evidence and arguments in support of its proposed alternative formula, which would abandon the current tonnage formula with virtually all of its special privileges, favoritisms, and free rides and would allocate cost burdens more even-handedly among the containerized carriers, PRMSA requests another feature, namely, a 25 percent reduction from the tonnage rate applicable to carriers serving the Puerto Rican trade. To justify such a special discount, PRMSA cites undisputed evidence of the island's economic difficulties, the fact that it is an American trade subject to certain infirmities, and numerous cases in which the Commission has shown concern for the Puerto Rican economy. (PRMSA op. br. at 122–140.) I find PRMSA's efforts to persuade to be effortful and do not agree that the 25 percent discount is proper.

There is no dispute as to the underdeveloped nature of the Puerto Rican economy, and the evidence in this proceeding illustrates the problems of that economy rather vividly. (See PRMSA Op. br. at 122–127.) The island is dependent on maritime trade, being over 1,000 miles from the nearest mainland U.S. seaport. It is densely populated (3.3 million people in an area of 3,459 square miles). Its citizens are American citizens. It has extremely limited natural resources and must depend upon imports to satisfy its people's need for food and other necessities of life. Indeed, the sum of the value of the island's imports and exports has exceeded its gross product during each of the last ten years. PRMSA was itself established because of the island's need for a reliable, economical maritime transportation system and is required to provide an efficient transportation service at the lowest possible cost. Increases in maritime transportation costs serve to raise prices of food and raw materials needed to run Puerto Rico industries.

The per capita income of Puerto Rico in 1982–1983 was $3,900, only 37 percent of the United States average of $10,517, and in 1981, was only about one-half that of the mainland state with the lowest per capita income. Unemployment for March 1984 was 21.9 percent, nearly triple the 7.8 percent figure for the United States. Unemployment benefits provided by the Puerto Rican government are minimal and, as PRMSA notes, are

[43] There is a minor complication which accompanies giving McAllister's barges special treatment for the carrier's sake as well as that of Boston/Providence or shippers who might wish to retain a choice between truck service and water service through the Port of Boston or Providence. That is that other carriers besides McAllister might be handling some of the 47.5 percent of the Boston containers transshipped in New York. Unless these other operations are granted similar treatment, there would be an unfair discrimination favoring McAllister. Therefore, other transshipment operations competing with McAllister (and it does not appear from the record that they are substantial) would have to be accorded similar treatment. Opponents of the McAllister special treatment will, of course, attack my decision and can cite this additional exception as ammunition. However, I still do not believe that McAllister Brothers, Inc. should die or that Massport's pleas in McAllister's behalf should be turned away.

far below the GAI benefits provided under the current NYSA–ILA labor contract. The Puerto Rican economy suffered setbacks in recent years, i.e., a recession in 1975 and decrease in federal assistance since 1981. However, the Puerto Rican government implements programs seeking to restore economic growth and it was predicted that such growth would resume in the 1983–1984 fiscal year. Among the programs are the encouragement of service and high technology industries, which require that Puerto Rico have a satisfactory maritime transportation network at low costs so as to make Puerto Rico a center for exports.

Puerto Rico is considered to be part of the United States for purposes of federal shipping laws, therefore ships serving the trade must be American-flag and mainly crewed by American citizens. These factors result in higher operating costs. Labor costs are also higher than those in foreign trades, the Puerto Rican trade served by the ILA or other American unions at both ends. The current assessment formula, furthermore, does not grant the Puerto Rican trade the "excepted" treatment granted to domestic, intercoastal trades. The impact on PRMSA is significant. PRMSA pays (through PRMMI) close to $300 per loaded container under the current formula and during the 1982–1983 contract year, 13.1 percent of PRMSA's revenues from cargo passing through the Port of New York were consumed by the NYSA assessment. It is Dr. Silberman's opinion that the high costs of this agreement place burdens on essential foodstuffs and on capital goods needed for Puerto Rican industry.

In consideration of all of the above, PRMSA's expert witness, Dr. Silberman, recommends a 25 percent discount off the normal tonnage rate under his proposed formula. Such a reduction, according to Dr. Silberman, would have saved PRMSA $2.8 million in contract year 1982–1983. He concedes, however, that "I recognize that the 25 percent figure has its basis in my judgment, rather than in a quantitative analysis of the precise discount required." (Ex. 465 at 28.) But he goes on to state that "in my judgment, some reduction in assessment, beyond that needed to achieve equality among carriers, is required on account of the trade's special situation." (*Id.*)

As mentioned, PRMSA puts forth much case law and argument to the effect that the Commission has recognized the special needs of the Puerto Rican economy in past cases and points to the different treatment accorded the Puerto Rican trade from that granted domestic, intercoastal trades under the subject formula on the purported basis that such trades had been declining and needed protection, the situation which PRMSA argues applies precisely to the Puerto Rican trade.

Respondents strongly oppose this 25 percent reduction in addition to opposing the Silberman formula. They question why did not PRMSA simply ask for a discount in the first place instead of creating a new formula which would affect so many other parties. NYSA contends, furthermore, that the economic problems of Puerto Rico cannot be attributed to the Port of New York or any other port. Moreover, argues NYSA, the public

interest standard has been removed from the MLAA, and the special consideration given to the Puerto Rican trade by the Commission in the Commission's 1970 decision (*Agreement No. T–2336*, cited above) was designed only to protect Puerto Rican interests from too abrupt a change-over from the previous man-hour formula to tonnage assessments. Moreover, NYSA contends, it is not shown that any cost break to PRMSA will directly flow to the consuming public in Puerto Rico, considering PRMSA's negative financial situation. Finally, NYSA points out that PRMSA has raised its freight rates by about 70 percent since February 1981 while the tonnage assessment rate rose by 52 percent. (NYSA r. br. at 26–27, and record citations therein.)

I find that on this particular question, PRMSA has not tipped the scales in favor of its proposed 25 percent discount. First, as is obvious, the figure is a judgment figure based upon the opinion of Dr. Silberman who concedes that "reasonable men will differ as to what that discount number ought to be . . ." (Ex. 46 at 28.) But it is not merely that the figure is not supported by something more objective or concrete than the witnesses' judgment that leads me to conclude that a special discount is not warranted on this record. There are other factors. Thus, I note that if PRMSA succeeds in this case by obtaining an order modifying the current formula to conform to Dr. Silberman's proposed alternative, even without the 25 percent discount or the suggested increased assessment on McAllister's barges, PRMSA stands to benefit substantially. Furthermore, it is entitled to considerable credit adjustments for the period between the filing of the complaint and the Commission's decision, as the MLAA provides. In other words, one of the best things that PRMSA can do for the people of Puerto Rico is to rid itself of the current unfair formula and obtain the monetary adjustments which will flow from a favorable decision. In previous cases cited by the Commission, PRMSA notes that the Commission considered the needy Puerto Rican economy and exercised some discretion when deciding the cases to help that economy. In this case, the evidence shows that certain carriers are enjoying unjustified "excepted" treatment in the domestic and transshipment areas and others are paying nothing for handling empties and stuffing and stripping. Although PRMSA has shown that all containerized carriers would benefit by termination of these unjustified special privileges, the particular infirmities which PRMSA shows to exist in its trades are factors which indicate that a carrier like PRMSA may well need the relief more than the others. Thus, to some extent, the economic problems of Puerto Rico have not been forgotten. However, there are still other reasons why I do not believe that a further discount is warranted.

PRMSA relies on the previous Commission decision modifying the 1969–1971 assessment agreement in *Agreement No. T–2336*, cited above, as well as on a number of rate cases. However, as NYSA points out, the reasons for modifying that agreement had to do with the fact that the drastic shift to a partial tonnage formula resulted in harsh and sudden cost increases.

It was for that reason as well as for the reason that the Puerto Rican carriers had not been responsible for certain fringe-benefit cost increases that the Commission relieved the Puerto Rican carriers of certain costs, although admittedly the Commission did consider the state of the Puerto Rican economy. See *NYSA* v. *F.M.C.*, 571 F. 2d 1231, 1240 (D.C. Cir. 1978) ("[The Commission's] first-period concessions to the Puerto Rican interests were based on the need to protect the ocean-cargo-dependent economy of Puerto Rico from too abrupt a change-over from man-hour to tonnage assessments."); *Agreement No. T-2336,* cited above, 15 F.M.C. at 265, 272, aff'd, *TTT* v. *F.M.C.*, 492 F. 2d 617, 627–628 (D.C. Cir. 1974). In the present case, the problem is not to cushion Puerto Rican carriers from the effects of a sudden increase in costs resulting from a change-over to a new formula but to relieve them from the unequal burdens caused by an unfair formula. Furthermore, the MLAA specifically limits the relief to disapproval or change in the agreement and prospective adjustments only, has deleted the "public interest" standard from section 15 as it existed under the previous case, and now specifies "carriers, shippers, and ports" as the parties to be protected.

Nor do I find that the citations to rate cases are all that helpful to PRMSA's cause. True, in such cases the Commission reiterated the policy that ocean rates to Puerto Rico should be maintained at the lowest possible levels because of the island's dependence on maritime trade, etc. (See cases cited in PRMSA's op. br. at 134–135, and in NYSA r. br. at 26.) But this is not a rate case and we are not simply dealing with carriers' seeking profits and proper ratemaking principles. For example, the leading case cited by PRMSA, namely, *Baltimore & O. R.R.* v. *United States,* 345 U.S. 146 (1953), is a rate case in which the Supreme Court held that a carrier could be required to impose rates that were less than fully compensatory for certain services when such rates would serve the public interest and when the company as a whole was in a profit position. As mentioned, the MLAA no longer contains a "public interest" standard but even if it is still in the statute implicitly in the "unjustly discriminatory and unfair" standard under which this case is being decided, the NYSA or the NYSA–ILA fund is not quite the same thing as a carrier with an overall profitable service. In fact, as this record shows, and as the Commission knows from previous experience with NYSA in assessment cases, the joint fund from time to time runs a deficit, necessitating borrowing or increases in the assessment rates and the NYSA is a non-profit corporation. The formula can and should be modified to remove the unfair burdens among carriers, including the great burden on PRMSA. However, that is not the same thing as finding that the NYSA–ILA fringe benefit fund is a profit-making carrier that can, in the public interest be called upon to reduce "rates" to help a depressed economy in the public interest. In other words, in this instance, I question how far the Commission can order the NYSA and ILA to become participants in the Puerto Rican

economic recovery programs other than by being ordered to follow a fair formula and give PRMSA the prospective adjustments to which it is entitled by law. It should be noted, furthermore, that even in the 1970 decision relieving the Puerto Rican carriers of responsibility for certain fringe benefit costs, the Commission gave those carriers no discount from the tonnage assessment rate for the industry-wide GAI obligations. In other words, PRMSA wants a discount from the tonnage portion of its proposed formula, which tonnage portion is supposed to fund the GAI-type industry-wide obligations. However, notwithstanding the Commission's concern for the Puerto Rican economy, it found that the Puerto Rican carriers should pay the tonnage portion at the normal rate for the GAI costs. *Agreement No. T-2336,* cited above, 15 F.M.C. at 270–272. Not only that, but the Commission, after specifically considering the serious economic problems affecting Puerto Rico in that case, nevertheless found that the Puerto Rican carriers would have to bear about $4.5 million more in assessment costs even under the compromise formula which the Commission had adopted as a means to relieve the Puerto Rican carriers from abrupt, excessive cost increases. 15 F.M.C. at 272–273. Finally, the Commission observed, somewhat as NYSA does in this case, that the Puerto Rican carriers in that 1970 case had themselves instituted bunker surcharges and were seeking rate increases of 18 and 28 percent in other Commission proceedings but were arguing in those other proceedings that such rate increases would not harm the Commonwealth's economy. 15 F.M.C. at 273. In the present case, as NYSA points out, PRMSA itself felt the need for more revenue and therefore increased its rates some 70 percent compounded since February 1981, compared to the 52 percent increase in the tonnage assessment at New York in the same time period. (NYSA r. br. at 26–27.) Furthermore, as regards PRMSA's more recent rate increase in early 1984 (13.5 percent), which was under investigation by the I.C.C., PRMSA answered a protest to the increase by stating that "[T]he claim that a rate increase will harm the Puerto Rican economy is a boilerplate argument of the Mfrs. Assn., an argument heard each time a rate increase is at issue, regardless of the status of the Puerto Rican economy." (I.C.C. Suspension Board Case No. 71131, Reply of PRMSA to Protests, January 9, 1984, pp. 8–9; Ex. 19, Att. C, pp. 101–102.) In refuting the argument that its rate increases would have a detrimental impact on the economy of Puerto Rico, PRMSA further states that "the credibility of this argument is doubtful," citing newsletters which failed to mention increased shipping rates as one of the factors adversely affecting the Puerto Rican economy. (Ex. 19, Att. C, p. 101.) (PRMSA went on to state that it would suffer a net loss even with its rate increase but that such increase was necessary to ensure efficient and high-quality shipping service. *Id.*, at 102.)

In the present proceeding, however, PRMSA is arguing that a further 25 percent discount in addition to the other cost reductions which it would derive if its proposed formula were adopted, is necessary to help the Puerto

Rican economy. But in this case we are not talking about PRMSA's having to pay new, increased costs. Rather the question is whether PRMSA should have received another $2.8 million in credits if the 25 percent discount had been in effect rather than only $3.5 million in credits under the Silberman formula (unadjusted) without such discount. PRMSA op. br. at 166–167.

I therefore conclude that modification of the current formula as Dr. Silberman recommends (absent the 25 percent discount and certain other features discussed above) plus the granting of credit adjustments as the applicable law provides, compensates PRMSA fairly, but that further relief in the form of a special 25 percent discount is excessive and untenable.[44]

Technical Accounting Disputes

The disputes between NYSA and PRMSA do not relate merely to conceptual or theoretical differences between the tonnage formula advocated and currently used by NYSA and the man-hour/tonnage formula advocated by PRMSA. NYSA appears to understand the theoretical difference between Type I costs associated with currently employed men and Type II costs which are industry-wide obligations and are related to men not working because of the advent of containerization. (Of course, NYSA argues that all costs are Type II and are industry-wide, as I have discussed earlier.) However, even if NYSA were to accept the Silberman-type formula, NYSA differs with PRMSA's calculations as to exactly how much of certain costs should fall under Type I and how much under Type II. In each instance, furthermore, where there is a disagreement, NYSA's calculations result in a greater amount of the package falling under the Type II category, i.e., where it would be funded by tons rather than by man-hours. It would be tempting to leave much of this technical area to the post-decision implementation procedure because it involves, to some extent, narrow arguments between specialists in fringe-benefit accounting. However, since the amount of credits which PRMSA should receive from the filing of its complaint on February 27, 1984, to the date of decision, as the MLAA provides, depends upon proper accounting methodology and if the Silberman formula is adopted, future assessments will likewise rely upon these methodologies,

[44] PRMSA also argues that it has shown an appreciable decline in traffic and diversion to other Atlantic coast ports, and that this factor was considered by the Commission in *Agreement No. T-2336,* cited above, as a reason to grant domestic trades "excepted" treatment. (PRMSA op. br. at 139.) There has indeed been a serious decline in loaded containers moved through New York by PRMSA from 87,715 in fiscal 1979 to 63,715 in fiscal 1983, a decline of 27.4 percent. (Ex. 41 at 41.) Par of this decline was caused by recession in the Puerto Rican economy, but part appears to reflect the losses to the non-ILA carrier at Pennsauken. (Ex. 41 at 41–42.) The reduction in assessment costs per container resulting from the Silberman formula from nearly $300 to under $200 (unadjusted by my recommended changes) should help PRMSA vis-a-vis the non-ILA competitor as well as the prospective credits. However, NYSA–ILA Contract Board is supposed to be concerned about losses of cargo from New York under the agreement's terms. If this diversion continues and the Board continues to refuse any relief, it is conceivable that PRMSA may be filing another complaint after the new assessment agreement is filed in 1986.

some decisions are necessary prior to the time of implementation under the post-decision procedure outlined later.

The nature of the disputes are set forth in some detail in PRMSA's op. br. at 141–164, to which there is virtually no reply in NYSA's reply brief. They relate to five areas: The holiday fund, vacations, welfare and clinic, pensions, and administrative costs.[45] Although these areas, to some extent, seem highly technical, on close examination, the arguments are seen to rest upon determinations as to credibility, i.e., on whom to believe and on who is the more persuasive. As discussed earlier, to a considerable extent, I find that Dr. Silberman, who, as I mentioned, among other things, has earned a B.S. in Accounting, summa cum laude, is the more persuasive, and that Mr. Sclar is less so.[46] Also certain other NYSA witnesses I found not so responsive or persuasive in certain areas.

Dr. Silberman has already allocated 67 percent of the total cost package to Type II to be funded by tons, as compared to Mr. Donovan of the Port Authority, who allocated only certain GAI costs (34 percent of the total) to Type II. This, by itself, firms up Dr. Silberman's credibility since it is not in the best interest of a containerized and highly productive carrier like PRMSA to urge more costs to be funded by tons rather than by man-hours. However, there are other reasons why I find PRMSA's evidence and reasoning to be the more persuasive.

First, as to the calculations of holiday payments, NYSA apparently does not dispute Dr. Silberman's conclusion that holiday payments received by currently employed men fall under Type I whereas such payments received by GAI recipients fall under Type II. But NYSA contends that Dr. Silberman failed to include some $5 million of holiday payments received by GAI recipients. Dr. Silberman did not include this amount under Type II because NYSA's own financial statement, which clearly showed payments for GAI recipients for other benefits, showed no similar payments for holidays. The logical conclusion was that the amount shown by the auditors for holiday pay did not include holiday pay for GAI but, instead, holiday

[45] NYSA and PRMSA have also disagreed about breakbulk productivity figures. NYSA contends that Dr. Silberman understated breakbulk productivity and overstated breakbulk hours utilized in 1982–1983, and that this error increased the allocation of Type I costs to breakbulk cargoes, thereby causing Dr. Silberman to recommend a cap on those cargoes, any deficit from their contribution being made up by the containerized carriers as a Type II industry-wide obligation. Under the current formula, NYSA contends, breakbulk cargoes would already pay their share under the tonnage formula. (NYSA op. br. at 85.) However, once again there appears to be a credibility problem. As PRMSA points out (PRMSA r. br. at 29 n. 14), Dr. Silberman had been criticized for using a lower productivity figure of .46 assessment tons per man-hour, which Mr. Sclar himself had used in earlier testimony, and then Dr. Silberman changed to a figure of .66, which Mr. Sclar later used himself. Therefore NYSA ends up trying to impeach its own witness. Moreover, NYSA attacked Dr. Silberman for allegedly overstating breakbulk hours because of his use of the .66 figure, but in fact his estimate is actually slightly lower than NYSA's own proposed figure (3,618,286 hours compared to 3,687,858 urged by NYSA).

[46] I find Dr. Silberman's rebuttal testimony (Ex. 46) to be very well explained and more persuasive on these accounting and methodology issues than the testimony of NYSA's witnesses. His testimony is all the more impressive because he had to obtain data from NYSA's records and work papers and often made concessions or found discrepancies in the NYSA papers which NYSA does not acknowledge. Dr. Silberman is a very impressive, highly qualified expert witness, who writes lucidly and cogently.

payments to GAI recipients were included in the GAI Fund account. Mr. Fier, the NYSA–ILA Treasurer, attempted to rebut Dr. Silberman's conclusion by showing that funds were disbursed from the Vacation and Holiday Fund for GAI recipients. But this rebuttal is unpersuasive because there were also separate disbursements form the Vacation and Holiday Fund for Vacation payments, yet the NYSA Financial Statement shows vacation payments attributable to GAI hours in the GAI fund, not the Vacation and Holiday Fund. In other words, funds were sometimes disbursed in a manner different from the way in which they were carried in the accounts. What is probably a more simple answer to the issue, however, is the fact that if Dr. Silberman was wrong in including holiday payments to GAI recipients in the GAI Fund account rather than in the Vacation and Holiday Fund, NYSA, which has access to its own auditors, could have put in the relevant evidence. Mr. Fier, however, had not communicated with the auditors prior to testifying. Under such circumstances, I am entitled to draw inferences against the position of NYSA. See *Insterstate Circuit* v. *United States,* 306 U.S. 208 226 (1939). Such inference is even more compelling considering the fact that Mr. Fier was asked six times by PRMSA's counsel and twice by myself how he could conclude that disbursements form the Vacation and Holiday Fund meant that the NYSA's auditors accounted for them in the same way, but did not provide a responsive answer, as PRMSA correctly notes. (PRMSA op. br. at 146–147, and record citations therein.)

As to vacation payments NYSA argues that Dr. Silberman should have allocated another $6.5 million to the Type II category. This argument depends on the testimony of Mr. Sclar that the fifth and sixth weeks of vacations should be treated like industry-wide Type II costs and obligations. Mr. Sclar reasons that one of these weeks is attributable to containerization and the other to the fact that the present imbalance of labor compared to available work results in the hiring of more senior men with longer vacation benefits. This position contrasts with NYSA's position that holiday payments as to currently employed men are all Type I expenses. In other words, in this case, NYSA argues that the first four weeks of vacation for currently employed men are Type I costs but the next two weeks are Type II and therefore become industry-wide obligations to fund.

From the outset, the argument that vacation costs attributable to currently employed men, which are essentially substituted for direct wages, should in part be the responsibility of someone who is not currently employing the longshoremen defies logic. Because of the imbalance of labor compared to work opportunities at New York, 86 percent of the workforce are senior workers with maximum vacation benefits. (Ex 46 at 19.) Each hiring employer derives the benefits of such senior men's skills and experience and ultimately derives profits from the use of such labor at the employer's facilities. Having hired senior workers, the employer ought logically to

be responsible for paying the full value of that worker's services and the costs that go with those services, namely, fringe benefits including six weeks' paid vacations. There may be some superficial appeal to Mr. Sclar's argument that containerization has resulted in a shrunken, active workforce consisting mainly of senior men to whom the available work must first be given. But vacations are still merely other forms of direct compensation as are paid holidays, which Mr. Sclar agrees as being entirely Type I costs insofar as currently employed men are concerned, yet ILA workers receive more paid holidays now than they did before containerization. Finally, once again Mr. Sclar appears to have taken a different position when he testified on the West Coast. There he did not contend that an increase in vacation benefits due to containerization should be treated as past or transition costs, i.e., as industry-wide Type II costs. (PRMSA op. br. at 149 n. 76, and record citations therein.) I therefore agree that for 1982–1983, the more persuasive evidence is that Vacation and Holiday Fund payments received by GAI recipients are industry-wide expenses and amounted to $10.7 million, and that Vacation and Holiday Fund payments received by currently employed ILA workers are direct labor costs, and in 1982–1983, amounted to $38.5 million. (PRMSA op. br. at 150–151.)

As to the Welfare and Clinic Fund, NYSA and PRMSA disagree on the calculations. NYSA would place $19.7 million of these costs into Type II and $13.3 million into Type I. Dr. Silberman would place $16.6 million into Type II and $16.4 million into Type I. (PRMSA op. br. at 151 and 152 and record citations therein.) Here PRMSA and NYSA agree on the principle that welfare and clinic costs attributable to retirees and their dependents plus the portion of these costs attributable to retirees and their dependents plus the portion of these costs attributable to GAI recipients should fall under Type II costs. Therefore, Dr. Silberman accepts NYSA's witness O'Neill's theory. However, Mr. O'Neill calculates the Type II figure by adding a proportion of welfare and clinic benefits to total welfare and clinic contributions made on behalf of GAI recipients to arrive at his Type II figure. (PRMSA op. br. at 151, and record citations.) Dr. Silberman criticizes this methodology. He would not add contributions and benefits to arrive at the final figure. Contributions and benefits are not the same thing. No contributions to the Welfare and Clinic Fund are made on behalf of retirees and dependents eligible to receive fund benefits. Instead, their benefits are funded through the contributions made on behalf of all active ILA men, both those currently employed and those on GAI. Dr. Silberman has unscrambled the mix by taking the percentage of hours of non-pensioners attributable to GAI (27 percent, which is the same percentage derived by Mr. O'Neill) and multiplying it against the value of welfare and clinic benefits received by non-pensioners. (PRMSA op. br. at 152; Ex. 46 at 22–23.) The product of this multiplication gave Dr. Silberman the amount of costs attributable to non-pensioners, which was

then added to the amount of costs attributable to pensioners. (Ex. 46 at 22, 23.) The total figure amounts to $16,622,515, which are those welfare and clinic fund expenses attributable to benefits received by still active men (albeit on GAI) and to benefits and those expenses which are attributable to retirees. (See table on Ex. 46 at 22, 23.) All of this package falls into Type II as an industry-wide obligation to get funded by tons. I find Dr. Silberman's methodology to be sound and more persuasive than that employed by Mr. O'Neill and accept Dr. Silberman's corrections to Mr. O'Neill's figure, which would reduce the allocation to Type II costs made by Mr. O'Neill by $3.1 million.

The Pension Liability Allocation Problem

This particular problem involves an extremely narrow, technical dispute concerning allocation of the amount of pension contributions between Type I and Type II. The incredibly complex subject matter involved in this narrow dispute is described in detail in PRMSA's op. br. at 153–160. The parties apparently agree that the pension fund consists of obligations to retirees and to currently enrolled employees. However, the portion of the fund attributable to the financing of pensions of retirees is apparently not now completely funded. There is apparent theoretical agreement as to allocation of portions of the fund between Type I and Type II costs, e.g., Type II costs include contributions applied to funding the unfunded liability attributable to pensioners and GAI recipients. Also, there is agreement apparently in theory that a portion of pension contributions can be attributed to funding the benefits that will be received by current workers. (PRMSA op. br. at 153.) There is, however, disagreement as to what method to use in calculating the amount of pension contributions that are applied to funding the portion of the plan's unfunded liability attributable to the pensioners. (*Id.*, at 153–154.)

It is interesting to note that PRMSA's expert witness, Mr. LoCicero, and NYSA's expert witness, Mr. Camisa, do not disagree that this portion of the pension fund can be allocated between Type I and Type II, i.e., between current employees and pensioners. They disagree, however, on the method of allocation.[47] After completing their calculations under their different methodologies, Mr. LoCicero calculates $19.5 million for Type I and $30.2 million for Type II. (PRMSA op. br. at 156, and record citations therein.) Mr. Camisa, however, calculates $13.4 million for Type I and $36.4 million for Type II. (Ex. 36 at 8–9.) Under the latter's calculation, therefore, the containerized carriers would pick up another $6 million in costs of funding pensions which would be treated as industry-wide

[47] Although NYSA's expert, Mr. Camisa states that there are several methods of allocation, NYSA's expert witness, Mr. Sclar, states that there is no acceptable method. (PRMSA op. br. at 158 n. 85.) Thus, Mr. Sclar, who has been shown to have testified in support of a different man-hour formula on the West Coast, and has used a productivity figure for breakbulk cargoes which NYSA itself attempted to discredit as being too low, now finds that the NYSA's own witness does not agree with his statement about the lack of a method of allocation.

obligations under the tonnage portion of Dr. Silberman's formula. (It is interesting to note that Dr. Silberman accepts Mr. LoCicero's calculations of $30.2 million to be allocated to Type II, which is an upward revision from Dr. Silberman's earlier estimates, made when he had not had access to underlying documents of over $6 million. See Ex. 46 at 21.)

Detailed explanations of Mr. LoCicero's methodology are set forth in PRMSA's op. br. at 154–156, and are based upon that witness's testimony (Exs. 43; 47). Mr. LoCicero, who is an enrolled actuary employed by George B. Buck Consulting Actuaries, has set forth a very careful methodology step by step to arrive at his ultimate figures. He further states that his methodology follows generally accepted actuarial principles. Mr. LoCicero is, furthermore, a member of the American Academy of Actuaries and the American Society of Pension Actuaries and is the Chairman of the American Academy of Actuaries Committee on Multiemployer Pension Plans. (Ex. 43 at 2.)

Kenneth P. Camisa, NYSA's expert witness, is a Senior Vice President of the Martin E. Segal Company, which serves as consultant and actuary to more multiemployer benefit plans covering more employees than any consulting firm in the United States. The Segal firm advises over 75 negotiated multiemployer plans, including the NYSA–ILA plan in New York. (Ex. 36, Att. A at 1–2.)

These two experts are obviously high-level professional persons in their technical fields. Between the two of them they show that there are at least four different methods of allocating the subject pension fund into Type I and type II. There is a technical disagreement in that Mr. Camisa disagrees that in making the calculations, all plan assets should be first assigned to existing pensioners. Mr. Camisa states that such assignment would be proper in the case of terminating plans, not existing plans, such as the present one. Mr. LoCicero disagrees, giving three examples but also conceding that there are no statutory rules or actuarial requirements which require his assignment. (Ex. 47 at 3–4.) This technical discussion could go on and on but would not help resolve the ultimate question, namely, how much of the contributions to the total pension plan should be assigned to Type II. Both experts are impressive and equally persuasive and perhaps this record could have benefited either by an independent "court-appointed" expert or by cross-examination, although with men of this calibre and testimony of this type, which is not based on sense impressions or reputations, there is little assurance that cross-examination would be of much assistance. To resolve this dilemma, I must use different reasoning and evidence.

As Mr. LoCicero states, "[t]hese questions have no precise right and wrong answers." (Ex. 47 at 9.) As mentioned above, there are at least four methodologies that could be used. If I were to decide the issue on a "substantial evidence" basis, I could find for Mr. LoCicero because, although Mr. Camisa questions the propriety of his technique in assigning

all the pension fund's assets first to the pensioner group and then comparing the remaining unfunded liabilities, Mr. LoCicero defends the technique, giving three examples. Thus, reasonable persons could differ. But the "substantial evidence" standard is for reviewing courts, not for finders of fact like myself. As I discussed, I must use the preponderance of the evidence test and the burden is on complainants to persuade. Here, the quality of both witnesses is so good and their testimony so persuasive that the preponderance in my opinion does not shift to complainants. However, there are other bases for choosing the methodology to follow.

It appears that Mr. LoCicero would allocate $30.2 million of pension funds into Type II and that Mr. Camisa would allocate $36.4 million, as I have mentioned. Mr. Camisa, however, states that using different, acceptable methodologies, the amount allocable to Type II could range from $36 million to $49 million. (Ex. 36, Att. A, at 10.) Mr. LoCicero, on the other hand, testifies that he was conservative and could have derived a figure lower than his $30.2 million. (PRMSA op. br. at 156 n. 83.) Therefore, there is a range of something below $30.2 million to about $49.8 million, which could be allocated to Type II. As noted earlier, it is in the interests of PRMSA to keep that figure as low as possible and in the interests of NYSA to keep it as high as possible since, being in Type II, it would continue to be funded by tons, as are all the benefit plans under the current formula. Since this is so, and since virtually every other NYSA witness yielded nothing toward Dr. Silberman's formula, any concession by any NYSA witness is tantamount to a significant statement against interest. If Mr. Camisa concedes that under one acceptable methodology as little as $36 million can be allocated into Type II, this is quite a concession indeed and reflects the integrity of Mr. Camisa (as did Mr. LoCicero's use of a methodology which tended to raise his figure to $30.2 million). I am impressed by Mr. Camisa's honest willingness to acknowledge that one methodology could allocate as little as $36 million to Type II and recommend the use of that methodology.

I have additional reasons why I recommend adoption of the $36 million figure and its methodology. First, by raising the Type II costs by $6 million from Mr. LoCicero's $30.2 million figure, this causes less disruption to the status quo, which will be changed inevitably anyway with the adoption of Dr. Silberman's formula but justifiably so (and without any jeopardizing of the requirement that all funds must be fully financed). The addition of $6 million to Mr. LoCicero's figure, which will go into Type II, means that if NYSA's predictions of something like 22.2 million assessable tons is realized for 1983–1984 (NYSA op. br. at 58), adding another $6 million averages out to about 27 cents per ton. With the addition of domestic, intercoastal and transshipped tons, which would no longer be excepted from the tonnage assessment under Dr. Silberman's formula, this would add more assessable tons and help bring the average cost per ton down possibly to 25 cents or so. For contract year 1982–1983 this would have

increased the tonnage assessment under Dr. Silberman's formula from $5.90 per ton to $6.15 or so. (Because of this statutory time period, it is obviously impossible, furthermore, to determine the credit adjustment amounts and other means to implement such adjustments on the day of the Commission's decision when the underlying data have not yet even been assembled.) A slight increase in the tonnage assessment by 25 cents or so to something like $6 or so is still better than paying $8.90 per ton, as under the current formula. This adjustment obviously would reduce the amount of PRMSA's credits because it would raise PRMSA's per ton assessment by this slight amount over the PRMSA assessment calculated under the LoCicero allocation. However, there must be some room for concessions in this proceeding on both sides, and under this decision PRMSA would achieve a number of changes to its benefit as would other containerized carriers.

Finally, to justify a middle ground in selecting Mr. Camisa's $36 million figure, I note some peculiar facts about the present situation in New York, namely, that the pension fund as a whole seems to be running a deficit, that there are more pension beneficiaries than employees actively working or available for work in the industry (12,676 pension beneficiaries compared to only 9,565 workers in active status as of December 31, 1982), that this situation must, to some extent, be attributable to containerization and consequent incentives to men to retire. (Ex. 36, Att. A, at 3, 5–6.) Therefore, raising the Type II industry-wide portion of the pension plan costs from Mr. LoCicero's $30.2 million to Mr. Camisa's $36.3 million does not seem so unreasonable.

Accordingly, I recommend the middle ground $36.3 million figure and Mr. Camisa's methodology by which it was derived.

Allocation of NYSA's Administrative Costs

Finally, there is a need to calculate NYSA's administrative expenses by proper methodology. The NYSA assessment, it must be noted, funds not only the ILA's fringe benefits under the collective bargaining agreement but also funds administrative expenses. Dr. Silberman would allocate these expenses into the Type I–Type II categories in the same proportion as he would allocate the fringe benefit costs. In other words, if 40 percent of fringe benefit costs were found to be Type I and 60 percent to be Type II, the administrative expenses would be allocated to Type I and Type II as 40 percent and 60 percent, respectively. The method seems sound, has not been opposed by NYSA, and should be employed.

There is a final problem, however. That relates to the fact that, as the evidence shows, NYSA administers not only the NYSA–ILA collective bargaining agreement but another union labor agreement as well (Port Policy and Guards Union (PPGU)). (PRMSA op. br. at 161, and record citation therein.) PRMSA contends that the payors under the ILA assessment agreement ought not to fund administrative expenses attributable to an entirely different union's contract. NYSA offers no justification to its present prac-

tice. Dr. Silberman estimated $7 million in administrative expenses as allocable to the NYSA–ILA labor contract, which amount is the substantial majority of total administrative expenses. Absent any better evidence from NYSA, I must conclude that Dr. Silberman's estimate is reasonable. As PRMSA states, however, in future years, the NYSA should be required to account for administrative expenses attributable to the ILA contract separately from those attributable to non–ILA contracts. (PRMSA op. br. at 162.)

Overview of the Silberman Formula

During preceding discussions I have indicated that I believe that Dr. Silberman's formula is well considered and supportable with some exceptions (the McAllister barge treatment, the special 25 percent discount for the Puerto Rican trade). I strongly urged its adoption.[48] In this section I give a brief summary of certain strong points which I have mentioned but emphasize now to illustrate further the merits of the formula. Furthermore, I refer, when appropriate, to Mr. Donovan's formula which has some similarities but certain deficiencies and is not so refined and supportable as that of Dr. Silberman. Again, I refer the reader to the table in the appendix which shows the NYSA, Silberman, and Donovan formulas and how they vary from each other. (A good discussion is also found in PRMSA's op. br. at 23–35.)

I do not wish to repeat in detail the features of the Silberman formula, i.e., the recognition of the difference between Type I costs, which are related to currently working men and to man-hours and the Type II costs (GAI-related), which are related to labor costs of men not working because of the advent of containerization. Mr. Donovan also makes a somewhat similar distinction although not so refined and appears to understate the industry-wide portion of the fringe benefit costs (GAI-related) seriously.

What is impressive about the Silberman formula, aside from its conceptual logic, are certain admissions against interest. For example, unlike Mr. Donovan, Dr. Silberman finds that 67 percent of the total package to be funded is Type II (GAI-related) costs which are industry-wide obligations to be

[48] Literally the last defense against PRMSA and the Silberman formula by the NYSA is the contention that on an overall average total labor costs per ton, PRMSA's labor costs are actually lower than Sea-Land's and several other carriers. The calculations show, for example, that PRMSA's total labor costs per ton average out to something less than Sea-Land and two other carriers and a little more than U.S.L. (NYSA r. br. at 28–29.) (The exact numbers are confidential but can be found in the confidential portion of the NYSA r. br.) This is supposed to mean that PRMSA is not suffering discrimination at all. What is readily apparent from this last-ditch defense, however, is that NYSA is throwing in all labor costs, not just fringe benefit costs. But this case deals with the question whether PRMSA is paying an unfair share or suffering an unfair burden as to fringe benefit costs under the assessment agreement. Costs of direct wages and container royalty payments are irrelevant. When these irrelevant portions of NYSA's calculations are extracted, leaving the relevant factors, we are back where we started. That is, as NYSA's table shows, if total assessment under the current formula are divided by total tons, this shows that PRMSA paid $8.18 per ton whereas Sea-Land paid only $5.55 per ton and U.S.L., $4.71 per ton. Two other lines, both foreign flag, are slightly higher than PRMSA at $8.22 and $8.25 per ton. This, it appears that NYSA has unwittingly put in evidence supporting PRMSA's case.

funded on the tonnage basis. In contrast, Mr. Donovan finds only 34 percent of total costs to be Type II. The more that costs are allocated under the Type II category to be paid by tons, the greater the contributions by PRMSA as well as by other containerized carriers. It would therefore have been to PRMSA's advantage and Dr. Silberman found that only 34 percent of the package was Type II and therefore allowed PRMSA to pay for 66 percent of the total package on the man-hour basis. Nevertheless, Dr. Silberman analyzed the situation and data and did what he thought was correct.

Another example of Dr. Silberman's statesmanlike analysis is the fact that under his formula, there would be a cap on the contribution of breakbulk cargoes so that such cargoes would not have to pay more *in toto* than what they actually paid under the 1982–1983 contract year. (PRMSA op. br. at 25 and 26; Ex. 41 at 35–36.) If this cap results in breakbulk cargoes not paying their full actual Type I costs under the Silberman formula, the deficit is made up by all containerized carriers paying under the tonnage portion of the formula, which deficit is treated as a Type II cost. Thus, PRMSA is willing to help subsidize the needy breakbulk operators who utilize relatively more man-hours of labor and are consequently needed to help keep down the GAI costs. As breakbulk carriers gradually shift to containerization, they would have to make their tonnage contribution toward Type II (GAI-related) costs but that is how it should be since the change to containerization is responsible for the GAI costs and the newly containerized carrier enjoys the benefits of containerization and should bear its share of the costs of displaced labor.

Another admission against interest is Dr. Silberman's willingness to allow maintenance activities to continue their free ride. This activity, as discussed, is substantial and it would have been to PRMSA's benefit to have carriers utilizing ILA deep-sea maintenance labor to pay at least their direct Type I costs since PRMSA does not use such labor. However, PRMSA offers to continue picking up the costs of other carriers' use of such labor for the good of the entire fund. That is because if the activity had to pay even under the lower man-hour basis, it would undoubtedly shift to non-ILA deep-sea labor, i.e., to ILA "Metro" labor, which is readily available and is under a different labor contract. Such a shift would aggravate GAI costs. I note that Mr. Donovan for the Port Authority would assess maintenance under the man-hour portion of his formula, however.

I have disagreed with Dr. Silberman and PRMSA in their efforts to obtain a special 25 percent discount for the Puerto Rican trade and their argument that the McAllister barge service should pay the full tonnage rate under their formula, as I have discussed earlier. These particular changes in Dr. Silberman's formula should temper the features which I cannot find to be supportable on a preponderance of the evidence.

The major objection to the Silberman formula will undoubtedly come from the special-privilege carriers who enjoy the rather enormous benefits

of not having to pay substantial money as their share of GAI-related costs under the tonnage portion of the Silberman formula. Both Sea-Land and U.S.L. have objected to any change in the status quo for their domestic and relay operations which the evidence shows are not hardship cases. Should any particular commodity show that it were a hardship case, the present machinery of the joint NYSA–ILA Contract Board is supposed to function (although it seems not to have functioned perfectly with respect to PRMSA's case of diversion from New York to Pennsauken, New Jersey).

However, the MLAA has intended that the Commission have "broad discretion . . . to fashion appropriate remedies for unfair or discriminatory assessments." Sen. Rep. to the MLAA, cited above, at 14. if necessary to cushion the increases that Sea-Land, U.S.L. or any other unjustifiably favored carrier should now bear toward the industry-wide obligations by paying their fair share under the tonnage portion of the Silberman formula, the Commission can consider means to spread the payments over time or otherwise cushion the transition, similar to the offers it made to NYSA as to how NYSA was to give credits to carriers as a result of the decision in *Agreement No. T–2336,* cited above. See *Agreement No. T–2336,* 19 F.M.C. 248, 263 (1976), aff'd *NYSA* v. *F.M.C.,* 571 F. 2d 1231 (D.C. Cir. 1978) (partial payments, spread payments over time). Arguments could be made that the special-privilege carriers have been enjoying substantial savings by not paying their share toward GAI-related costs under the tonnage formula in the past and should not be given further consideration. However, rather than abandon the changes in the formula necessary to distribute burdens evenly, because of outcries from carriers who object to sudden increases in costs, the Commission can adopt the Silberman formula and fashion an appropriate remedy, easing the transition if necessary.

Implementation of the Remedies

PRMSA suggests a post-decision procedure by which NYSA can implement a decision to grant PRMSA credit adjustments (and also to compute reparations which the law does not allow in cases of this type, as I have discussed). PRMSA op. br. at 174–175. Under this plan, NYSA would be directed to submit to the Commission within 30 days of the Commission's decision a plan outlining all steps necessary to implement the PRMSA assessment proposal. PRMSA could object within 15 days and then attempt to resolve differences, leaving unresolved disputes to be submitted to the Commission. As to the assessment adjustments, PRMSA wants NYSA to appoint an independent certified public accountant to conduct an audit and to report its findings to the Commission within 60 days of the Commission's decision. PRMSA would audit the NYSA auditor's findings within 40 days, submit objections, and the parties would be allowed 20 more days to try to resolve their disputes. Unresolved matters would be submitted to the Commission for resolution.

As I have mentioned, the Commission has statutory authority to "fashion appropriate remedies." The Commission has some experience in fashioning remedies and procedures as seen from the proceedings following the decision in *Agreement No. T–2336,* cited above, which unfortunately took time to complete because of continual appeals by the NYSA, all of which were rejected by the courts. The above procedure seems reasonable and somewhat similar to procedures used by the Commission in reparation cases when the record does not quantify the exact amount of reparation. See Rule 252, 46 CFR 502.252. But see also the procedure established by the Commission in *Agreement No. T–2336,* cited above, 19 F.M.C. at 265.

In one matter of substance, however, I do not agree with PRMSA. That is the matter of interest which PRMSA is seeking in addition to adjustments (and the unauthorized reparation). In *Agreement No. T–2336,* cited above, the Commission did not award interest to the carrier group which obtained adjustments from the NYSA. This decision was affirmed. *NYSA* v. *F.M.C.,* 571 F. 2d 1231 (D.C. Cir. 1978). The Commission held that the decision to award interest was discretionary but that the equities of the situation did not warrant such an award. Thus, although the claiming carrier group had been deprived of the use of its funds because of previous overpayments under the assessment formula, it was not clear for some time exactly how much the overpayment was, NYSA had not delayed the proceeding unfairly nor had NYSA engaged in any conduct which it should have known was improper at the time, nor had it withheld assessment payments from the fund. 19 F.M.C. at 261.

In the present case, under the most pressing time constraints, NYSA has furnished considerable data and has worked hard, as have all other parties, to meet the tight deadlines imposed by law, and its counsel have been invariably courteous. It fully believes that its formula was and is lawful, and, as I have noted, this is probably the first time that a complete factual record has been assembled in one place so that everyone can see the unfair effects of the formula. There is some indication that PRMSA might have been given the runaround in its last request for relief before the filing of its complaint, and it is questionable whether the Contract Board has been entirely fair to PRMSA, which has shown cases of diversion to a non-ILA carrier. There is also a curious advertisement about an NYSA "plan" to reduce assessments which has not been revealed, and, if it is any good and would help lead to a settlement, should probably have been made public. However, all of these facts, in my opinion, do not justify imposition of interest liability on NYSA. I therefore would not award interest for reasons similar to those expressed by the Commission in *Agreement No. T–2336,* cited above.

ULTIMATE CONCLUSIONS

Two parties, the Port Authority of New York and New Jersey, and PRMSA, the leading Puerto Rican carrier, complain that the current tonnage

assessment formula in use at the Port of New York is unjustly discriminatory and unfair and ask that it be modified, and, as to PRMSA, that PRMSA be granted credit adjustments provided by the applicable law. Respondents NYSA *et al.*, as well as other parties representing competing ports and Hearing Counsel, oppose any relief but would leave everything up to the parties to resolve on their own. NYSA furthermore raises a number of legal defenses, almost all of which have no merit, which defenses would not allow the Commission even to consider the complaints on their merits. Even if the merits are considered, NYSA argues impossibly difficult standards of proof which the Congress rejected when it enacted the MLAA.

Contrary to respondents' and other parties' contentions, the extensive evidence developed by the Port Authority and by PRMSA shows certainly by a preponderance of the evidence and probably, in many respects, even by a clear and convincing standard even though that stricter standard is not required, that the Port Authority suffers a handicap because of a $200–300 differential assessment on loaded containers moving through New York which all competing ports, which are not under the unique New York tonnage formula, do not have to bear. This handicaps the Port of New York in its efforts to attract and maintain containerized cargoes mainly from Midwest destinations and origin points but also other regions. The evidence of this handicap is shown, among other ways, by admissions of at least 11 of respondent carriers' officials and by respondent carriers' own cost studies, one of which bore the notation: "The killer is NYSA assessment of $7.50/ton compared to: Baltimore $8.10/Manhour; Portsmouth $10.55/Manhour." Of course, the tonnage rate has since increased to $8.90 per ton. Although now denying that such a large differential at New York exists, at least one important official of a respondent terminal operator, conceded to a New York State legislative committee hearing that such a differential up to about $250 existed.

In addition to the foregoing admissions, data accumulated from the Maritime Administration and other sources show that the Port of New York has been stagnating and has declined in its share of containerized cargo in the North Atlantic from 69 percent in 1972 to 56 percent in 1982. Such declines are not explainable simply in terms of other ports' catching up to New York in containerizing their facilities.

Other evidence presented by two expert witnesses shows that this differential, which handicaps New York competitively, does not have to exist merely because New York's underlying fringe-benefit labor costs are higher than those at other ports, which admittedly they are. The differential is to a large extent the result of the peculiar tonnage formula which no other port employs and two alternative combined man-hour/tonnage or man-hour/container type formulas presented by two expert witnesses, among other evidence, show that the underlying costs do not have to result in such a huge differential.

Finally, it should be noted that the Port is not claiming that Midwest or any other containerized cargo is "naturally tributary" to New York or that New York is fundamentally entitled to such cargo to the exclusion or detriment of Baltimore, the major port competing with New York, or that NYSA is deliberately attempting to handicap New York by employing some type of harmful device. Nor is the Port asking for or entitled to monetary adjustments. All that the Port wants is to have a formula at New York which will get the competitive handicap off its back and enable it to compete fairly with Baltimore and other ports. The current tonnage formula, as the evidence shows, does not enable the Port to do that and therefore it is "unjustly discriminatory and unfair as between ports," as the MLAA states and should be modified to give the Port relief.

Congress specifically entrusted the Commission with the responsibility to ensure that there would be equal treatment of localities and that there would be no abuses caused by concerted activity of carriers and others and restored jurisdiction to the Commission in response to pleas of parties worried about not having any protection under shipping law. See Sen. Rep. to the MLAA, cited above, at 10. On this record and in view of such a legislative mandate, I do not believe that the Port Authority can be turned away without relief.

Similarly, on the record developed by PRMSA, I do not believe that the carrier can be turned away without relief. PRMSA's case, unlike the Port Authority's, is based essentially on the fact that the unique tonnage formula in New York unfairly distributes burdens among containerized carriers in comparison with the benefits which they all received when first containerizing. PRMSA's evidence shows that the current tonnage formula totally fails to distinguish between the type of fringe benefit costs attributable to displacement of work caused by containerization and the type of costs attributable to labor currently employed. Such a flat tonnage formula not only shoves all costs onto containerized carriers for their general responsibility in displacing labor and increasing GAI-type costs but also for introducing efficiencies in non-vessel loading/unloading functions which represent current improvements in terminal efficiencies. Such a formula, therefore, taxes efficiencies and terminal productivity, reduces incentives to introduce such efficiencies, and causes more efficient carriers to pick up some of the costs of the less efficient carriers. Moreover, the evidence developed by PRMSA shows enormous favoritisms to a certain few carriers who pay no tonnage assessment on domestic, intercoastal cargoes or transshipped cargoes and favoritisms to a few carriers who pay absolutely nothing though hiring labor for handling empty containers and stuffing and stripping containers at their terminals. These enormous special privileges help to create a startling situation in which the evidence shows PRMSA paid an average of $272 per loaded container in tonnage assessments under the current formula whereas another major containerized line paid only $141 per container and still another, only $168 per container, those other carriers also

being the prime beneficiaries of the special treatment for domestic and transshipped cargoes. Other evidence shows that on those favored cargoes, the payments per container by one carrier averaged only $23 and for the other, only $13.05 per container, again compared to PRMSA's average of $272 per loaded container. On some domestic cargoes, it was even shown that one carrier paid an average of only $10 per container.

The disparities are enormous and the justifications for them ought accordingly be persuasive but extensive examination of such justifications shows that they are not persuasive and that they rest mainly on speculation and self-serving predictions of adverse consequences if the special privileges are terminated. In some cases, however, such as the total free ride for handling empty containers and for stuffing and stripping containers, which free ride burdens everybody else even with the direct-type costs of hiring labor, the justification is virtually non-existent.

To remedy these gross disparities, PRMSA has presented a well-explained alternative combined man-hour/tonnage formula supported by an impressive expert witness. This formula would relate direct currently-employed type fringe benefit costs with man-hours and non-employed GAI-type costs, which are industry-wide obligations, with tonnage assessments. It would also, for the most part, eliminate unjustified special privileges and free rides. In certain instances, furthermore, it goes against PRMSA's own interest, for example, when it allocates fully 67 percent of industry-wide costs to the tonnage portion of the formula, when it puts a cap on breakbulk cargo payments for the good of the Port, and when it recommends retention of the free ride for maintenance labor because of the clear danger that taxing that activity would result in diversion to non-ILA deep-sea labor and consequent aggravation of the GAI costs. PRMSA does overreach in seeking a further special 25 percent discount for the Puerto Rican trade and is unduly harsh on a barge carrier upon whom other interests depend and also seeks retroactive reparation which the law does not provide in this type of case. However, the formula it proposes is otherwise supportable and far more fair than the current tonnage formula which is riddled with unjustified favoritisms and exceptions which burden everyone else trying to fund the fringe benefits fully.

As with the Port Authority, PRMSA has presented a persuasive case. The Commission was given the specific responsibility by the Congress to protect carriers and others against abuses and to strive to ensure fair and equal treatment, as shown by the legislative history to the MLAA. In view of that fact and the persuasive evidence developed, I do not believe that PRMSA can be turned away without relief.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX

TABLE 1.—A COMPARISON OF THE ASSESSMENT FORMULAS

Types of Assessments and Benefits Funded	*NYSA*	*SILBERMAN (PRMSA)*	*Donovan (Port Authority)*
	1. Tonnage—Funds almost all fringe benefits	1. Tonnage-Funds GAI, GAI-related fringes, other "industry-wide" obligations	1. Container-Funds GAI, GAI holiday, and GAI vacation costs.
	2. *Man-hour—For "excepted cargoes" only*	2. *Man-hour—Funds fringes associated with currently employed workers*	2. *Man-hour-Fund—Funds all other fringe benefit costs.*
Basis for Assessment for:			
General Containerized Cargo	Tonnage	Man-hour/Tonnage	Man-hour/Container.
Transhipped/Rehandled	Man-hour	Man-hour/Tonnage	Man-hour/Container.[1]
Domestic	Man-hour	Man-hour/Tonnage	Man-hour/Container.[1]
Breakbulk	Tonnage	Reduced man-hour	Man-hour.
Empty Containers	None	Man-hour	Man-hour/Container.[2]
Stuffing & Stripping	None	Man-hour	Man-hour.
Maintenance	None	None	Man-hour.
Puerto Rico Trade	Tonnage	Man-hour/Reduced tonnage	Man-hour/Container.
Formula as Applied to Assessment Rates for Contract Year 1982–83	Regular: $8.90/ton Excepted: $5.50/man-hour	Tonnage: $5.90/ton Man-hour: $6.35.man-hour[4]	Container: $64/container[3] Man-hour: $11.64/man-hour[5].

[1] Reduced man-hour/Container under alternatives 2, 3.
[2] Man-hour/Reduced container under alternative 3.
[3] Under alternative 3, full containers assessed $77, empty and stuffed and stripped assessed $38.
[4] $5.41/hour for breakbulk.
[5] $11.94/hour under alternatives 2, 3.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–6

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

NEW YORK SHIPPING ASSOCIATION, ET AL.

DOCKET NO. 84–8

PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO MARINE MANAGEMENT, INC.

v.

NEW YORK SHIPPING ASSOCIATION

ORDER

February 27, 1985

The Federal Maritime Commission, having this date made and entered of record a Report in the above matter, which Report is hereby referred to and made a part hereof;

THEREFORE, IT IS ORDERED, That the whole tonnage assessment formula contained in NYSA–ILA Agreement No. LM–86 is found to be "unfair" and "unjustly discriminatory" under the Maritime Labor Agreement Act of 1980 to the extent indicated herein, and on this date modified to remove such unfairness and unjust discrimination.

IT IS FURTHER ORDERED, That within 61 days of service of this order, NYSA and ILA shall file with the Commission a modified agreement which: (1) embodies the man-hour tonnage formula here prescribed; and (2) removes the "expected" treatment for domestic and transshipped cargoes to the extent here required; and

IT IS FURTHER ORDERED, That within such 61 day period Respondents shall file with the Commission a statement describing the means of "phasing out" the man-hour assessment and "phasing in" the man-hour/tonnage assessment herein prescribed for transshipped/rehandled cargoes; and

IT IS FURTHER ORDERED, That within such 61 day period Respondents shall further file any requests for "phasing out/phasing in" beyond September 30, 1986 up to and including September 30, 1987, together

with supporting data based on commitments, capital expenditures, or operational difficulties; and

IT IS FURTHER ORDERED, That within such 61 day period assessment adjustments shall be made in favor of PRMSA/PRMMI in the manner prescribed herein, and Respondents shall file with the Commission a statement of the adjustments so made; and

IT IS FURTHER ORDERED, That to the extent the adjustments in favor of PRMSA/PRMMI described in the preceding paragraph cannot be made until after the date of this Order, additional adjustments shall be made to insure that PRMSA/PRMMI receives credits for any portion of the period between February 27 and April 29 during which it may have been assessed at the rate applicable under the formula here modified.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 550 AND 580]

DOCKET NO. 84–35

ELECTRONIC FILING OF TARIFFS BY COMMON CARRIERS IN THE FOREIGN AND DOMESTIC OFFSHORE COMMERCE OF THE UNITED STATES

March 14, 1985

ACTION: Final Rules.

SUMMARY: The Commission amends its domestic offshore and foreign commerce tariff filing rules by permitting the electronic receipt of filings outside of the Commission's offices subject to certain stated conditions.

DATES: Effective April 18, 1985.

SUPPLEMENTARY INFORMATION:

On October 18, 1984, the Federal Maritime Commission (Commission) issued a notice of proposed rulemaking in Docket No. 84–35—*Electronic Filing of Tariffs By Common Carriers in the Foreign and Domestic Offshore Commerce of the United States,* to amend certain domestic offshore and foreign commerce tariff filing rules (46 CFR Parts 550 and 580) in order to allow electronic tariff filings to be received on terminals located in the same building as the Commission's offices subject to certain stated conditions (49 FR 40940, Oct. 18, 1984). Interested parties were invited to file comments by November 19, 1984.

Comments on the proposed rule were received from the Inter-American Freight Conference, the Journal of Commerce, Sumner Tariff Service, Inc., Transax Data Corporation and Distribution-Publications, Inc.

The Inter-American Freight Conference (IAFC) * asserts that under section 8(a)(1) of the Shipping Act of 1984, 46 U.S.C. app. 1707(a)(1), ("the Act"), a tariff is not on "file" with the Commission when it is electronically transmitted to an off-premises terminal because a filing must be physically delivered to the Commission or deposited with a proper Commission employee. The Commission does not agree. Strictly ministerial functions may be validly delegated to private parties without express authorization in the Commission's enabling statute. *Tabor* v. *Joint Bd. for Enrollment of Actuaries,* 566 F.2d 705 (D.C. Cir. 1977). Nothing in section 8 of the Act prohibits such a delegation. Accordingly, the Commission is modifying its proposed rule to clarify that it is delegating authority to receive

* By letter December 27, 1984, Delta Steamship Lines, Inc., a member of IAFC advised that it disassociated itself from the IAFC comments.

tariffs to the operators of data processing terminals specially designated for this function pursuant to the provisions of the rule. Moreover, the rule is further amended to require prompt physical transmission of filed tariff pages to the Commission. These provisions will both clarify the Commission's authority on this matter and protect the legitimate concerns of all affected interests.

Sumner Tariff Service, Inc. (Sumner), commented that the proposed rule did not address the question of the physical receipt of electronic filings by the Commission's staff and suggests that a "deadline" for such physical receipt should be established in the Final Rule. Distribution-Publications, Inc. also believes that the Commission should establish a specific cut-off time for actual receipt of the printed pages. Transax Data Corporation (Transax) recommends that the Commission allow electronic filing services to physically deliver tariff pages to the Commission before noon of the next business day following receipt of the terminals.

The proposed rule is revised to specify a deadline for the physical receipt by the Commission of pages from electronic filing services. Although Transax's concerns for a noon deadline have been considered, we have set the cut-off time at 9:00 a.m. on the next business day following the receipt of electronic tariff filings on the receiving machine. This deadline is imposed so that the public can access the previous days filings as soon as possible. Any extended delay, including only a few additional hours could result in interested parties being deprived of necessary tariff information for an additional day. Further, the 9:00 a.m. deadline will provide administrative processing of electronic filings in the same manner as tariff filings received from tariff filers which use the Commission's around-the-clock tariff mail drop located in the lobby of the Commission's Washington, D.C. offices.

Transax also suggests that the Commission recognize the date that pages are received on "disk," rather than by the printing device, as the official filing date. The Commission's present policy is to accept for official filing purposes the time and date that pages are received on "disk". This policy will be continued on the final rule with the further prohibition that no alteration of material filed on the desk shall be allowed. Once material is filed on the disk it must be printed without alteration.

Finally, Transax urges that the commercial entity operating the receiving terminals be identified by a registration number, an alpha-numeric code identifying the commercial entity receiving the tariff filing and the specific work station. It further recommends that this number should be unique to the commercial entity and the location of the work station rather than a number unique to a specific piece of hardware.

It is neither beneficial nor necessary for the registration number of each electronic tariff filing to identify the commercial entity by an alpha-numeric code. The unique machine registration number should be sufficient to identify the commercial entity receiving the filing.

The unique machine registration number would appear to be the best method of controlling the integrity of the electronic tariff filing system. Moreover, this method will provide surveillance over the actual hardware that will be used to receive the filings. We perceive no undue burden either to the Commission or to the commercial entities to register hardware changes, additions or replacements as they may occur.

Sumner suggests that the time, date and terminal identification be permitted to be published at the top or bottom of the tariff page. Sumner claims that some of the filings currently accepted by the Commission have this information printed at the top of the page and to change the machines to print this information on the bottom would require expensive reprogramming. This comment has merit and, accordingly, the final rule allows the terminal identification number to be printed at the top *or* bottom of the tariff page.

The final rule also contains various organization changes for the purpose of clarity. The rule moves the formerly applicable electronic filing provisions from the definition sections 550.2(i) and 580.2(w) to 550.3(e) and 580.3(a)(2), respectively.

This rule contains no substantial information requirements or requests different than those already present in Part 580 for which O.M.B. approval has been obtained.

The Commission has determined that this final rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with Foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of Subjects in 46 CFR Parts 550 and 580

Maritime carriers, Rates and fares, Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 553; secs. 8, 9 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707, 1708, and 1716); secs. 18(a) and 43 of the Shipping Act, 1916 (46 U.S.C. app. 817(a) and 841(a); and sec. 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 844) the Federal Maritime Commission amends Parts 550 and 580 of Title 46 of the Code of Federal Regulations as follows:

PART 550—[AMENDED]

1. The authority citation for Part 550 is revised to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 812, 814, 815, 817(a), 820, 833a, 841a and 843–847.

2. Revise paragraph (i) of § 550.2 to read as follows:

§ 550.2 Definitions.

* * * * *

(i) *"File, Filing (of Tariff Matter)"* means the actual receipt by the Federal Maritime Commission at its offices in Washington, D.C., including those received by electronic transmission. Electronic filings are those transmitted through the use of commercial data processing terminals and conforming to all the regulations applicable to permanent tariff filings. The data processing receiving terminal(s) are located within the same building as the Commission's Washington, D.C. offices.

* * * * *

3. Revise paragraph (e) of § 550.3 to read as follows:

§ 550.3 Filing of tariffs; general.

* * * * *

(e)(1) Tariff matter will be received by the Commission at its Washington, D.C. offices on an around-the-clock basis. Receipt of tariff filings during other than normal business hours will be time stamped at a tariff mail drop in the lobby of the Commission's Washington, D.C. offices.

(2)(i) Terminals receiving electronic filings must imprint the date and time received on the top or bottom of each page as well as imprinting a unique machine registration number.

(ii) The unique machine registration number must be registered with the Director, Bureau of Tariffs. Owner/operators of such registered machines must obtain certification from the Director as having delegated authority to receive tariff matter on behalf of the Commission.

(iii) Information received and stored on a "disk" must be filed without alteration. All electronically filed tariff pages including those received and stored on a "disk" must be delivered to the Commission's Tariff Library before 9:00 a.m. the next successive business day following receipt on the receiving machine.

* * * * *

PART 580—[AMENDED]

4. The authority citation to Part 580 is revised to read:

Authority: 5 U.S.C. 553; 1702–1705, 1707–1709, 1712, 1714–1716 and 1718.

5. Revise paragraph (w) of § 580.2 to read as follows:

§ 580.2 Definitions.

* * * * *

(w) *Tariff filing, electronic* means the transmission of tariff filings to the Commission through the use of commercial data processing terminals. The data processing receiving terminal(s) are located within the same building as the Commission's Washington, D.C. offices.

6. Revise paragraph (a)(2) of § 580.3 and add paragraph (a)(3) to § 580.3 to read as follows:

§ 580.3 Filing of tariffs; general.

(a)(1) * * *

(2) The Commission will receive tariff filings on an around-the-clock basis. Receipt of tariff filings during other than normal business hours will be time-stamped at a tariff mail drop located in the lobby of the Commission's Washington, D.C. offices.

(3)(i) Electronic tariff filings transmitted to the Commission by electronic modes will be receipted by a date/time device on the receiving machine which will imprint the date and time on the top or bottom of each received tariff page. The receiving machine will also imprint a unique registration number which must be registered with the Director, Bureau of Tariffs. Owner/operators of registered receiving machines must obtain certification from the Director as having delegated authority to receive tariff matter on behalf of the Commission.

(ii) Tariff material filed electronically must conform to all the regulations of this part applicable to permanent tariff filings, except as follows:

(A) Electronically filed tariff pages received from data processing terminals may be used for filing with the Commission;

(B) Information received and stored on a "disk" must be printed and filed without alteration;

(C) All electronically filed tariff pages including those received and stored on a "disk" must be delivered to the Commission's Tariff Library before 9:00 a.m. The next successive business day following receipt on the receiving machine; and

(D) Electronically filed tariff matter shall be accompanied by an electronically filed letter of transmittal.

* * * * *

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–32

KUEHNE AND NAGEL, INC.

v.

BARBER BLUE SEA LINE AND NEDLLOYD LINES

ORDER OF REMAND

March 28, 1985

This proceeding was instituted by the complaint of Kuehne & Nagel, Inc. (K&N or Complainant) against Barber Blue Sea Line (BBS) and Nedlloyd Lines (Nedlloyd) seeking reparations for alleged overcharges on four shipments of rock crushing plants and accessories from Baltimore to Damman, Saudi Arabia, in violation of section 18(b)(3) of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. § 817(b)(3)). Administrative Law Judge Seymour Glanzer found in favor of Complainant and awarded reparations in the amount of $12,334.54. The case comes before us on Respondents' Exceptions to the Initial Decision.

BACKGROUND

K&N, acting as the freight forwarder and agent for the purchaser/consignee, made four shipments of rock crushing and conveying plants and accessories from Baltimore to Saudi Arabia from August to November, 1981. Each shipment was described on the bills of lading as a "rock crushing and conveying plant (Telsmith 2540 PP–VGF Portable Primary Crushing Plant with Vibrating Grizzly Feeder and Accessories)." Each of the shipments consisted of two or four large, vehicle-like, or "ro-ro," pieces and numerous small boxes, crates, bundles, skids, cases and pieces. The bills of lading listed Barber Greene, manufacturer of the rock crushing equipment, as shipper. The freight, however, was prepaid by Complainant as agent for the consignee.[1]

The tariff of the "8900" Rate Agreement, to which Respondents are parties in the trade, reflected the following provisions effective at the time of shipment:

[1] Respondents originally contested K&N's standing to seek reparations on ground that it was not the party injured by the violation alleged. *See* Respondents' Motion For Summary Judgment, 4 and Respondents' Proposed Finding of Fact and Conclusions of Law, 8. This issue was resolved, however, with the filing of an assignment of the claim from the consignee by Complainant at the behest of the Presiding Officer with the acquiescence of Respondents. *See* Initial Decision, 4.

Commodity Description & Packing	Rate Basis	Rate
Item 765:		
MACHINES AND MACHINERY PARTS THEREOF, N.O.C., (NOT AGRICULTURAL OR ROAD-BUILDING)		
* * * * *		
Rock Crushing Plant—(If Mobile, See Item 1255)	W/M	131.25
* * * * *		
Item 1255 of the tariff provided:		
Vehicles, Specially Equipped (UNBOXED), Incl.:	W/M	122.25
* * * * *		
Mobile Rock Crushing Plants		
* * * * *		

Units exceeding 60 gross tons in weight per piece or package apply to the "8900" Lines.

In addition, Rule 2(H) of the tariff read:

2. *APPLICATION OF RATE—*

> (H) Whenever rates are provided for an article named herein, the same rate will also be applicable on named parts of such articles when so described on ocean bills of lading, except where specific rates are provided herein for such parts.

Although the non-ro-ro components made up by far the greater proportion of the items in each shipment on a numerical basis, the ro-ro pieces accounted for a majority proportion of three of the four shipments by volume as well as by weight, and were a majority proportion of the fourth shipment by weight.

The ro-ro pieces of the rock crushing plants were rated under Item 1255 at $122.25 W/M and the remaining packages and pieces were rated under Item 765 at $131.25 W/M. Complainant sought to have the entire shipment rated at the lower rate under Item 1255, alleging that all of the shipments consisted entirely of mobile rock crushing plants and their associated parts and accessories.

No evidentiary hearing was held. The parties submitted a stipulation of facts. Respondents filed a Motion for Summary Judgment, accompanied by two affidavits and several exhibits, and Complainant filed a Cross-Motion for Summary Judgment with an affidavit and exhibits. The Presiding Officer found, however, that the material facts remained in dispute and refused to resolve the matter on the basis of the cross motions. The parties agreed to submit the matter for decision on the basis of the existing record supplemented by proposed findings of fact and briefs with supporting

exhibits. These exhibits, however, consisted entirely of material previously submitted.

The Initial Decision granted Complainant's request for reparations, finding that Respondents had violated section 18(b)(3) of the 1916 Act by applying the wrong rate under the tariff to part of each of the four shipments in issue. Peripheral issues of standing and a statute of limitations defense were disposed of in favor of Complainant on grounds that a complaint timely filed may be perfected by a later executed assignment of the claim to the filing party, citing *Rohm & Haas Co.* v. *Italian Line*, 21 SRR 213 (1981) and *Interconex, Inc.* v. *Federal Maritime Commission*, 572 F2d 27 (2nd Cir., 1977).

The Presiding Officer similarly disposed of Respondents' affirmative defense of estoppel by reason of Complainant's alleged agreement in advance to the tariff interpretation pursued by Respondents, on grounds that the evidence of the alleged agreement—a letter from one of the Respondents to Kuehne and Nagel, and statements by Respondents' affiants—was insufficient to prove Complainant's acquiescence in the stated tariff interpretation.

Relying upon Tariff Rule 2(H), under which parts of an article are to be moved under the same commodity description and rate as the article of which they are components, the Presiding Officer found in favor of Complainant on the major issue of interpretation of the tariff items in issue, reasoning that the commodity description in Item 1255 should apply to the entire shipment "if more than half of a shipment, measured by weight or volume, consists of vehicles * * *" (I.D. 20).

Respondents except to the Presiding Officer's conclusion that their application of the tariff provisions in question was inconsistent with the clear language of the tariff itself. Respondents argue that Item 1255 must be read as referring only to "vehicular parts of plants, not entire plants" because it is stated as "Vehicles, Specially Equipped (UNBOXED), Incl[uding] * * * mobile rock crushing plants." Respondents assert that there is "no such thing" as a completely mobile rock crushing plant, and therefore an "entire" plant could never be considered a vehicle. They maintain that the non-ro-ro pieces which constituted a majority of the packages shipped, should be, and were, rated as parts of a stationary plant under Item 765.

Respondents also argue that their interpretation of the tariff is supported by the lower cost of loading and unloading ro-ro cargo, and by custom and usage and agreement among the parties. In affidavits submitted with their Motion for Summary Judgment, employees of both lines averred that they had discussed the application of rates to similar shipments with employees of both the Complainant and the consignee. Respondents note that complainant has stated only that it was "not aware of any agreement covering the freight rate assessed" without further contesting the statements contained in Respondents' affidavits that the two lines' "rating policies * * * were understood and agreed to by all parties." (Affidavits of Edward

L. McCabe, 2, and Carmine Disclafani, 4, attached to Respondents' Motion For Summary Judgment). In addition, the failure of Complainant or the shipper to respond to an October 29, 1980 letter from a Nedlloyd sales representative setting forth Nedlloyd's rating policy for a rock crushing and conveying plant booked on a Nedlloyd vessel is cited as evidence consistent with both the unrebutted affidavits and customary business practices. Respondents thus contend that a mutual interpretation of the tariff existed which precludes Complainant's assertion of improper application of the rates.

Finally, Respondents fault the Presiding Officer's analysis of the proportion of the shipment to be considered as governing which commodity description it fits. The Presiding Officer used weight and volume in determining that the rock crushing plants were mobile because the ro-ro pieces constituted a greater proportion of each shipment. Respondents urge that the more appropriate factor in such a judgment is the proportion of the non-ro-ro pieces to overall number of packages in each shipment.

Complainant in its Reply to the Exceptions argues that the Presiding Officer correctly found that Respondents misapplied the higher tariff rate for stationary rock crushing plants to the non-ro-ro portions of the four shipments. Complainant points to the clear language of Tariff Rule 2(H), and Respondents' failure to mention that Rule until the last substantive paragraph of their brief, as support for its contention that the no-ro-ro items were misrated.

As evidence of the mobile nature of the rock crushing plants, Complainant cites the manufacturer's brochures and the bills of lading which describe the shipments as "portable" rock crushing plants. Complainant argues that the comparative weight and volume of the few major ro-ro pieces vis-a-vis the numerous smaller components of the plants are the distinguishing feature of mobile rock crushing plants.

In response to the argument that Respondents' tariff interpretation is rooted in agreement or "custom and usage," Complainant argues that neither prior notification of Respondents' incorrect application of their tariff nor a shipper's acquiescence in such an incorrect application can vary the clear terms of a tariff. Complainant also points to inconsistent action by BBS, *i.e.*, a 1982 shipment on which all of the component parts of a rock crushing and conveying plant (identical in description to those at issue herein) were freighted at the then-effective rate for mobile rock crushing plants. (Reply to Exceptions, 11, Exhibits B and C. Those exhibits also appear in the record as attachments to Complainant's Answer to Respondents' Motion For Summary Judgment and Complainant's Cross Motion For Summary Judgment).

DISCUSSION

For the most part, Respondent's Exceptions are re-arguments of points made below and addressed in the initial Decision.

The argument that Complainant is estopped from bringing the present action by its prior agreement to the Respondents' tariff interpretation was rejected by the Presiding Officer on evidentiary grounds. We agree with the Presiding Officer that the evidence is insufficient to show Complainant's acquiescence in Respondents' tariff application. We would also point out that while such evidence may be used to adduce the precise nature of the commodity shipped or the meaning of the tariff, it may not be used to *estop* a party from raising such an issue. The only rate which may be lawfully charged under Respondents' tariff is the correct rate, and a shipper's agreement to application of any other rate cannot immunize a carrier from violation of section 18(b)(3) or justify its application of a different rate. *Louisville and Nashville R.R.* v. *Maxwell,* 237 U.S. 94 (1914), *United States* v. *Pan American Mail Line, Inc.* 359 F.Supp. 728 (S.D. N.Y. 1972); *Kansas Southern Ry.* v. *Carl,* 227 U.S. 639 (1913).

Respondents on exceptions reiterate their contention that the reference in tariff Item 1255 to specially equipped vehicles, unboxed, makes their vehicular nature the major characteristic of commodities covered, and therefore only those portions of the named examples which are actually vehicles come within the commodity description. This argument is not compelling. As the Presiding Officer noted, tariff Item 1255 does not limit applicability to the ro-ro portions of the named items. To the contrary, the tariff item contemplates inclusion of "pieces" or packages" of the named units (which are to be carried under the Item 1255 rate unless they individually exceed 60 gross tons in weight, in which case shippers are directed to "apply to the '8900' Lines").

The Presiding Officer's reading of tariff Rule 2(H) in conjunction with Items 1255 and 765 as requiring the application of a single rate to the entire shipment appears correct. The record evidence is insufficient to convince us, however, whether the rate to be applied to each of the shipments in its entirety should be the higher rate under tariff Item 765 for stationary rock crushing plants, or the lower rate under tariff Item 1255 for vehicular, mobile plants.

Tariff Items 765 and 1255 clearly contemplate the existence of "mobile" rock crushing plants. Item 765 contains a proviso within its commodity description for rock crushing plants specifically referring shippers of such plants "*If mobile*" to Item 1255 which lists "mobile rock crushing plants" among other commodities. (Emphasis supplied). The Presiding Officer ruled that each of the rock crushing plants as a unit should be considered mobile for purposes of classification under the tariff based upon the preponderance of the mobile or ro-ro pieces as a proportion of each shipment measured by weight or volume. The problem with this resolution is not, as Respondents contend, that it utilizes the wrong yardstick, weight and volume, rather than number of pieces per shipment. Weight and volume are the traditional yardsticks for determining total transportation charges. They are not however, ordinarily useful determinants of the nature of the commodity shipped

for purposes of finding the applicable rate. The Presiding Officer appears to have accepted the preponderance of the ro-ro pieces in each shipment as an indication of the mobile nature of the rock crushing plants shipped, and therefore concluded that these plants were sufficiently mobile to fit within the tariff description of mobile rock crushing plants.

The question, however, which remains unresolved in our opinion is whether these rock crushing plants may, in common parlance, be considered "mobile," consistent with the usual sense of that word as reflected by the other "mobile" units listed under tariff Item 1255.[2] We find the evidence as to the nature of the commodity actually shipped insufficient to resolve this question.[3] While the Presiding Officer himself expressed some reservations as to the sufficiency of the record in declining to dispose of the case on the basis of the parties' cross Motions for Summary Judgment, the parties' subsequent filings of a Stipulation of Facts, proposed findings of facts, briefs and supporting exhibits added nothing new to the record. We therefore remand the case to the Presiding Officer for further hearing on the question of whether the portable rock crushing plants here at issue may generally be considered "mobile" rock crushing plants. Without binding the Presiding Officer in structuring a further hearing, we note that the characterization or classification of such plants within the industries which produce and use them may be the most material evidence to the question at issue here.[4]

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer for the purpose of determining whether the rock crushing plants at issue herein may be considered mobile rock crushing plants within the meaning of tariff Item 1255; and

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[2] Tariff Item 1255 applies, inter alia, to: aircraft servicing trucks; airfield vacuum cleaners; audio-visual aid units; automobile and scrap metal crushing machinery—mobile; batching plants, asphalt or cement; communication repair trucks; conveyor trucks; crash trucks; fire engines; fork lifts, pickup and Warehouse, N.O.S.; hoists or lifts, telescoping (not truck mounted); machine shop trucks; meteorological instrument equipped trucks; mobile asphalt mixing plants; mobile cafeterias and kitchens; mobile health clinic; mobile laboratories; mobile motion picture units; mobile rock crushing plants; platforms, aerial work; radar trucks; radio trucks; rigs, drilling truck/trailer mounted; road sweeping vehicles; seismograph instrument equipped trucks; sewer cleaning trucks; soil testing laboratory; vacuum tank trucks; vibratory compactors; and welding trucks.

[3] The evidence of record consists of the following:

> Both the bill of lading description and the manufacturers brochure describe the rock crushing plants as "portable." The brochures refer to their "excellent mobility." *See, e.g.* Barber Green Bulletin 423, "Telsmith Portable Crushing Plants—up to 280 tph" which describes the unit as follows, at p. 2:
>
> "*Excellent Mobility*
>
> All plant components come equipped with running gear. Except for the crushers, all motors are factory-wired to a plug and receptacle on the chassis. The control trailer—standard with the 3 stage plant—is also wired with plug and receptacle. Just plug in and you're ready to crush."
>
> Exhibit C to Respondents' Proposed Findings of Fact and Conclusions of Law.

[4] It would be particularly helpful to learn, for example, whether there exist mobile rock-crushing vehicles such as might be used for tunnels or road construction, that are self-propelled and to which tariff Item 1255 would clearly apply, as distinguished from the equipment which constitutes the shipments in issue.

IT IS FURTHER ORDERED, That the Initial Decision is adopted to the extent not inconsistent with this Order and vacated in all other respects.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–32

KUEHNE AND NAGEL, INC.

v.

BARBER BLUE SEA LINE AND NEDLLOYD LINES

Respondents overcharged Complainant on four shipments in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3). Reparation with interest awarded.

Paul S. Aufrichtig and *Bruce L. Stein* for Kuehne and Nagel, Inc., Complainant.

Marc J. Fink and *Kelly A. Knight* for Barber Blue Sea Line and Nedlloyd Lines, Respondents.

INITIAL DECISION [1] OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

Partially Adopted March 28, 1985

This is a complaint proceeding filed pursuant to section 22 of the Shipping Act, 1916, 46 U.S.C. 821. Treating the complaint as having been amended [2] and as having been conformed to the proof, it alleges that the Respondents,[3] common carriers by water in foreign commerce and members of Eighty Nine Hundred Rate Agreement charged, demanded, collected and received greater compensation for the transportation of property than the rates and charges specified in that Rate Agreement's tariff on file with the Commission and duly published and in effect at the time in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3), in connection with four shipments of rock crushing and conveying plants and accessories transported from Baltimore, Maryland, to Damman, Saudi Arabia.

BACKGROUND OF THE PROCEEDING

The complaint was filed July 28, 1983, by Kuehne and Nagel, Inc. In it Kuehne and Nagel claimed standing as an aggrieved party entitled

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

[2] The amendment was made informally in a letter dated October 25, 1983. In that letter, counsel for Complainant advised counsel for Respondents that Complainant had written its claim for overcharges with respect to a shipment of "batching plants" carried by Respondent, Nedlloyd Lines, on August 19, 1981, from New Orleans, Louisiana, to Damman, Saudi Arabia.

[3] The complaint named the first of the two Respondents "Barber Steamship Lines, Inc., as Agents for Barber Blue Sea Line." The caption of the proceeding was changed to its present style by order of September 27, 1983. In keeping with the usage employed by the parties in their Stipulation of Facts, *infra*, Barber will be referred to hereafter as BBS.

to reparation by virtue of having paid the freight for the four shipments, as agents for the consignee, E. A. Juffali and Bros. Jeddah, Saudi Arabia. For present purposes, the following are the pertinent details of the four shipments:

Date (Bill of Lading)	Respondent	Amount of Claimed Overcharge
(1) August 9, 1981	BBS	$11,448.65
(2) August 9, 1981	BBS	2,285.80
(3) November 21, 1981	Nedlloyd	2,287.66
(4) November 21, 1981	Nedlloyd	2,312.43

The answer, filed August 31, 1983, denied that there were any overcharges, affirmatively contested Complainant's standing to sue and affirmatively invoked the statute of limitations as a bar to suit. A third affirmative defense alleged that Complainant and the consignee were estopped from alleging the overcharge claims because "they agreed in advance of shipment that the now disputed charges were correctly assessed."

After a prehearing conference was held, Respondents moved for summary judgment. Complainant's answer to the motion contained a cross motion for summary judgment.[4] Respondents' motion was not granted because factual issues remained in dispute, but no written ruling was necessary because, at a further prehearing conference, it was decided that the case would be disposed of by an initial decision based upon a factual record consisting of: (1) a Stipulation of Facts agreed to by counsel for both sides and filed with the Commission on April 24, 1984; (2) Exhibits attached to the separate proposed findings of fact to be submitted by the opposing parties or exhibits otherwise in the record and incorporated by reference in those proposed findings.[5]

Subsequent to the filing of the stipulated and proposed findings of fact, I asked Complainant's counsel if Complainant could obtain an assignment from the consignee of any claims the latter might have against the Respondents arising from the four shipments underlying the complaint.[6] On June 8, 1984, Complainant's counsel furnished a telex of such assignment, dated June 7, 1984. By telephone, counsel for Respondents advised me, in effect, that Respondents would not object to a finding that a valid assignment had been made, but that Respondents continued to assert the affirmative defense of the statute of limitations.

[4] The cross motion was not timely. See Notice of Further Prehearing Conference served January 9, 1984, ordering Respondents not to respond to the cross motion. Nevertheless, as indicated at a subsequent prehearing conference, the arguments made in the cross motion will be considered here.

[5] See, also, Procedural Order, served April 30, 1984. The Respondents' Proposed Findings, etc., were filed May 15, 1984. Complainant's Proposed Findings, etc., were received by me on May 18, 1984.

[6] Respondents' counsel was advised of this telephone conversation with Complainant's counsel and informed me that Respondents did not object to what I was doing.

FACTS

In addition to those matters appearing in the Stipulation of Facts, my findings of fact will include those portions of the proposed findings specifically set forth, *infra*. Any proposed findings not included are rejected. Nevertheless, for convenience, some findings of fact appear under headings of this decision other than *Facts*.

THE STIPULATION OF FACTS

The following is the Stipulation of Facts entered into by counsel for the parties:

1. The Complainant challenges the tariff classification which Respondents have applied to four (4) shipments of rock crushing and conveying plants and accessories from Baltimore to Saudi Arabia during the period August—November 1981.

2. For each of these shipments Kuehne and Nagel, Inc.[7] acted as agents for the consignee E.A. Juffali and Bros., Jeddah, Saudi Arabia and paid the freight for the shipments. Respondents have contested the standing of the Complainant to bring this action.

3. The Respondents named above are common carriers by water engaged in transportation of cargo between U.S. ports and Middle East ports and as such are subject to the provisions of the Shipping Act of 1916, as amended.

4. Under BL[8] No. 143944028/81 (Shipment 1) Barber Blue Sea Line (hereafter "BBS") carried from Baltimore to Saudi Arabia a shipment described on the face of the bill of lading, as a "rock crushing and conveying plant (Telsmith 3646 PP–VGF Portable Primary Plant with Vibrating Grizzly Feeder and Accessories)." More specifically, this shipment consisted of 66 packages; 4 of these packages were ro-ro pieces, whereas the remainder were in boxes, crates, etc., and were thus non-ro-ro pieces. Together, these 66 packages weighed 462,190 lbs. and encompassed a volume of 38,825.8 CFT.[9] The ro-ro pieces accounted for 36% by weight and 53% by volume of this shipment.

5. Under BL No. 143943067/81 (Shipment 2) BBS carried from Baltimore to Saudi Arabia a shipment, described on the face of the bill of lading, as a "rock crushing and conveying plant (Telsmith 2540 PP–VGF Portable Primary Crushing Plant with Vibrating Grizzly Feeder and Accessories)". More specifically, this shipment consisted of 46 packages; 2 of these packages were ro-ro pieces, whereas the remainder were in boxes, crates, etc., and were thus non-ro-ro pieces. Together, these 46 packages weighed a

[7] Kuehne and Nagel is a licensed freight forwarder.

[8] All Bills of Lading involved in this proceeding designate Barber Greene as the shipper.

[9] As the weight and measurement figures indicate, the Barber Greene Telsmith Model 3646 is massive. Its portable primary unit weighs about 159,000 pounds and measures about 50 feet long, 23½ feet high and 14½ feet wide. The plant includes one 50-foot, several 60-foot, and one 70-foot conveyers.

total of 239,010 lbs. and encompassed a volume of 17,383.1 CFT.[10] The ro-ro pieces accounted for 52% by weight and 52% by volume of this shipment.

6. Under BL. No. 141947032/81 (Shipment 3) Nedlloyd Lines (hereafter "Nedlloyd") carried from Baltimore to Saudi Arabia a shipment, described on the face of the bill of lading, as a "rock crushing and conveying plant (Telsmith 2540 PP–VGF/DD Portable Primary Plant with Vibrating Grizzly Feeder and Accessories)." More specifically, this shipment consisted of 46 packages; 2 of these packages were ro-ro pieces, whereas the remainder were in boxes, crates, etc., and were thus non-ro-ro pieces. Together, these 46 packages weighed a total of 239,060 lbs. and encompassed a volume of 17,246.2 CFT. The ro-ro pieces accounted for 52% by weight and 52% by volume of this shipment.

7. Under BL. No. 141947029/81 (Shipment 4) Nedlloyd carried from Baltimore to Saudi Arabia a shipment, described on the face of the bill of lading, as a "rock crushing and conveying plant (Telsmith 2540 PP–VGF/DD Portable Primary Plant with Vibrating Grizzly Feeder and Accessories)." More specifically, this shipment consisted of 46 packages; 2 of these packages were ro-ro pieces, whereas the remainder were in boxes, crates, etc., and were thus non-ro-ro pieces. Together, these 46 packages weighed a total of 239,760 lbs. and encompassed a volume of 17,355.8 CFT. The ro-ro pieces accounted for 52% by weight and 52% by volume of this shipment.

8. A rate of $122.25 W/M was applied to the ro-ro pieces in these shipments. This rate is contained in item 1255 of the 8900 Rate Agreement Freight Tariff No. 8, FMC No. 8 ("tariff"),[11] and applies to "Vehicles, Specially Equipped (UNBOXED), Inc.: . . . Mobile Rock Crushing Plants." A rate of $131.25 W/M was applied to the non-mobile, i.e. the non-ro-ro pieces. This rate is contained in item 765 of the tariff and applies to "MACHINES AND MACHINERY AND PARTS THEREOF, N.O.S. (NOT AGRICULTURAL OR ROAD BUILDING) . . . Rock Crushing Plants—(If Mobile See Item 1255)."

9. Complainant contends that the ro-ro pieces are the basic components of the rock crushing plants and that the non-ro-ro pieces are parts of the plants and should have been rated at the lower $122.25 rate. BBS and Nedlloyd, on the other hand, maintain that the rock crushing plants are not mobile units since the plants themselves are incapable of moving on wheels and thus do not qualify for the lower rate in item 1255 which is reserved for specially equipped unboxed vehicles.[12] Accordingly, Re-

[10] Although not as large as Model 3646, Barber Greene Telsmith Model No. 2450 is big. Its portable primary unit weighs 88,000 pounds and measures about 50 feet long, 21½ feet high, and 14¼ feet wide. The plant includes several 50- and one 60-foot conveyers.

[11] Under Rule 9 of the tariff, Kuehne and Nagel was entitled to freight forwarder compensation for services provided to a member line of the Rate Agreement.

[12] Respondents urge that the rock crushing plants cannot be moved without being completely disassembled. See Respondents' Motion for Summary Judgment, p. 7; Appendix B to Respondents' Motion for Summary

spondents believe that the rate of $131.25 is applicable to all pieces except for those mobile ro-ro pieces which qualify for the lower $122.25 rate provided for in item 765 of the tariff. Respondents contend such rating is consistent with tariff items 765 and 1255 and with Rule 2(H) which provides that "Whenever rates are provided for an article named herein, the same rate will also be applicable on named parts of such articles when so described on ocean bills of lading, except where specific rates are provided herein for such parts." Complainant contends that the ro-ro pieces are the main part of the plant. Complainant also contends that the plants should be rated at the $122.25 rate for mobile rock crushing plants and that the non-ro-ro parts should, according to Rule 2(H), be rated at the same rate.[13]

10. The total charges for shipment No. 1 were $161,171.42. Complainant believes that the freight should have been $149,722.77. It therefore seeks a refund of the difference of $11,448.65. As noted, BBS maintains that it charged the correct rate and that no refund is owing.

11. The total charges for shipment No. 2 were $69,318.99. Complainant believes that the freight should have been $67,033.19. It therefore seeks a refund of the difference, $2,285.80. As noted, BBS maintains that it charged the correct rate and that no refund is owing.

12. The total charges for shipment No. 3 were $68,792.56. Complainant believes that the freight should have been $66,504.90. It therefore seeks a refund of the difference, $2,287.66. As noted, Nedlloyd maintains that it charged the correct rate and that no refund is owing.

13. The total charges for shipment No. 4 were $69,241.51. Complainant believes that the freight should have been $66,929.08. It therefore seeks

Judgment, paras. 6, 12. In accordance with the terms of the Procedural Order of April 30, 1984, *supra*, Appendix B was received in evidence without objection from Complainant. There is, of course, a difference between evidence being adduced and evidence satisfying the burden of persuasion. Appendix B is an affidavit of Nedlloyd's Assistant Manager for Pricing and Manager of Conferences. The affiant states that, "it is clear that, after assembly, none of these plants could be moved without being completely disassembled." While it is probably true that the plant would require some disassembly before it could be moved, it is not "clear" from any exhibit that it would have to be "completely disassembled" to be moved. It is evident that the plant was not "completely disassembled" when it was moved aboard Respondents' vessels. Consequently, I do not find that the statement of the affiant reflects the facts of record or meets the burden of persuasion. Moreover, I can perceive of no relevancy to the statement. The issue is not whether the plant can be moved when assembled. The issue is whether the *plant* was "mobile" when shipped. *Webster's Third New International Dictionary of the English Language Unabridged*, G & C Merriam Company, 1967, p. 1450, offers many definitions of the word "mobile." One is "vehicle." Another meaning is "capable of moving or being moved about readily."

[13] Appendix B, previously described, and Appendix A, an affidavit of a BBS official, attached to the Respondents' Motion for Summary Judgment, state, among other things, that the lower rate was intended to pass on to the shipper some of the cost savings realized by the carrier in loading ro-ro equipment, thus implying that it costs more to load boxed shipments or boxed parts or accessories of ro-ro equipment. These statements standing alone (and there is no other probative evidence) do not justify a finding that it costs less to load and unload ro-ro equipment. It may be true, in many instances, that it costs less to handle ro-ro shipments than non-ro-ro shipments, but that lower cost depends upon many factors affecting costs and this record is barren of any evidence of those factors. I find that those statements are merely conclusory and are unsupported by the evidence.

a refund of the difference, $2,312.43. As noted, Nedlloyd maintains that it charged the correct rate and that no refund is owing.

THE APPLICABLE TARIFF PROVISIONS

At the time the shipments were made, the following tariff provisions were in effect.

Item No. 765, at tariff page 120, read:

Commodity Description & Packaging	Rate Basis	Rate
Machines and Machinery and Parts Thereof, N.O.S. (Not Agricultural or Road Building):		
Rock Crushing Plants—(If Mobile, See Item 1255)	W/M	131.25

Item No. 1255, at tariff page 149, read, as pertinent:

Commodity Description & Packaging	Rate Basis	Rate
Vehicles, Specially Equipped (UNBOXED), Incl.:		
Aircraft Servicing Trucks)		
Airfield Vacuum Cleaners)		
Audio-Visual Aid Units)		
Automobile and Scrap Metal Crushing Machinery—Mobile)		
Batching Plants, Asphalt or Cement)		
Communication Repair Trucks)		
Conveyor Trucks)		
Crash Trucks)		
Fire Engines)		
Fork Lifts, Pickup and Warehouse, N.O.S. (Also see Item 1240))		
Hoists, or Lifts, Telescoping (Not truck Mounted))		
Machine Shop Trucks)		
Meterological Instrument Equipped Trucks)		
Mobile Asphalt Mixing Plants)		
Mobile Cafeterias and Kitchens)	W/M	122.25
Mobile Health Clinic)		
Mobile Laboratories)		
Mobile Motion Picture Units)		
Mobile Rock Crushing Plants)		
Platforms, Aerial Work)		
Radar Trucks)		
Radio Trucks)		
Rigs, Drilling Truck/Trailer Mounted)		

Commodity Description & Packaging		Rate Basis	Rate
Road Sweeping Vehicles	)		
Seismograph Instrument Equipped Trucks	)		
Sewer Cleaning Trucks	)		
Soil Testing Laboratory	)		
Vacuum Tank Trucks	)		
Vibratory Compactors—Eff. thru 8/20/81	)	(A)	
Welding Trucks	)		

Units exceeding 60 gross tons in weight per piece or packages—Apply to the "8900" LINES [14]

Rule 2(H) at page 10 read:

RULES AND REGULATIONS

2. *Application of Rates*—

(H) Whenever rates are provided for an article named herein, the same rate will also be applicable on named parts of such articles when so described on ocean bills of landing, except where specific rates are provided, herein for such parts.

DISCUSSION AND CONCLUSIONS

I: Affirmative Defenses

It will be helpful to examine the affirmative defenses before proceeding to the section 18(b)(3) (or tariff overcharge) issue.

A: Standing and Statute of Limitations

The affirmative defenses of lack of standing and running of the statute of limitations are related and may be examined together, even though standing may no longer be in issue by virtue of Respondents' offering no objection to the validity of the assignment which took place in June 1984.

[14] It is noted that the primary unit of Telsmith Model 3646 weighs in excess of 60 tons, but the Respondents do not defend on this basis. Under these circumstances, it may be assumed that the tariff procedures were complied with.

Section 22(a) of the Shipping Act, 1916, 46 U.S.C. 821(a),[15] limits the filing of a complaint for reparation to a period of not more than two years from the time a cause of action accrues.[16]

It is not necessary to engage in a prolonged discussion of the twin affirmative defenses asserted by Respondent in the fact situation presented, for it is now well settled that if a complaint is filed within two years of accrual of a claim, relief by way of reparation will not be denied merely because a complainant did not perfect its claim by the time the complaint was filed. In enunciating this principle, the Commission held that if a complaint was otherwise timely filed, proof of an assignment of the claim to the complainant after the two-year period had run satisfied the complainant's burden of establishing it was the person that suffered injury.[17] See *Rohm & Haas Co.* v. *Italian Line,* 24 F.M.C. 429 (1981); *Interconex, Inc.* v. *Federal Maritime Commission,* 572 F.2d 27 (2 Cir. 1977).

On the authority of *Rohm & Haas Co.* v. *Italian Line, supra,* the affirmative defenses alleging lack of standing to sue and alleging the bar of the statutory limitations are dismissed.

B: Estoppel By Agreement

It is not necessary to decide whether the defense of estoppel by agreement is an available defense to causes of action alleging overcharges, because the existence of that agreement is denied by Complainant and, in the face of that denial, there simply is no proof that either Kuehne and Nagel or Juffali "agreed in advance of shipment that the now disputed charges were correctly assessed."

Presumably, the evidentiary matter relied upon by Respondents to support this affirmative defense are the following statements which appear in affidavits attached to this motion for summary judgment.

Paragraph 7 of the affidavit of a BBS vice-president states:

> The shipments involved here are part of a long series of similar shipments beginning in 1979 or 1980. Prior to and during such series of shipments, I discussed the subject charges with Kuehne & Nagel personnel in New York and Juffali & Bros personnel

[15] As pertinent, section 22(a) provides:

> That any person may file with the [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, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

[16] By Notice, "Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984," served May 15, 1984, 49 *Fed. Reg.* 21,798 (May 23, 1984), the Commission stated that determination of the applicability of the Shipping Act of 1984 in cases pending before the agency on June 18, 1984, the effective date of the 1984 Act, would be made on a case-by-case basis. In light of the decision reached herein, it is not necessary to determine the applicability of section 11 of the 1984 Act, which provides for a three-year statute of limitations, to this proceeding. See section 11 of the Shipping Act, 1984, 46 U.S.C. app. 1710(g).

[17] Of course, there must also be proof of a violation of the Shipping Act.

in Saudi Arabia. BBS's rating policies as reflected and explained in the accompanying Motion for Summary Judgment were understood and agreed to by all parties.

Paragraphs 15 and 16 of the affidavit of Nedlloyd's assistant manager for pricing and manager of conference state:

> In further support of our position, I would point out that, the shipments involved here are part of a long series of similar shipments beginning in 1979 or 1980. Prior to and during such series of shipments, I discussed the subject charges with employees of both Juffali and Bros. and Kuehne and Nagel by telephone, telex, and letter. Nedlloyd's rating policies as reflected and explained in the accompanying Motion For Summary judgment were understood and agreed to by all parties.
>
> Since these shipments began, Nedlloyd has always made clear that ro-ro components of stationary batching and rock crushing plants would be rated under the lower rate received for mobile plants, but that other pieces of such stationary plants would be rated at the higher rate reserved for stationary plants. A letter from Nedlloyd to Kuehne & Nagel reflecting Nedlloyd policy on this subject is attached.

The referenced letter from a Nedlloyd sales representative to a named, but otherwise unidentified Kuehne and Nagel employee [18] reads in pertinent part:

> RE: "NEDLLOYD ROUEN" VOYAGE 0129 BALTIMORE/DAMMAM–ONE TELSMITH 3646 PP–VGF ROCK CRUSHING AND CONVEYING PLANT.
>
> We are writing in reference to your recent booking of this Rock Crushing and Conveying Plant on the Nedlloyd Rouen voyage 0129.
>
> To reiterate on what was quoted to you, the following rates will apply on this shipment:

All Rolling Stock Pieces	$116.25 W/M
All Break Bulk Pieces	$125.00 W/M

> Break Bulk Pieces are subject to heavy lift charges where applicable. Rock Crushing and Conveying Plant must be shown on the Bill of Lading in order for these rates to apply.
>
> These rates are subject to the Bunker Surcharge and War Risk Surcharges in effect at the time of shipment.
>
> We trust all of the above will satisfy your requirements. Should you have any further questions, please feel free to call us at 212/432–9150.

[18] All that the record shows is that she is the notary public before whom the complaint was verified.

It is apparent that all that those affidavits and the letter establish is that, a letter, dated October 29, 1980, was sent from Nedlloyd to Kuehne and Nagel setting forth Nedlloyd's quotation for the Telsmith Model 3646 rock crushing plant. It does not manifest Kuehne and Nagel's agreement or, even, acquiescence, that the quoted rates were the rates published in the governing tariff. Inasmuch as the burden of proof is on the party alleging an affirmative defense and the Respondents have failed to meet that burden, the affirmative defense of estoppel by agreement must be dismissed.

In apparent recognition that their affirmative defense is unfounded and unsound, in their proposed findings of fact, Respondents do not seek a finding that an agreement existed and, in their motion for summary judgment, Respondents make no argument in support of this defense. But they do not entirely abandon their defense. Instead, they alter it and call it "custom and usage." Thus, they claim that the cited passages from the affidavits and the letter are evidence of custom and usage, which they assert are useful and reliable factors to be considered in determining the meaning of a tariff item.

In *Allied Chemical S.A.* v. *Farrell Lines, Inc.*, 23 F.M.C. 381, 401 (I.D. 1980), adopted 23 F.M.C. 375 (1980), the Commission did state that custom and usage were useful and reliable tools for interpreting a tariff, but the Commission also stressed that custom and usage, as an aid to interpretation, come into play only when certain conditions are satisfied. First, custom and usage cannot vary the terms of a tariff. Second, there must be evidence that carrier and shipper both accorded the same meaning to the tariff provision. This is the way the Commission put it:

> Custom and usage cannot vary the terms of a tariff. But, custom and usage, as demonstrated by the actions of carriers and shippers, are useful and reliable factors to be considered in determining the meaning of a tariff item.

For present purposes, it is not necessary to examine the first condition, because the second condition has not been met. Respondents have made no showing of mutuality of tariff interpretation nor any showing of acquiescence by the shipper interests in the "interpretation" provided by Nedlloyd. In this respect it must be noted, also, that there is no evidence of record showing a course of conduct dating back to shipments made in 1979, despite the statements to that effect in the affidavits. The only evidence of record which shows when the rock crushing plant shipments might have begun is the Nedlloyd letter of October 29, 1980, but that letter relates to a single booking and cannot be considered as persuasive evidence of mutuality of tariff interpretation. Neither does the letter constitute proof that the shipment contemplated by the booking took place.[19]

[19] This finding should not be misunderstood. I do not find that Kuehne and Nagel/Juffali did not ship rock crushing plants under the 8900 Rate Agreement tariff until the fall of 1981. I merely find that the record

Accordingly, whether it is intended as an adjunct to the estoppel defense or merely as an aid to tariff construction, the custom and usage argument must be rejected.

II: THE 18(b)(3) ISSUE

The contentions of the two sides to the dispute with respect to the tariff overcharge issue appear in Paragraph No. 9 of their Stipulation of Facts, *supra*, and will not be repeated here except when required for clarity.

This much is clear about the facts which bear on the question. Sometime in the fall of 1980, the Complainant booked a shipment of a Telsmith 3646 Rock Crushing Plant aboard a Nedlloyd vessel. When that shipment was booked, Nedlloyd quoted a rate of $116.25 W/M on all rolling stock pieces and a rate of $125.00 W/M on all break bulk pieces. Official notice may be taken that on October 29, 1980, the following rates appeared in the tariff: [20]

Item No. 765 [21]—$125.00 W/M
Item No. 1255 [22]—$116.25 W/M

It is manifest, then, neither in 1980, when the letter was sent, nor in 1981, when the shipments took place, was there any tariff commodity description for rock crushing plants which included the terminology "rolling stock pieces" or "break bulk pieces." Thus, rather than providing an aid to construction of the tariff provisions, the letter introduces elements dehors the tariff and, as will be seen, at variance with the terms of the tariff.

While it may be possible, armed with the October 29, 1980, letter, to reach the conclusion that Respondents intended the tariff to mean what was represented in the letter, the tariff, as published, is not susceptible of being accorded that construction. The tariff plainly provides for the application of the Item No. 1255 rates to each of the four shipments of rock crushing plants, in their entirety. An explanation follows.

By way of introduction, it should be noted that there is no dispute that the Item No. 765 rate applies to all non-mobile rock crushing *plants*.

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does not establish that they made shipments before that date. Neither do I find that shipments, if any, made before the fall of 1981 were rated any differently by the carriers than were these shipments. I find only that there is no evidence of probative value in the record before me to warrant a finding that these four shipments "are part of a long series of similar shipments beginning in 1979 or 1980."

[20] Prior to the writing of this decision, Respondents were orally advised that I would take official notice of the effective tariff provisions at the time of the October 29, 1980, letter. Respondents agreed that the tariff provisions cited, *infra*, were in effect at that time. See section 7(d) of the Administrative Procedure Act, 5 U.S.C. 556(e) and Rule 226(a) of the Commissions' Rules of Practice and Procedure, 46 CFR 502.226(a), authorizing the taking of official notice of a material fact not in the record.

[21] The tariff description for Item No. 765, at 8th rev. p. 121, effective September 29, 1980, was nearly identical to the one shown in the text under the heading "The Applicable Tariff Provisions," *supra*.

[22] The tariff description for Item No. 1255, at 16th rev. p. 147, effective October 27, 1980, differs from the one shown in the text, *supra*, by the absence of the word "(UNBOXED)" following the words "Vehicles, Specially Equipped."

The underpinning of Respondents' overcharge defense lies in the belief that the commodity description set forth in Item No. 1255 is applicable only to unboxed vehicles, i.e., ro-ro pieces. They put it this way—"Therefore, mobile rock crushing plants that are in the form of *unboxed vehicles* get a lower rate than such plants would otherwise obtain."[23] From this base, they urge that because the ro-ro pieces, "Whether by weight or volume," amounted to "less than 54% of each shipment,"[24] the remaining percentage, consisting of boxes, crates and skids were properly rated under Item No. 755.

Respondents' argument assumes that there may be a minimum percentage of vehicle weight or volume which might allow the remainder (boxes, skis and crates) to carry the vehicle rate. Of course, the tariff provides no minimum, nor do Respondents suggest what that minimum might be. Under the circumstances, it is fair to construe the commodity description in Item No. 1255 to mean that if more than half of a shipment, measured by weight or volume, consists of vehicles, that commodity description fits the shipment. Respondents attempt two separate approaches to fill the gap between premise and conclusion. First, they posit that after assembly, the plants could not be moved without being completely disassembled.[25] They follow this statement with the curious assertion that it would be reasonable for them to argue, therefore, that even the ro-ro pieces would not qualify for the vehicle rates by virtue of the fact that since the plants are not mobile, the vehicles could not be components of a mobile plant, but, instead should be viewed as components of a stationary plant. Seemingly recognizing that this approach might jeopardize the manner in which they actually rated the bills of lading, Respondents resolve their quandary by saying that they gave the shipper the "benefit of the doubt" and classified the *"ro-ro pieces only"* under the rates for mobile plants.

However, the facts upon which Respondents rely for their "benefit of the doubt" argument and the facts upon which they attempt to support their estoppel/custom and usage defense collide head on. Given the documentary nature of the evidence underlying the custom and usage defense, the "benefit of the doubt" argument and the "facts" implied by that argument are determined to be devoid of credibility.

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[23] Respondents' Motion For Summary Judgment, p. 6.

[24] See Stipulation of Facts, Nos. 4 through 7, inclusive, *supra*. Summarized, those Facts disclose the following with respect to weight and measurement percentages:

Shipment	Ro-Ro Weight %	Ro-Ro Volume %
No. 1	36	53
No. 2	52	52
No. 3	52	52
No. 4	52	52

[25] See n. 12, *supra*, rejecting a finding to this effect.

Second, Respondents urge an equally fanciful conclusion bottomed on their cost saving hypothesis.[26] They say that the lower Item No. 1255 rate, which applies only to unboxed vehicles, was "intended"[27] to pass on the savings from less costly handling to the shipper. (One may observe that this argument is also at loggerheads with the "benefit of the doubt" argument.) Overlooking their admission that the non-ro-ro portions consisted of components other than boxes, they complete their point by saying, "Thus, even if the non-ro-ro pieces in issue were vehicles or parts of vehicles (and they are not), most would not qualify for the lower rate because they are not unboxed."[28] Even if the cost savings basis for this argument had not been rejected, I can perceive scant merit to the logic of this argument, for in addition to being without evidentiary support, it overlooks the unambiguous language of the tariff.

It is evident that if the tariff writers wanted to limit the application of the Item No. 1255 rate to only those parts of rock crushing plants which were unboxed (ro-ro) vehicles, they were not without the means to do so. Yet they did not. They did not make the rate applicable only to ro-ro *parts of* "Mobile Rock Crushing Plants." They did make the lower rate applicable to *entire* "Mobile Rock Crushing Plants," whether or not some components were non-ro-ro. One does not have to go beyond the commodity and packaging provisions of Item No. 1255 for confirmation that the parts rule of the tariff, Rule 2, Application of Rates, *supra*, is to be applied to non-ro-ro component parts of mobile rock crushing plants for those provisions specifically identify "*pieces* or *packages*" as units of "Mobile Rock Crushing Plants."

Summarizing, the commodity description did not limit the lower rates under Item No. 1255 to: "Vehicles, Specially Equipped (UNBOXED), Incl. Mobile, Rock Crushing Plants, ro-ro pieces only." There are no such words of limitation in the tariff. To the contrary, as if the unconditional language "Mobile Rock Crushing Plants" were not sufficient to allow for the inclusion of non-ro-ro parts, Item No. 1255 expressly denominates pieces and packages as units within the scope of that Item. A package is, after all,

[26] See n. 13, *supra*, for rejection of the cost saving contention.

[27] Respondents' Motion For Summary Judgment, p. 7.

[28] *Id.* In using the word "most" to describe the quantity of "not unboxed" components, Respondents treat themselves generously. However, their proposed findings do not attempt to show the breakdown by number, weight or volume of the components. An examination of the bills of lading and riders thereto show the following numbers of non-ro-ro pieces in each shipment.

Shipment	Boxes	Skids	Crates	Bundles	Cases	Pieces
No. 1	6	9	2	4	9	32
No. 2	6	1	2	3	7	25
No. 3	6	3	2	3	7	23
No. 4	5	1	3	3	7	25

It should be noted that Respondents make no claim that skids, crates, bundles, cases and pieces do not meet the definition of "unboxed."

a commodity in a container or wrapping of some sort.[29] Moreover, even if the package provision did not appear in Item No. 1255, the non-ro-ro pieces, skids, crates, bundles, etc., clearly qualify for the rate shown for that Item under Rule 2 because they are *parts* of "Mobile Rock Crushing Plants."[30]

The lesson to be learned from this exercise is that a tariff must be given the plain meaning of the language which appears within the four corners of the tariff pages. The language of this tariff is quite clear. The only element which detracts from that clarity and which, at best (treating that element most favorably to Respondents), introduces an ambiguity, is the Nedlloyd letter of October 29, 1984. However, extrinsic evidence may not be used to vary the plain meaning of the terms of a tariff nor will an ambiguity be resolved in favor of the tariff publisher. See *West Gulf Maritime Association* v. *Port of Houston Authority*, 22 F.M.C. 420, 451 (1980), Rejection of Petition [For Reconsideration], 22 F.M.C. 560 (1980), aff'd mem. sub nom. *West Gulf Maritime Association* v. *Federal Maritime Commission*, 652 F.2d 197 (D.C. Cir (1981)), cert. denied 454 U.S. 893 (1981). Accordingly, I find that Complainant was overcharged for each of the shipments in violation of section 18(b)(3).[31]

ORDER

It is ordered that Barber Blue Sea Line make reparation to Kuehne and Nagel, Inc., in the amount of $13,734.45, together with interest thereon, said interest to be computed in accordance with Rule 253 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.253.

It is further ordered that Nedlloyd Lines make reparation to Kuehne and Nagel, Inc., in the amount of $4,600.09, together with interest thereon, said interest to be computed in accordance with Rule 253 of the Commission's Rules of Practice and Procedure, 46 CFR 502.253.

(S) SEYMOUR GLANZER
Administrative Law Judge

[29] See *Webster's Third New International Dictionary of the English Language Unabridged, supra,* at pp. 1617–1618.

[30] Respondents would apply Rule 2 to their arguments in this way. Bearing in mind that Rule 2 allows parts to take the same rate as the article (the commodity described in the tariff), they urge that the non-ro-ro parts of the rock crushing plants must be viewed as stationary rock crushing plants, thus taking the specific rate provided in Item 765. They do not explain, however, how component parts of a mobile plant can, without more, become parts of a stationary plant.

[31] There is no cause to independently examine the substantive applicability of the Shipping Act, 1984, 46 U.S.C. app. 1701, to this proceeding beyond the statement which appears in this note, inasmuch as the provisions of sections 18(b)(3) and 22 of the Shipping Act, 1916, which bear upon the subject matter of this case have not been substantively altered by the comparable provisions in the new statute—sections 10(b)(1) and 11, 46 U.S.C. app. 1709(b)(1) and 1710. N.B. Attorneys' fees were not requested in the complaint, nor subsequently. See Notice cited in n. 16, *supra.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–21

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES—SERVICE CONTRACTS AND TIME/VOLUME CONTRACTS

DOCKET NO. 84–23

FILING OF TARIFFS AND DUAL RATE CONTRACT SYSTEMS IN THE FOREIGN COMMERCE OF THE UNITED STATES

DOCKET NO. 84–26

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

ORDER DENYING PETITIONS FOR RECONSIDERATION

APRIL 5, 1985

On November 15, 1984, the Federal Maritime Commission published Final Rules in the above-captioned proceedings which implemented various provisions of the Shipping Act of 1984 (46 U.S.C. app. §§ 1701–1720) (the Act or the 1984 Act). 49 *Fed. Reg.* 45320–45396. These Final Rules became effective on December 15, 1984.

Subsequent to the publication of the Final Rules, the Commission received pleadings, including petitions for reconsideration and replies thereto, which seek modifications of certain aspects of the Final Rules. A group of conferences serving the Mediterranean, Australian and New Zealand trades filed petitions for reconsideration in Docket Nos. 84–21, 84–23, and 84–26.[1] A group of conferences serving the North Atlantic trades filed petitions for rulemaking, or alternatively, replies in support of the Mediterranean Conferences' petitions, in Docket Nos. 84–21, 84–23, and 84–26.[2] A group

[1] The conferences, which are hereinafter collectively referred to as "the Mediterranean Conferences", are: Australia/Eastern U.S.A. Freight Conference; Greece/U.S. Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Med-Gulf Conference; Mediterranean-North Pacific Coast Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; and West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference.

[2] The conferences, which are hereinafter collectively referred to as "the U.S.-European Carrier Associations", are: North Europe-U.S. Gulf Freight Association; Gulf-European Freight Association; North Europe-U.S. Atlantic Conference; U.S. Atlantic-North Europe Conference; and Pan-Atlantic Carrier Trade Agreement.

Continued

of conferences serving the transpacific trades filed a reply in support of the Mediterranean Conferences' petitions in Docket Nos. 84–21 and 84–23.[3] And the North Europe-U.S. Pacific Freight Conference (NEUSPFC) filed a reply in support of the U.S.-European Carrier Associations' petition in Docket No. 84–26.[4]

One issue raised in the Petitions regarding conference membership is currently being addressed in a recently inaugurated rulemaking proceeding.[5] The proposed rule would, among other things, allow conference membership changes to become effective upon filing, and would essentially provide the relief requested by the Petitions on this issue. In fact, one of the petitioning conferences acknowledges that final adoption of the proposed rule in Docket No. 85–4 will render the conference membership issue moot.

It is the intention of the Commission to take this same approach to another issue raised in the Petitions and to inaugurate a future rulemaking on service contracts which will address the question of whether the Shipping Act of 1984 allows a service contract to be stated in terms of a fixed portion or percentage of the total quantity of the commodity described in the contract. The Commission believes that such a separate proceeding will offer a better vehicle for the consideration of this issue in light of the overall objectives and policies of the 1984 Act. This future rulemaking will also provide an opportunity for further public comment on this specifically defined question.

The requested relief from the quarterly index of documents requirement will not be granted at this time, but the rule may be reconsidered at a future date based on the Commission's experience under the rule. The document index rule requires conferences and rate agreements to maintain an index of twelve specific categories of documents and to file this index with the Commission on a quarterly basis.[6] The Petitions have urged the Commission to withdraw the index rule or to suspend its effectiveness until the completion of further rulemaking, essentially on the grounds that it is an unreasonable and unnecessary burden. In denying the requested relief at this time, the Commission is directing the staff to review the index filings for the first quarter of 1985 in order to determine the extent to which such filings may be an undue burden on the industry, and to evaluate the regulatory utility of such indices. The Commission will review the staff's report concerning the indices filed for the first quarter of 1985,

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The Office of the Secretary advised filing counsel by letters dated February 20, 1985 and March 7, 1985 that the pleadings submitted on behalf of the U.S.-European Carrier Associations would be treated as replies in support of the Mediterranean Conferences' Petitions.

[3] The conferences, which are hereinafter collectively referred to as "the Transpacific Conferences", are: Trans-Pacific Freight Conference of Japan/Korea; and Japan/Korea-Atlantic and Gulf Freight Conference.

[4] All of these pleadings are hereinafter collectively referred to as "the Petitions".

[5] *See* Docket No. 85–4, *Miscellaneous Modifications to Existing Agreements—Exemption* (50 *Fed. Reg.* 5401–5402, February 8, 1985).

[6] *See* 46 C.F.R. § 572.704. The first quarterly reports for the period January 1, 1985 to March 31, 1985 are to be submitted on or before April 30, 1985.

and based upon this experience, will at that time determine whether to rescind or modify the index requirement.

Finally, the Commission has determined not to withdraw its statement that loyalty contracts would appear to be subject to both the Shipping Act of 1984 and the federal antitrust laws. The Commission's statement was made in response to a comment which suggested that the use of a loyalty contract is an activity which enjoys antitrust immunity under section 7 of the 1984 Act (46 U.S.C. app. § 1706). The statement was not "volunteered" by the Commission as is suggested in the Petitions. Nor is the statement an "advisory opinion" as is suggested in the Petitions. Nor is the statement intended to assert or imply that the Commission has any jurisdiction over the antitrust laws. The statement is merely a response to a comment and an explanation of the action taken by the Commission in issuing its Final Rules. This statement remains the Commission's view of section 7 of the Act and the Commission does not see any need to further address this question in a future rulemaking.

Accordingly, the Commission has determined to deny the Petitions. In the case of the service contract and quarterly index issues, this denial is without deciding the ultimate merits of the various arguments presented in the Petitions.

THEREFORE, IT IS ORDERED, That the Petitions filed on behalf of the Mediterranean Conferences in Docket Nos. 84–21, 84–23, and 84–26; the Petitions filed on behalf of the U.S.-European Carrier Associations in Docket Nos. 84–21, 84–23 and 84–26; the Petitions filed on behalf of the Transpacific Conferences in Docket Nos. 84–21 and 84–23; and the Petition filed on behalf of the North Europe-U.S. Pacific Freight Conference are denied.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 580]

DOCKET NO. 84–27

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES; CO-LOADING PRACTICES BY NVOCCS

April 10, 1985

ACTION: Final rule.

SUMMARY: This Final Rule addresses the practices of Non-Vessel-Operating Common Carriers (NVOCCs) combining cargo, usually for the purpose of attaining full container loads, such practices being commonly known as co-loading. The rule requires each NVOCC to describe in its tariffs the undertaking to offer or perform co-loading. Further, the Rule requires that NVOCCs give actual notice to a shipper that its cargo has been co-loaded and of the identity of the other NVOCC(s) involved in the co-loading. Special rates published by one NVOCC for the exclusive use of other, co-loading NVOCCs will be prohibited.

DATES: Effective May 15, 1985.

SUPPLEMENTARY INFORMATION:

The Commission initiated this rulemaking proceeding by publication of a Notice of Proposed Rulemaking in the *Federal Register* on July 25, 1984, 49 FR 29980. The Commission received 15 comments on the Proposed Rule. Commenting parties or groups of parties are: (1) 3-Way Ocean; (2) Airport Brokers Corporation; (3) John v. Carr & Son, Inc.; (4) F.X. Coughlin Co.; (5) Greene Companies International Inc.; (6) Hemisphere Forwarding, Inc.; (7) F.W. Myers & Co., Inc.; (8) New England Groupage; (9) Reardon Export, Inc.; (10) Associated Latin American Freight Conferences; Atlantic & Gulf/West Coast of South America Conference; East Coast Colombia Conference; South Atlantic & Gulf/Guatemala, El Salvador & Honduras Rate Agreement; South Atlantic & Gulf/Panama & Costa Rica Rate Agreement; United States Atlantic & Gulf/Ecuador Freight Conference; United States Atlantic & Gulf/Jamaica and Hispaniola Steamship Freight Association; United States Atlantic & Gulf/Southeastern Caribbean Conference; United States Atlantic & Gulf/Venezuela Freight Association; United States Florida/Ecuador Steamship Conference; West Coast of South America Northbound Conference; (11) 8900 Lines; 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 Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Mediterranean-North Pacific Coast Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; West Coast of Italy Sicilian and Adriatic Ports/North Atlantic Range Conference; (12) Japan/Korea-Atlantic and Gulf Freight Conference; New York Freight Bureau; Philippines North America Conference; Trans Pacific Freight Conference (Hong Kong); Trans Pacific Freight Conference of Japan/Korea; (13) Council of European & Japanese National Shipowners' Associations; (14) International Association of NVOCCs; and (15) National Customs Brokers and Forwarders Association of America, Inc.

In general, the commenters' views were as follows:

Individual NVOCC's Comments

New England Groupage (New England) supports the Proposed Rule without any changes. New England states that the abuses of co-loading greatly exceed any benefit that the shipping public might derive from the practice.

Three other commenters, 3-Way Ocean (3-Way), John V. Carr & Son, Inc. (Carr), and F.X. Coughlin Co. (Coughlin), support the Commission's Proposed Rule, in part. These commenters essentially object to the documentation requirements and the prohibition of special co-loading rates. Further details of these and other commenters' views are outlined herein under the various sub-parts of the Proposed Rule.

The five other commenting NVOCCs, Airport Brokers Corporation (Airport), Greene Companies International, Inc. (Greene), Hemisphere Forwarding, Inc. (Hemisphere), F.W. Myers & Co., Inc. (Myers) and Reardon Export, Inc. (Reardon) do not support the Proposed Rule, because in their opinion co-loading does not require special treatment with a special tariff filing rule. Hemisphere urges the Commission to enter into an investigation prior to pursuing a final rule which might result from the instant rulemaking procedure. Hemisphere, Airport, Greene, Myers and Reardon are of the opinion that the public is aware of the liability and responsibilities inherent in co-loading and that the present tariffs and rate structures of the NVOCCs and the VOCCs accommodate the economics and efficiencies of co-loading. Further, Greene is of the opinion that the Commission lacks jurisdiction in the matter of co-loading agreements.

Conferences' Comments

The Conferences support the Commission's effort to promulgate a rule covering co-loading. The Conferences, however, would modify the rule to provide: (1) additional documentation requirements which would require NVOCCs to notify the shipper prior to booking of the fact that the shipper's cargo would be co-loaded; (2) a restriction to allow co-loading only for

LCL shipments; and (3) a clarification of the rule as it relates to NVOCCs' co-loading activities which involve agreements.

Transportation Organizations' Comments

The Council of European & Japanese National Shipowners' Associations (CENSA) support the Proposed Rule, but suggest that the Commission review and clarify its jurisdiction in any circumstance where an NVOCC also acts as an ocean freight forwarder or undertakes other activities in connection with export or import shipments.

The International Association of NVOCCs (IANVOCCs) shares Greene's views with respect to the Commission's jurisdiction over NVOCC agreement matters. The IANVOCCs supports the Proposed Rule in principle, but urges that the Commission delete any reference in the rulemaking that suggests that NVOCCs can avoid their responsibility in publishing tariff information concerning co-loading by merely mentioning that such an activity is performed under the terms of an agreement.

Lastly, the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) is of the opinion that the Proposed Rule will impede lawful NVOCC activities which are regarded as beneficial to U.S. exports and thus requests that the Commission grant its request for oral argument in order to develop further details in this rulemaking. Briefly, NCBFAA states that the proposed requirements relating to the explanation of liability in both the tariff and in shipment documentation in section 580.17(b)(3) and the proposed prohibition of special co-loading rates in section 580.17(d) are burdensome to the NVOCCs, harmful to the shipping public, and will curtail viability of the forwarder/NVOCC.

Comments directed to specific portions of the proposed rule are discussed below:

Section 580.17 Special Rules and Regulations Applicable to Co-loading Activities of Non-Vessel-Operating Common Carriers (NVOCCs)

(a) *Definition*

> For the purposes of this section, "Co-loading" means the combining of cargo by two or more NVOCCs for tendering to an ocean carrier under the name of only one of the NVOCCs.

The National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) suggests that where the term "ocean carrier" appears in section 580.17(a) it should be amended to state "ocean *common* carrier" to be consistent with the statutory term and definition. We will not adopt this suggestion because it would unnecessarily narrow the scope of the regulations. An NVOCC is a common carrier regardless of whether the cargo it handles is ultimately transported by an ocean common carrier or by some other type of ocean carrier, such as a contract or tramp

carrier.[1] The ability to co-load and the necessity for notice to and equal treatment of shippers are unaffected by the NVOCC's choice of underlying vessel operator.

Greene states that the definition ignores the important distinctions between co-loading by agreement and co-loading through published tariffs. While there may be important distinctions between these two types of co-loading arrangements, the definition is not the place in which these distinctions need be reflected. We believe that co-loading by either type of arrangement does and should meet the definition set forth in the Rule. As indicated below, the substantive requirements of this Rule are made applicable only to those co-loading arrangements where a shipper/carrier relationship exists between the tendering and receiving NVOCCs, regardless of the existence of an agreement.

The Associated Latin American Freight Conferences, *et al.* (ALAFC) suggest that the words "in the import or export foreign commerce of the United States" be added to the definition of co-loading to make it clear that these regulations apply equally to foreign-based NVOCCs operating in U.S. import trades. It was the intent of the Commission to apply these rules to all NVOCCs subject to the Shipping Act of 1984 and we will, therefore, adopt ALAFC's suggestion in the interest of clarity.

The U.S. Atlantic & Gulf/Australia-New Zealand Conference, *et al.* (AGANZ) suggest that the definition be amended to delete the words "under the name of only one of the NVOCCs." Their concern is that the regulations would arguably not apply if cargoes are tendered to an ocean common carrier under the name of more than one NVOCC. The Commission is unaware of present co-loading arrangements by which cargo is tendered to an ocean common carrier under the name of more than one NVOCC. However, the possibility would appear to exist as suggested by AGANZ and, if so, could circumvent the intent of the Rule. Therefore, we will adjust the definition to accommodate AGANZ's concern, but will leave intact the concept that the cargo must be tendered to the ocean carrier in the name of one (or more) of the NVOCCs involved in the co-loading. To delete the phrase completely would broaden the scope of the regulations and could arguably encompass activities beyond the Commission's jurisdiction, such as those of shippers' agents, freight brokers, etc. One or more of the NVOCCs involved in the co-loading must be named as the shipper on the ocean carrier's bill of lading.

[1] The definition of NVOCC found in section 3(17) of the Shipping Act of 1984 (46 U.S.C. App; 1702(17)) states that an NVOCC is a shipper in its relationship with an *ocean common carrier*. We view this language as a clarification of the relationship between an NVOCC and the only type of ocean carrier that is regulated by the 1984 Act when the NVOCC tenders cargo to that type of carrier. We do not believe that Congress intended, by that language, to limit regulation of NVOCCs to only those which tender cargo to *ocean common carriers*. The activities of the NVOCC which are sought to be regulated—i.e., its holding out to the public as a common carrier—are not affected by the type of vessel operating carrier to which the NVOCC chooses to tender the cargo.

Section 580.17(b)(1)

(a) *Filing Requirements*
(1) All tariffs filed by an NVOCC shall contain a rule which describes its co-loading activities. If co-loading is accomplished pursuant to the terms of an agreement between or among NVOCCs, it is only necessary to note the existence of such agreement in each of the applicable NVOCC tariffs. If a co-loading service is not offered or performed by an NVOCC, its tariffs shall contain a rule which states that co-loading is "not offered or performed" by the publishing carrier.

Greene argues that the Commission lacks jurisdiction to promulgate regulations which require information concerning the implementation of private co-loading agreements and that none of the proposed sections of the Rule effectively deal with co-loading when offered or performed pursuant to an agreement between NVOCCs.

The IANVOCCs shares the same view as Greene with respect to the Commission's jurisdiction over NVOCC agreement matters. The IANVOCCs, however, supports the Commission's proposed rule in principle, and suggests that the Commission delete any reference in the rulemaking which infers that NVOCCs can avoid their responsibility in publishing tariff information concerning co-loading by merely mentioning that such an activity is performed under an agreement.

ALAFC are of the opinion that NVOCCs should be required to append any agreement it has executed on co-loading to its tariff so that shippers are made aware of any arrangements between NVOCCs.

AGANZ and the Transpacific Freight Conference of Japan/Korea *et al.* (Trans-Pac) suggest that section 580.17 be amended to accommodate co-loading activities which are implemented through an agreement. It is AGANZ's and Trans-Pac's opinion that agreement matters relating to co-loading must be viewed as a "practice" subject to tariff-filing requirements.

AGANZ further suggests that a distinction should be drawn between co-loading agreements which do not involve the furnishing of common carrier services and co-loading agreements which do involve the furnishing of common carrier services by the receiving NVOCC to the tendering NVOCC. In the latter case, AGANZ argues that the tariffs of the receiving NVOCC should be required to reflect the terms of the arrangement, regardless of the existence of an agreement.

AGANZ also comments that co-loading agreements could be required to be filed under the Shipping Act of 1984 when an NVOCC party to such an agreement is otherwise subject to agreement-filing requirements of either the 1984 Act or the Shipping Act, 1916. Attention is called to the Commission's Notice of Proposed Rulemaking of August 29, 1984 (49 FR 34253) in which the Commission announced an opinion that section 15 of the 1916 Act continued to apply to agreements between freight forwarders.

This last suggestion is one that is beyond the scope of this rulemaking proceeding and one that we believe addresses an unlikely situation. Since AGANZ filed its comments, Congress has acted to remove agreements among freight forwarders from the filing and approval requirements of the Shipping Act, 1916 (H.R. 5833, Pub. L. No. 98–595, 98 Stat. 3130 (1984). See 49 FR 46174, November 23, 1984. The only two entities now required to file agreements with the Commission relating to foreign commerce are ocean common carriers and marine terminal operators, neither of which is a typical affiliate of an NVOCC. Should such a situation arise in which ocean common carriers or marine terminal operators enter into an NVOCC co-loading agreement, we would address that situation on an *ad hoc* basis.

The general subject of co-loading performed pursuant to the terms of an agreement requires some clarification. As we said in the Notice of Proposed Rulemaking (p. 4 note 1), we express no opinion on the relationship that may be created between two or more NVOCCs by the terms of a private agreement. However, we agree with the comments that suggest that all shipper/carrier relationships between two or more NVOCCs should be reflected in appropriate NVOCC tariffs regardless of the existence of a separate agreement. Section 8 of the Shipping Act of 1984 is very explicit in its requirement that each common carrier file:

> "tariffs showing all its rates, charges, classifications, rules, and practices between all points or points on its own route and on any through transportation route that has been established."

Complementing the filing requirement of section 8 are the prohibitions of section 10(b) of the act.

> "(b) Common Carriers.—No common carrier, either alone or in conjunction with any other person, directly or indirectly may—
>
> (1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts; [or] . . .
>
> (3) extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs or service contracts; . . ."

As long ago as 1935, the Commission's predecessor, the United States Shipping Board Bureau recognized that,

> "The law prohibits special arrangements between shippers and carriers unless the terms thereof are fully disclosed in the tariff."[2]

[2] *Intercoastal Investigation, 1935*, 1 USSBB 400, 416 (1935) While that case was decided under the Intercoastal Shipping Act, 1933, (46 U.S.C. app. 843 *et seq.*) the tariff filing and adherence provisions of that Act are virtually identical to those now contained in the Shipping Act of 1984, with the exception of the

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The important question pertinent to this proceeding is whether a shipper/carrier relationship exists between the NVOCCs in a co-loading arrangement. If it does, the statute requires that the "carrier" party to that arrangement include all of the applicable rates, charges, concessions, privileges etc. in its tariffs. The rate in the effective tariff affords the only legal basis upon which freight charges may be collected, any agreement to the contrary notwithstanding.[3]

A shipper/carrier relationship is established in a co-loading arrangement when the receiving NVOCC issues a bill of lading to the tendering NVOCC for the transportation of the co-loaded cargo. In such instances, the tendering NVOCC looks to the receiving NVOCC in the event of loss or damage to the co-loaded cargo, and the tendering NVOCC has no privity of contract or other type of direct relationship with the ocean carrier or other carrier which forms the next link in the transportation chain.

In contrast, one example of a carrier/carrier relationship would appear to be where two NVOCCs hold themselves out jointly to the shipping public to co-load and transport cargo. In such cases, we would expect that a joint or common bill of lading would be issued to the originating shipper and that the cargo would be tendered to the ocean carrier in the names of both co-loading NVOCCs. Other types of carrier/carrier relationships may be created by co-loading agreements and are not meant to be excluded by this example.

We have clarified section 580.17(b)(1) to distinguish between co-loading agreements which create a shipper/carrier relationship and those which create a carrier/carrier relationship. The issuance of a bill of lading by the receiving NVOCC to the tendering NVOCC will create a presumption that a shipper/carrier relationship exists. In neither case are we suggesting that the agreement itself must be filed with the Commission, nor are we asserting any other type of jurisdiction over the agreement *per se*. We are only taking the position that a common carrier's tariff must include all of the terms and conditions of its offering to the shipping public and that this fundamental principle cannot be circumvented or avoided by a private agreement.

A final comment on section 580.17(b)(1) is made by Trans-Pac, who suggests that NVOCCs should be restricted to co-loading only less-than-containerload (LCL) cargo. Trans-Pac states that the Commission and NVOCCs have relied upon LCL service as justification for the activity and it should, therefore, be so restricted.

The Commission will not adopt this suggestion. The fact that co-loading of LCL cargo is more prevalent and more likely than co-loading of full container loads is no reason to prevent the latter. The concern that Trans-Pac expresses over possible delay and unnecessary expense to shippers and consignees is one that the market should be able to control given

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new provisions for Service Contracts contained in the 1984 Act. Since only *ocean* common carriers, and not NVOCCs may offer such contracts, this difference has no relevance to the instant proceeding.

[3] *C.W. Spence* v. *Pacific-Atlantic S.S. Co.* 1 USSBB 624, 626 (1936).

the notice that these rules will require concerning the co-loading activities of NVOCCs.

Section 580.17(b)(2)

> In the event an NVOCC tenders cargo to another NVOCC for co-loading, its tariffs shall provide a clear explanation of its liability to the shipper and its responsibility to pay any other common carrier's rates and charges necessary in order to transport the shipper's cargo to its destination.

Hemisphere is of the opinion that NVOCC tariffs are clear and definite with respect to the liability of NVOCCs participating in co-loading activities. If that is true, then this part of the rule presents no additional burden or imposition upon the NVOCC industry.

However, the Commission's concern here is that confusion may exist in the minds of both shippers and NVOCCs in a situation where there is a failure of performance or damage to the cargo at some intermediate step in the transportation network. We want the initial NVOCC to make it absolutely clear to its shippers that it will live up to its obligations as a common carrier regardless of lower liability limits by subsequent NVOCCs, lack of privity with the ocean carrier, the absence of its own employees or facilities at particular destinations, or a myriad of other problems which may arise when cargo is co-loaded.

Section 580.17(c) Documentation Requirements

> NVOCCs which tender cargo to another NVOCC for co-loading shall notify each shipper of such action by annotating each applicable bill of lading with: (a) a summary statement of its liability and its responsibility to pay any other rates and charges necessary to transport the cargo to its destination; and (b) the identity of any other NVOCC with which its shipment has been co-loaded.

3-Way states that the requirements of the proposed rule relative to documentation, i.e., to provide a "summary statement of liability" and the "identity of any other NVOCC with which its shipment has been co-loaded", is redundant and ineffective. 3-Way is of the opinion that NVOCCs' tariffs already contain provisions setting forth liability.

3-Way does not support the "identity" requirement unless the "other" co-loading NVOCCs liability is also stated. 3-Way further states that if there is any justification for the "identity" requirement it should be expanded to include the identification of the VOCC.

3-Way contends that the question is not one of identity, but one of demonstrating the capability of liability. 3-Way's answer is that capability probably means licensing and bonding.

Carr objects to the proposed requirement to identify the name of the "other" NVOCC on the bill of lading because it could compromise its relationship with the shipper. According to Carr, NVOCCs not only co-

load because of short freight commitments (less-than-containerload) but also because of overflow conditions.

Coughlin supports 3-Way's views that the separate documentation requirements are unnecessary so long as liability requirements are clearly set forth in the tariff.

Greene argues that the documentation requirements are burdensome.

Reardon is of the opinion that "the liability issue is really between the NVOCC and the ocean carrier with the responsibility being passed up to the master loader and the steamship company."

The NCBFAA is of the opinion that it is unnecessary to require NVOCCs to state separately their liability and responsibility to pay any other NVOCCs charges. First, NCBFAA states that the NVOCC's liability is already provided in its specimen bill of lading regardless of co-loading and that it is common knowledge that a shipper is not responsible for any charges beyond those charged by the NVOCC which receives its cargo. NCBFAA alleges that the Commission's proposed rule is unnecessary and discriminatory in that there are situations involving the handling and custody of cargo by VOCCs which are analogous to co-loading which are not subject to special tariff filing requirements, e.g., an intermodal movement wherein a VOCC uses an inland carrier to whom a portion of the through rate is due.

ALAFC suggests that the Commission require the NVOCC which engages in co-loading to advise the shipper in writing of such fact prior to booking cargo. ALAFC has provided suggested language to accommodate the added requirement.

In view of these comments, the Commission is deleting the requirement for annotating each applicable bill of lading with a summary statement of the NVOCC's liability and responsibility to pay any other rates and charges necessary to transport the cargo to its destination. We are persuaded that the inclusion of such information in the NVOCC's tariffs and specimen bill of lading will be sufficient to avoid possible confusion over liability and the responsibility for payment of transportation charges.

However, we will continue the requirement that an NVOCC provide a shipper with notification of the identity of other NVOCCs with which the shipper's cargo has been co-loaded. We view this notice as an essential ingredient of our goal of ensuring that the shipping public is fully aware of an NVOCC's co-loading activities.

A shipper which tenders cargo to an NVOCC does so with the clear understanding that the cargo will, in turn, be tendered to a vessel-operating carrier. Many shippers would be surprised, however, to learn that their cargo had been tendered to another NVOCC for co-loading. If this is the type of service offered by an NVOCC, then shippers have a right to know that fact. They can then make an intelligent choice of the type of service they prefer.

We believe that the method we have chosen for identifying other NVOCCs—annotating the bill of lading—is straightforward and of minimal burden to the industry. Because of this, we are rejecting the suggestion of ALAFC that the NVOCC should notify the shipper in writing prior to booking the cargo. This requirement would appear to be not only more burdensome but also unrealistic in that a decision to co-load cargo may not be made prior to its booking.

§ 580.17(d)

(d) *Co-Loading Rate Application*

> No NVOCC tariff shall contain special co-loading rates for the exclusive use of other NVOCCs. If cargo is accepted by an NVOCC from another NVOCC which tenders that cargo in the capacity of a shipper, it must be rated and carried under tariff provisions which are available to the general public.

3-Way states that the Commission has apparently considered the status of NVOCCs as "shippers" only, rather than as shippers/carriers since it has proposed to prohibit any special rates which apply for the account of another NVOCC. 3-Way questions why the prohibition for NVOCCs to publish special rates for the account of other NVOCCs does not apply in the instance of VOCCs which publish rates to apply only for the account of NVOCCs. 3-Way is of the opinion that NVOCCs are a distinct "class of shipper" because they are also a common carrier. According to 3-Way, without the Commission's recognition of the above distinction (which would permit special co-loading rates between NVOCCs), the economic incentive to the NVOCCs to co-load and the advantages of co-loading services will be lost.

Airport supports 3-Way's position that the Commission should recognize NVOCCs as a distinct class of shippers for the purpose of allowing special co-loading rates which are applicable only for the account of another NVOCC. Airport is of the opinion that the proposed rule will result in NVOCCs: (1) holding shipments for consolidations until they build a volume large enough to fill a container; (2) going out of business; and/or (3) diverting cargo through the unregulated Canadian/Mexican ports. Airport views the proposed rules as discriminatory when "other" entities are permitted to "pool" cargoes. Airport describes the operation of an Export Trading Company and the Japanese space charter arrangement as being analogous to co-loading.

Airport maintains that special rates are justified since co-loading eliminates sales calls, extraordinary assistance in setting up shipments and documents, credit checks, rate quotes for shipments that might never be shipped and various other services that require the publication of higher rates to general shippers.

Hemisphere argues that no discrimination is involved in the practice of NVOCCs co-loading or in the application of the rates for such services.

Hemisphere indicates that the only instruction received by NVOCCs from shippers is to obtain the most economical and expedient manner of handling their shipments that is available. Further, Hemisphere states inasmuch as NVOCCs are not a major force in all trading areas, the publication of special rates by NVOCCs which are restricted to other NVOCCs is beneficial to the shipping public by allowing NVOCCs as a group of shippers/carriers to take advantage of full containerload rates offered by VOCCs.

Myers sets forth the same views as 3-Way, Airport and Hemisphere in attempting to justify the continuation of special co-loading rates among NVOCCs. Additionally, Myers suggests that NVOCCs and other shippers are not similarly situated, and is of the opinion that the elimination of co-loading rates would create discrimination in favor of large and specialized NVOCCs which would enjoy VOCC Freight-All-Kinds (FAK) rates exclusively.

Carr, Couglin, Greene, Reardon and NCBFAA share the views of 3-Way, Airport, Hemisphere and Myers in the matter of the Commission's proposed rule prohibiting special rates.

The ALAFC, AGANZ, Trans-Pac, and CENSA support the Commission's rule prohibiting special rates. ALAFC suggests that the Commission's analysis was not comprehensive enough to conclude that co-loading was beneficial to the shipping public. ALAFC suggests that co-loading and the special tariff rates only benefit the NVOCCs and not the actual shippers using NVOCCs which co-load.

The suggestion that NVOCCs and other shippers are not "similarly situated", or that NVOCCs are a "distinct class of shippers" is one that must be supported by transportation factors. The fact that they can all be identified as NVOCCs or that they are also carriers is not sufficient. It is well settled that the identity of a shipper is not a legitimate transportation factor.[4]

The fact that NVOCCs have a carrier alter-ego is irrelevant to their status as shippers when tendering cargo to another carrier. They are acting solely as shippers in that capacity and the question to be resolved here is whether their shipments can be distinguished from those of other shippers of like commodities.

Some effort is made in the comments to distinguish between NVOCC shipments and those tendered by other shippers. One suggestion is that the greater volume of the shipments received from other NVOCCs warrants lower rates. If that is the case, volume discounts could certainly accommodate the cargo and would not suffer from the infirmity of being offered only to certain shippers on the basis of their identity.

Another suggested distinction is alleged savings in costs of sales, customer service, documentation etc. inherent in shipments from other NVOCCs.

[4] *I.C.C. v Delaware, Lackawanna v. Western Railroad Co.* 220 U.S. 235, 252 (1911); *I.C.C. v United States,* 289 U.S. 385 (1933); *Mitchell v. United States,* 313 U.S. 80, 94 (1941).

While cost savings could certainly warrant a difference in rates, very few specifics are offered which could be identified solely with NVOCC co-loaded cargo. For example, it would appear that cargo tendered by a freight forwarder would entail savings in sales, services and documentation similar to those alleged to be realized in connection with NVOCC co-loaded cargo.

Several of the commenters also suggest that special co-loading rates for NVOCCs should not be prohibited because some VOCCs offer special FAK rates for consolidated cargo tendered by NVOCCs, consolidators and freight forwarders. We do not find this argument persuasive. Any VOCC rates which are limited would be evaluated on the same principles discussed in connection with this rule. Without focusing specifically on the VOCC rates to which the commenters made reference, we cannot make any judgment as to whether any such rates may be justified on the basis of transportation characteristics. At the very least, it seems clear that the VOCC tariff description referred to in these comments is not identical to the special NVOCC co-loading rates addressed in this rule.

The Commission is not attempting to prohibit legitimate discounts which may apply to NVOCC co-loaded cargo. However, on the basis of the comments herein, we are still not persuaded that co-loaded cargo tendered by NVOCCs is sufficiently distinct in and of itself to warrant a rate based solely upon the fact that the cargo is tendered by an NVOCC.

There are numerous other, legitimate, means of offering discounts to this type of cargo, so long as the same rates would apply to any other shippers of the same type of cargo. For example, FAK rates, time/volume rates, and consolidated cargo rates are all conventional ratemaking devices which could be used to offer reduced rates to other NVOCCs without the stigma of excluding other shippers of like commodities.

Our intent in this rule is not to eliminate or to discourage co-loading activity, but rather to raise the level of shipper awareness of this activity and to ensure that it is not being used as a device for unjust preference, prejudice or discrimination among shippers. To that end, this rule is being added to 46 CFR Part 580.

Inasmuch as NVOCCs will be required to describe co-loading activities in each of their tariffs, the Commission is amending its tariff filing regulations so that such information will appear in a uniform location. Paragraph 5(d)(14) of Part 580, (presently listed as "Reserved") will, therefore, be assigned to the subject rule and shall be captioned "Special Rules and Regulations applicable to co-loading activities of Non-Vessel-Operating Common Carriers (NVOCCs)."

Oral argument has been requested by NCBFAA. The Commission has determined to deny this request because it believes that the issues have been duly considered in this proceeding. NCBFAA has had the same opportunity as other commenters to argue its position and it has, in fact, done so eloquently in its comments. No other commenter has either filed a similar request or indicated support for the request of NCBFAA.

The Commission has determined that this final rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individuals industries, Federal, State or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with Foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units or small governmental jurisdictions.

Collection of Information requirements contained in this regulation have been approved by the Office of Management and Budget under provisions of the Paperwork Reduction Act of 1980 (P.L. 96–511) and have been assigned control number 3072.0046.

List of subjects in 46 CFR Part 580:

Cargo; Cargo vessels; Exports; Harbors; Imports; Maritime carriers; Rates and fares; Reporting and recordkeeping requirements; Water carriers; Water transportation.

Therefore, pursuant to 5 U.S.C. 553 and sections 8 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707 and 1716) the Federal Maritime Commission is amending Title 46 CFR Part 580 as follows:

1. The authority citation to Part 580 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702–1705, 1707, 1709, 1712, 1714–1716 and 1718.

2. Section 580.5 is amended by adding paragraph (d)(14) to read as follows:

§ 580.5 Tariff contents.

* * * * *

(d) * * *

(14) *Special Rules and Regulations Applicable to Co-loading Activities of Non-Vessel-Operating Common Carriers (NVOCCs)*

(i) *Definition.* For the purpose of this section, "Co-loading" means the combining of cargo, in the import or export foreign commerce of the United States, by two or more NVOCCs for tendering to an ocean carrier under the name of one or more of the NVOCCs.

(ii) *Filing Requirements.*

(A)(*1*) All tariffs filed by an NVOCC shall contain a rule which describes its co-loading activities.

(*2*) If co-loading is accomplished pursuant to the terms of an agreement which establishes a carrier-to-carrier relationship between or among NVOCCs, it is only necessary to note the existence of such agreement in each of the applicable NVOCC tariffs. But, if two or more NVOCCs enter into a co-loading agreement which establishes a shipper/carrier relationship between or among the NVOCCs, the co-loading activities must be described in a tariff rule pursuant to paragraph (d)(14)(ii)(A)(*1*) of this section.

(*3*) A shipper/carrier relationship shall be presumed to exist where the receiving NVOCC issues a bill of lading to the tendering NVOCC for carriage of the co-loaded cargo.

(*4*) If a co-loading service is not offered or performed by an NVOCC, its tariffs shall contain a rule which states that co-loading is "not offered or performed" by the publishing carrier.

(B) In the event an NVOCC tenders cargo to another NVOCC for co-loading, its tariffs shall provide a clear explanation of its liability to the shipper and its responsibility to pay any other common carrier's rates and charges necessary in order to transport the shipper's cargo to its destination.

(iii) *Documentation Requirements.* NVOCCs which tender cargo to another NVOCC for co-loading shall notify each shipper of such action by annotating each applicable bill of lading with the identity of any other NVOCC with which its shipment has been co-loaded.

(iv) *Co-Loading Rates Application.* No NVOCC tariff shall contain special co-loading rates for the exclusive use of other NVOCCs. If cargo is accepted by an NVOCC from another NVOCC which tenders that cargo in the capacity of a shipper, it must be rated and carried under tariff provisions which are available to all shipments with similar transportation characteristics.

* * * * *

3. § 580.91 is amended by adding the following to the Table at the end:

§ 580.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

580.5(d)(14)	3072–0046

* * * * *

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–4

WARNER LAMBERT COMPANY

v.

THE EGYPTIAN NATIONAL LINE

NOTICE

April 17, 1985

Notice is given that no appeal has been taken to the March 12, 1985, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–4

WARNER LAMBERT COMPANY

v.

THE EGYPTIAN NATIONAL LINE

DISMISSAL OF COMPLAINT

Finalized April 17, 1985

The respondent has moved for dismissal of this complaint and continues to press its motion, on the grounds that the complainant has failed to meet its burden of proof that the complaint is not barred by the applicable statute of limitations.

By ruling served March 28, 1984, a preliminary ruling was made denying the motion to dismiss, on the grounds that for the purposes of resolving a motion to dismiss prior to any hearing, stipulation of facts, or final resolution of the facts, it was appropriate to base the ruling on the alleged facts stated by the non-moving party. The preliminary ruling was made without prejudice to renewal of the motion to dismiss at a later date.

A prehearing conference was held on June 18, 1984, at which the parties agreed that certain facts should be discovered all relating to the statute of limitations, and that a ruling on the statute should be made, prior to any hearing on the merits of the complaint.

By its motion to dismiss dated August 15, 1984, received August 17, 1984, the respondent moved for dismissal of the complaint. One of the attachments to the motion was a stipulation of facts signed by attorneys for both parties.

By ruling served September 18, 1984, by the Administrative Law Judge, further information was required. It was pointed out that the complaint was filed on February 1, 1984; that the check in payment of the transportation charges in issue herein was dated December 31, 1981; that the stipulation of facts stated that the check was received by Uiterwyk Corporation as agent for the respondent Egyptian National Lines *in no event later than February 1, 1982*; and that the check was received by Egyptian National Lines sometime after the issuance of the check, i.e., December 31, 1981, and *on or before the date the check was deposited in Manufacturers Hanover Trust Company, i.e., February 1, 1982,* (emphasis supplied).

It was ruled that the stipulation of "in no event later than February 1, 1982," was imprecise. Further information was requested as to the precise date the check was received by Uiterwyk, and whether Egyptian

National Lines (the principal and not its agent) ever physically received the check, or constructively received it through its agent.

A copy of the check itself on its back shows that it was endorsed and deposited by Uiterwyk Corporation as agent for Egyptian National Lines.

The parties asked and were given certain extensions of the times to submit clarifying data. Respondent pointed out that its former agent, Uiterwyk Corporation, was in bankruptcy, and that it was difficult if not impossible to obtain clarifying information from Uiterwyk. Respondent insisted that complainant had the burden of proof to show that its complaint was commenced timely.

Accordingly, respondent demanded that the complainant search its records and those of its freight forwarder, who was able after some prompting to present the original check in issue. Respondent also promised to continue its efforts with Uiterwyk. The last advice from the parties was that each felt the other had the burden of producing any more clarifying information, and each party asks final judgment in its favor on the issue of the statute of limitations.

Under the above circumstances I conclude that the critical facts are as follows:

This complaint was filed on February 1, 1984, alleging overcharges of $12,367.30 on certain cargo shipped from New York, New York, to Alexandria, Egypt, "Freight to be Prepaid," bill of lading dated December 30, 1981. A check for $18,704.92 dated December 31, 1981, in payment of the freight charges for this cargo was made out to the order of the respondent, by Export-Import Services, Inc., as forwarding agent for the complainant-shipper/exporter.

Presumably, the said check was mailed or delivered on or after December 31, 1981. In the normal course of business, this may have been on December 31, 1981, or on the next business day after the January, 1982, holiday. Whether or not this check was mailed or delivered promptly the record does not show. In this situation, the burden of proof properly is on the complainant because through its forwarder, Export-Import Services, the complainant was in the best position to obtain proof of the mailing or delivery date of the said check dated December 31, 1981.

The endorsement(s) on the back of the check (copy submitted as evidence as attachment to the motion to dismiss) are not clear except for a stamp marked "Paid" February 2, 1982. The check was drawn on the Chemical Bank and was endorsed on the back pay to the order of Manufacturers Trust Co. Any interbank endorsements on the back of the check are not clear, but it is conceded by the parties that the February 2, 1982, date is the one when the Chemical Bank stamped the check as paid.

The invoice, attachment C to the motion to dismiss, shows that Export-Import Services, Inc., billed the complainant (Warner Lambert) on December 31, 1981, for the ocean freight charges of $18,704.92, plus certain other

of its charges for messenger fees, forwarding fees, consular fees, consular forms, certificate of origin, etc., a total of $18,911.92.

Exhibit D, attached to the motion to dismiss, shows that Warner Lambert satisfied the invoice for $18,911.92 on or before January 19, 1982, as shown by a daily statement dated January 19, 1982, from the First National Bank of Boston to Warner Lambert.

Presumably the check for $18,704.92 in payment to respondent for the freight charges was received by respondent's agent, Uiterwyk, on or after December 31, 1981, and on or before February 1, 1982, when it was deposited. The stipulation of facts states that the Chemical Bank stamped the February 2, 1982 on the back of the check when it paid the check, and that the stamp dated February 1, 1982, showing the date of deposit in Manufacturers Hanover Trust Company, was obliterated on the copies of the check which are of record, but apparently was visible to counsel for the parties who saw the original check.

Since the check admittedly and as agreed by the parties was deposited on February 1, 1982, where was it between December 31, 1981, when it was drawn, and when it was deposited?

When was the check received by the respondent or by respondent's agent? Of necessity, it was so received on or before February 1, 1982. But, this is still imprecise for the purposes of deciding the issue of the statute of limitations.

The computation of time under the statute begins on the date following the date on which the cause of action accrued, Rule 101 of the Commission's Rules of Practice and Procedure, 46 CFR 502.101. Under the two-year statute of the Shipping Act, 1916 (the Act), if the cause of action accrued on February 1, 1982, the two-year period began on February 2, 1982, and ended on February 1, 1984.

The question remains when did the act, event, or default in issue, that is, the cause of action accrue herein.

If the cause of action accrued on February 1, 1982, then the complaint was filed timely. But, if the cause of action accrued prior to February 1, 1982, then the complaint is barred.

The stipulation that Uiterwyk received the check in issue from Warner Lambert or from its agent freight forwarder no later than February 1, 1982, does not satisfy the law.

Jurisdiction of the Federal Maritime Commission cannot be presumed or assumed. Rather, there must be a definite showing of jurisdiction. Regardless of who has the burden of showing jurisdiction, no one in this proceeding has shown jurisdiction definitely. The check in issue was received on a date certain, but that date has not been shown. It follows that jurisdiction has not been shown.

It is ultimately concluded and found that it has not been shown that the Federal Maritime Commission has jurisdiction to rule on the issues in this complaint.

Under section 22 of the Act, complaints must be filed within 2 years from the time the cause of action accrues to vest jurisdiction in the Commission. As a general rule, when jurisdiction is conferred by statute *every act necessary to such jurisdiction must affirmatively appear.* (Emphasis supplied.) 1 U.S.M.C. 794 (795, 796, 797).

In the present case, it does not affirmatively appear when the cause of action accrued, and so it is not shown that the complaint was filed within 2 years from the time the cause of action accrued.

The motion to dismiss for lack of jurisdiction is granted. The complaint is dismissed.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 85–4

MISCELLANEOUS MODIFICATION TO EXISTING AGEEMENTS—EXEMPTION

April 24, 1985

ACTION: Final Rule.

SUMMARY: This Rule sets forth the approach the Commission will take under the Shipping Act of 1984 with regard to modifications to existing agreements which provide for cancellations of agreements and reflect changes in conference membership, officials of agreements, and neutral body authority and procedures. Copies of these modifications shall be submitted to the Commission for information purposes in the proper format but are otherwise exempt from the Information Form, notice and waiting period requirements of the rules.

EFFECTIVE DATE: April 29, 1985.

SUPPLEMENTARY INFORMATION:

In order to fulfill an obligation of the Commission as stated in its Final Rule in Dockets Nos. 85–26 and 84–32, *Rules Governing Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984,* 49 FR 45320 (November 15, 1984), the rule proposed in this proceeding would exempt modifications to existing agreements, which provide for cancellations of agreements and reflect changes in conference membership, officials of agreements, and neutral body authority and procedures, from the waiting period requirements of section 6 of the Shipping Act of 1984 (46 U.S.C. app. 1705), and allow them to become effective upon filing.

The Proposed Rule was published in the FEDERAL REGISTER on February 8, 1985 (50 FR 5401) with comments due on March 11, 1985. Comments were received from: (1) the Trans-Pacific Freight Conference of Japan/Korea, the Japan/Korea-Atlantic and Gulf Freight Conference, the Trans-Pacific Freight Conference (Hong Kong) and the New York Freight Bureau (collectively); (2) the North Europe-U.S. Pacific Freight Conference; (3) the Mediterranean/U.S.A. Freight Conference, the North Atlantic/Mediterranean Freight Conference, the U.S. Atlantic and Gulf/Australia-New Zealand Conference, and the U.S. Atlantic Ports/Italy, France and Spain Freight Conference (collectively); (4) the Atlantic and Gulf/West Coast of South

America Conference, the West Coast of South America Northbound Conference, the United States Atlantic and Gulf/Colombia Conference, the United States Atlantic and Gulf/Venezuela Conference and the United States Atlantic and Gulf/Ecuador Freight Conference (collectively); (5) the Philippines-North America Conference; and (6) the North Europe-U.S. Gulf Freight Association, the Gulf-European Freight Association, the North Europe-U.S. Atlantic Conference, the U.S. Atlantic-North Europe Conference, the Pan-Atlantic Carrier Trade Agreement and the Trans-Atlantic American Flag Liner Operators Agreement (collectively).

All of the conferences, with the exception of the five South American conferences, fully support the Rule and urge the Commission to adopt it as proposed.

The five South American conferences recommended that the Commission modify its rule with respect to agreement cancellations and changes in membership to allow these to become effective upon receipt of a letter from the agreement chairman (or whatever title is afforded the senior official of the agreement) or agreement counsel, provided that the modification is subsequently received by the Commission within 30 days of receipt of the letter. The reason given by the conferences was that there exists a pre-submission delay occasioned by the need to collect the signatures to such modifications from parties whose corporate offices are located in cities or countries other than the location of the conference office.

This suggested change cannot be accommodated. Adequate notice of an agreement cancellation or change in membership would not be assured by such proposal because the Commission and the public could be uncertain of the effectiveness of such changes for as long as 30 days after notice is received. This could seriously compromise the Commission's surveillance responsibilities and contribute to possible abuse and manipulation of events in regard to a conference member's status, rights and responsibilities under the law.

For the reasons stated in the Notice of Proposed Rulemaking, the Commission remains of the opinion that the proposed exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in substantial reduction in competition, or be detrimental to commerce within the meaning of section 16 of the Act. Accordingly, the proposed rule is adopted as final without change.

The Commission has determined that this Rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) that this rule will not have a significant economic impact on a substantial number of small entities including small businesses, small organizational units and small governmental jurisdictions.

The Commission has determined that this rule is excepted from the 30-day effective date requirement of 5 U.S.C. 553 because it grants an exemption and relieves a restriction from existing requirements.

List of Subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

Therefore, in order to exempt these agreements from the waiting period requirements of section 6 of the Act, and allow them to become effective upon filing, the Commission, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1715, 1716), hereby amends Parts 572 of Title 46 of the Code of Federal Regulations as follows:

1. The authority citation is revised to read:

Authority: 5 U.S.C. 553, 46 U.S.C. app. 1701–1707, 1709–1710, 1712 and 1714–1717.

2. A new § 572.307 is added to read as follows:

§ 572.307 Miscellaneous Modifications to Agreements—Exemptions.

(a) Each of the following types of modifications to agreements is exempt from the Information Form, notice and waiting period requirements of the Act and of this part provided that such modifications are filed for informational purposes in the proper format:

(1) Any modification which cancels an effective agreement.

(1) Any modification to the following designated agreement articles:

(i) *Article 3—Parties to the agreement (limited to conference agreements).*

(ii) *Article 6—Officials of the agreement and delegations of authority.*

(iii) *Article 10—Neutral body policing (limited to the description of neutral body authority and procedures related thereto).*

(b) Any modification exempt under paragraph (a) is effective upon filing.

3. § 572.605 *Requests for Expedited Approval* is amended by the removal of paragraph (c).

By the Commission.

(S) BRUCE A. DOMBROSWKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–9
INGERSOLL RAND COMPANY

v.

MAERSK LINE

NOTICE

MAY 2, 1985

Notice is given that no exceptions were filed to the March 26, 1985, 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) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–9

INGERSOLL RAND COMPANY

v.

MAERSK LINE

Proper rate applied to shipment of air compressors. Reparation denied and complaint dismissed.

Frank J. Hathaway from complainant Ingersoll Rand Company.

Marc J. Fink and *Karen S. Ostrow* for respondent Maersk Line.

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

Finalized May 2, 1985

Complainant, Ingersoll Rand Company (Rand), charges Maersk Line with the improper application of its tariff to a shipment of air compressors on wheels from Newport News, Virginia, to Singapore, Malaya. Maersk, a member of the Conference, rated the shipment at $140.00 W/M under Item 1446, 44th Revised Page 180 of the Atlantic and Gulf-Singapore, Malaya and Thailand Conference Freight Tariff No. 16, FMC No. 6. Forty-fourth Revised Page No. 180 reads in relevant part:

> SPECIAL RATES EXPIRING MARCH 31, 1983
>
> Machinery: Air Compressors and air Dryers—C W/M $140.00
>
> Machinery: Air Compressors
>
> To Singapore Only: C—$321.00 W
>
> In CY/CY containers only subject to a minimum of 14 revenue tons per container.

Rand says that Maersk should have charged the $321.00 rate even though its air compressors were not in CY/CY containers. In Rand's view the language quoted above does not limit the $321.00 rate to only those shipments moving in CY/CY containers. In order to reach this conclusion Rand goes back to 42nd Revised Page 180 which reads in pertinent part:

> Machinery: Air Compressors
>
> Singapore Only—C $321.00 W

[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).

> If in a CY/CY container minimum of 14 Revenue tons per container would apply.

Rand next points out that when the Conference published 43rd Revised Page 180, the critical language was changed to its present form, "In CY/CY containers only subject to a minimum of 14 revenue tons per container." This change according to Rand made the provision "unclear" and "subject to numerous interpretations" because of the (R) reduction symbol which accompanies the change and the "lack of punctuation." As an example Maersk offers:

> . . . for example: (1) 42nd R.P. 180 "If in a CY/CY container" this would have application on a non-containerized cargo without a minimum weight application and (2) 43rd R.P. 180—"In CY/CY container . . . bearing an (R) symbol." If the charge effective on October 1, 1983 on 43rd Revised Page was intended to restrict the item to CY/CY containers only, the item should have had an increase symbol because the $140.00 W/M would apply on a measurement basis on non-containerized cargo. If the entry on 42nd R.P. 180 was interpreted to only apply in CY/CY containers and the item was opened on 43rd Revised Page 180 to include non-containerized, it would have an (R) reduction symbol.

Whatever merit may be found in this reasoning by the complainant, as an exercise in logic, it is without relevance to the question presented here. The all important (R) appeared on *43rd* Revised Page 180. The shipment on which Rand seeks reparation moved under *44th* Revised Page 180. There is no (R) reduction symbol on 44th Revised Page 180. The time to raise the argument now made by Rand has passed. The question of the proper interpretation of 43rd Revised Page 180 should have been made when that page was in effect. Probably Rand made no shipments during that period.

As for the lack of punctuation, grammar purists might place a comma between "only" and "subject" so that sentence would read "In CY/CY containers only, subject to a minimum of 14 revenue tons per container." But with or without the comma the meaning of the provision is clear. To try, as Rand does, to read the provision as if it said "when in CY/CY containers shipments are subject to a minimum of 14 revenue tons per container and that [the] provision has application to non-containerized cargo" strains the natural interpretation of the provision and the plain meaning of the words.

Complainant's request for reparation is denied and the complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PART 580]

DOCKET NO. 84–27

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES; CO-LOADING PRACTICES BY NVOCCS

May 9, 1985

ACTION: Deferral of Effective Date of Final Rule.

SUMMARY: Due to the uncertainty expressed by various segments of the affected industry as to the application of the final rule issued in this proceeding, the effective date of the final rule is being deferred for 90 days.

DATE: Final Rule effective August 13, 1985.

SUPPLEMENTARY INFORMATION:

By Notice published in the Federal Register on April 15, 1985 (50 FR 14704–14710), the Commission issued a Final Rule in this proceeding with a scheduled effective date of May 15, 1985. Since the publication of this final rule, numerous non-vessel-operating common carriers (NVOCCs) and representatives of the NVOCC industry have written or contacted the Commission indicating uncertainty as to the application of certain aspects of the rule to the various types of NVOCC operations. Particular concern was expressed over the meaning of a carrier-to-carrier relationship and the requirement for bills of lading to identify any other NVOCC involved in a co-loaded shipment. Several parties have requested postponement of the effective date of the final rule, and given the apparent uncertainty on the part of certain portions of the affected industry, the Commission believes a deferral is warranted. Accordingly, the effective date of the final rule in this proceeding is being hereby postponed until August 13, 1985. During the deferral period, the Commission staff will further review the entire situation and make an appropriate recommendation to the Commission as to the final disposition of this matter.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1191

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC. FOR THE BENEFIT OF WILHELM SCHLEEF GMBH & CO. KG.

Initial Decision of Administrative Law Judge reversed.

Application to waive collection of $18,481.19 of freight charges granted.

Joey J. Radabaugh and *R.J. Finnan* for applicant Lykes Bros. Steamship Co., Inc.

REPORT AND ORDER

May 10, 1985

By the Commission: (Alan Green, Jr., *Chairman*; James J. Carey, *Vice Chairman*; Thomas F. Moakley, Edward J. Philbin and Robert Setrakian, *Commissioners*).

Lykes Bros. Steamship Co., Inc. excepts to the Initial Decision of Administrative Law Judge Seymour Glanzer denying it permission to waive collection from Wilhelm Schleef GMBH & Co. KG. of a portion of the freight charges assessed on a shipment of "dried flowers, parts of dried flowers, decorative wood, used for ornamentation," which moved from Cucamonga, California, to Hamburg, Federal Republic of Germany.[1]

Lykes asks that the Initial Decision be set aside and the case remanded to the Presiding Officer for further proceedings.

BACKGROUND

By application filed pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), (46 U.S.C. §817(c)(3)), Lykes requested permission to waive collection of $18,481.19 of the $21,231.19 in freight charges assessed on a shipment described in the bill of lading as "DRIED FLOWERS, PARTS OF DRIED FLOWERS, DECORATIVE WOOD, USED FOR ORNAMENTATION."[2]

The application indicates that on November 29, 1983, Lykes' Seabee Department requested the Pricing Division to file a rate of $2,750 per 40 foot container to cover a shipment of dried flowers from California terminals to Hamburg. A commodity rate of $2,750.00 for "Flowers, Dried" was filed in Lykes' Eastbound Pacific Coast to Europe Joint Container Freight Tariff No. 2, FMC No. 145, to take effect December 1, 1983.[3]

[1] Lykes' Exceptions are in the form of a letter addressed to the Secretary, which for the expeditious resolution of this matter is treated as formally filed. Rules of Practice and Procedure, 46 CFR 502.10.

[2] The bill of lading lists 262 cartons, 4 bundles and 83 loose pieces.

[3] 1st Rev. Page 122, effective 12/1/83.

The shipment was delivered to the inland carrier which issued the bill of lading dated December 2, 1983. When Lykes' Seabee Department became aware of the discrepancy between the commodity description in the tariff and the description of the shipment in the bill of lading, it requested the Pricing Division to revise the tariff to include "and/or Decorative Wood Used For Ornamentation" in the commodity description and to set forth a thirty-day expiration date for the rate. A second revision to the tariff, effective December 13, 1983, added the expiration notice but made no changes in the commodity description. The vessel upon which the shipment was loaded sailed on December 14, 1983. Subsequently, a third revision, effective December 15, 1983, included the $2,750.00 rate, the description "Flowers, Dried, and/or Decorative Wood used for Ornamentation" and the expiration date.

Thereafter, in the belief that the incomplete tariff commodity description in effect on the date of shipment subjected the cargo to the Cargo N.O.S. rate of $296.00 W/M, Lykes applied for permission to waive collection of $18,481.19, which represents the difference between the $2,750.00 lump sum per container rate promised the shipper and freight charges of $21,231.19, computed on the basis of the $296.00 Cargo N.O.S. rate.

The Presiding Officer denied the application on the ground that there was no error in the tariff within the meaning of section 18(b)(3) of the Act because Lykes' intent to publish a rate for the expanded commodity description was formed "some time after the shipment began." [4]

Lykes maintains on exception that under Rule 2 L of its tariff the commodity description as originally filed adequately covered the shipment and made the negotiated rate applicable.[5] Lykes' argument is that dried flowers and similar decorative items are often shipped together "and have historically been accorded the same rates and basis for parts and accompanying items as the generic item." Finally, Lykes refers to "the procedural breakdowns, misinformation, incomplete filing procedures" which took place in the filing of the $2,750.00 rate, none of which were attributable to the shipper.

DISCUSSION

The Presiding Officer's denial of the waiver rests on the premise that Lykes had agreed to and promised the shipper a lump sum per-container rate for dried flowers only and that the decision to extend the rate to

[4] Section 18(b)(3) provides that the Commission may grant a refund or waiver "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 . . ." 46 U.S.C. 817(b)(3).

Date of shipment for special docket applications has been defined by the Commission to mean the date of sailing of the vessel from the port at which the cargo was loaded. Rules of Practice and Procedure, 46 CFR § 502.92(a)(3).

[5] Rule 2 L. provides: "Wherever rates are provided for articles, the same basis will also be applicable on parts of such articles where so described in the Ocean Bill of Lading, except where specific rates are provided for such parts."

include decorative wood was reached only after delivery of the cargo to the inland carrier. In refusing relief, the Presiding Officer relied on *Munoz y Cabrero* v. *Sea-Land Service, Inc.*, 20 F.M.C. 152 (1977). In that case Sea-Land had failed to timely file a $44.00 rate promised the shipper. Before applying for a waiver, Sea-Land mistakenly published a $40.00 rate in lieu of the $44.00 rate it intended to file. The Commission held it had no authority to grant a waiver upon a rate the carrier never intended to file.[6]

Here, Lykes' request for the tariff revision contains an annotation asking that the commodity description be amended in accord with the description in the bill of lading. Were the Commission to agree that only at that time Lykes formed the intent to publish the expanded commodity description, the strict construction of the statute applied in the *Munoz* case would support adoption of the Initial Decision.

It should be noted, however, that two of Lykes' offices participated in the publication of the lump sum rate: the Pricing Division which filed the rate and the Seabee Department which requested the filing. As mentioned, when specifically requested to revise the tariff by adding decorative wood to the commodity description and to set forth a thirty-day expiration date, the Pricing Division only added the expiration notice leaving the description "Flowers, Dried" unchanged. This indicates a misunderstanding between Lykes' two offices on the matter of the publication of the lump sum rate and evidences a clerical or administrative error in filing by the Pricing Division in the second revision of page 122 of the tariff.[7] This in turn raises the inference of a similar error in the tariff published on December 1, 1983.

There is also no reason to believe that the shipper who accurately described the contents of the house-to-house container in the bill of lading, withheld that information from the carrier when negotiating the rate. Moreover, the promptness with which Lykes moved to amend the tariff clearly suggests that when it agreed to the $2,750 lump sum per container rate for this particular shipment which otherwise would be subject to the payment of $21,231.19 in freight charges, Lykes had from the beginning the intent to publish a commodity description which properly identified the cargo and covered the entire shipment. The failure to do so in the first instance can be said to result from the misunderstanding between Lykes' Seabee Department and its Pricing Division.

The Commission therefore finds that the rate filed by the Pricing Division did not reflect the rate Lykes from the outset intended to file for this shipment and that there was an error of an administrative nature in the tariff as contemplated in section 18(b)(3) of the Act.

[6] As distinguished from the *Munoz* case, before applying for a waiver, Lykes here had on file with the Commission the $2,750 rate agreed upon with the shipper.

[7] 2nd Rev. Page 122, effective December 13, 1983.

Consequently, the Initial Decision of the Presiding Officer is reversed and Lykes is granted permission to waive collection of the amount of $18,481.19 of the freight charges assessed the consignee Wilhelm Schleef GMBH & Co. KG. In so deciding, it is unnecessary to rule whether under the holding in *Nepera Chemical Inc.* v. *Federal Maritime Commission*, 662 F.2d 18 (D.C. Cir. 1981), the absence of a specific reference to decorative wood in the tariff would preclude the application of the lump sum rate to the shipment.[8]

THEREFORE, IT IS ORDERED, That the Initial Decision denying the application is reversed; and

IT IS FURTHER ORDERED, That pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)), Lykes Bros. Steamship Co., Inc., is granted permission to waive collection of $18,481.19 of the $21,231.19 freight charges assessed the consignee Wilhelm Schleef GMBH & Co. KG; and

IT IS FURTHER ORDERED, That Lykes Bros. Steamship Co., Inc., shall published within thirty (30) days from the service of this Report and Order 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. 1191, that effective December 1, 1983, and continuing through December 14, 1983, inclusive, the rate on "Flowers, Dried, and/or Decorative wood used for ornamentation" is $2,750.00 per 40 ft. container. This notice is effective for purposes of refund or waiver of freight charges on any shipment of the goods described which may have been shipped during the specified time.

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

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

[8] In *Nepera Chemical Inc.* v. *Federal Maritime Commission*, 662 F.2d 18 (D.C. Cir. 1981), the Commission, following the holding in *Munoz, supra*, had denied the waiver request because the rate on which the waiver was to be based was different from the rate the carrier had promised the shipper.

The difference amounted to $91.25. The denial of the waiver meant an increase of $42,569.90 in transportation costs. On appeal, the court reversed, noting the absence of any language either in the statute or in the legislative history of section 18(b)(3) that required precise equivalence between the published and the intended rate. The court also emphasized the remedial purpose of the statute and insisted on the need for a reasonable construction to achieve that purpose.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1220
APPLICATION OF HAPAG-LLOYD, AG FOR THE BENEFIT OF GENERAL MOTORS CORPORATION

SPECIAL DOCKET NO. 1225
APPLICATION OF HAPAG-LLOYD, AG FOR THE BENEFIT OF GENERAL MOTORS CORPORATION

ORDER CONDITIONALLY ADOPTING INITIAL DECISIONS

May 10, 1985

The Commission determined to review the Initial Decisions issued on December 31, 1984 in Special Docket No. 1220 and on January 8, 1985 in Special Docket No. 1225 by Administrative Law Judge Charles E. Morgan (Presiding Officer). Though they were not consolidated, the proceedings involve the same parties and essential facts and present identical issues of law.[1]

For the reasons set forth below, the Commission hereby adopts the Initial Decisions subject to the meeting of certain conditions by Hapag-Lloyd. In reaching that result, we have concluded that we will no longer impose on special docket applications involving intermodal cargo movements the requirement first articulated in *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Texas Turbo Jet, Inc.*, 24 F.M.C. 408 (1981), that the ocean carrier must prove that it actually provided the inland service originally intended in strict accordance with the terms and conditions of its tariffs.

BACKGROUND

Hapag-Lloyd seeks the Commission's permission, pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e), and Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR § 502.92(a), to waive certain freight charges. The charges apply to a total of 28 shipments of automobile parts from inland points in Michigan, via railroad to Baltimore or New York, to various ports in Europe and then to European inland destinations. The earliest shipment was dated February 18, 1984 and the last was dated August 2, 1984. The shipments were

[1] The Initial Decision in Special Docket No. 1220 explains (p. 1, n. 2) that Special Docket No. 1225 was necessary to cover certain rates for which new corrective tariffs had not yet been filed as of the filing date commencing Special Docket No. 1220.

consigned to various subsidiaries or affiliates of General Motors. The consignees were to be responsible for the payment of all freight charges, except that General Motors was responsible for payment of the terminal handling charges at the United States exit ports.

In 1983, Hapag-Lloyd offered independent intermodal rates in connection with its service from East Coast ports of the United States to countries in Northern Europe. On August 5, 1983, General Motors requested Hapag-Lloyd to quote intermodal rates on various shipments of auto parts. By letter dated September 16, 1983, Hapag-Lloyd quoted competitive rates over the requested routings, which General Motors accepted on October 24. On November 18, Hapag-Lloyd supplemented its rate offerings and made clear its intention to offer these rates for the period from November 1, 1983 through October 31, 1984. Of those rates, there are a total of nine involved in these two proceedings, seven in Special Docket No. 1220 and two in Special Docket No. 1225.

On Friday, December 9, 1983, the Commission granted authority to the North Atlantic/Continental Freight Conference (NACFC), of which Hapag-Lloyd was a member, to offer intermodal rates. The Conference met the next day, Saturday, December 10, and scheduled another meeting for Sunday, December 11, to discuss intermodal rates to be charged. The decision was made to require all member lines to submit to the Conference at the December 11 meeting any rate commitments they had with customers.

When the NACFC met on December 11, Hapag-Lloyd had prepared a list of its intermodal rate commitments, including those with General Motors. The list was compiled hurriedly by the carrier in Hamburg, West Germany, and sent by telex to the Conference meeting. Due to clerical oversight, the nine rates here in issue were omitted from the telex.

NACFC implemented its intermodal authority by filing rates to become effective February 1, 1984, at which time all intermodal rates published by individual members (including Hapag-Lloyd) were canceled. Because Hapag-Lloyd had failed to present the nine rates at the December 11, 1983 meeting, they were not reflected in the NACFC tariff. As a result, the 28 shipments here in issue incurred higher freight costs involving a combination of certain NACFC port-to-port rates, terminal handling charges at U.S. ports, U.S. inland charges and container service charges and inland carriage charges in Europe. However, Hapag-Lloyd charged and collected amounts based on the lower intermodal single factor through rates it had intended to apply to these shipments. It seeks the Commission's permission to waive collection of the difference between those rates and the combined charges listed above. The total amount for which waiver is sought is approximately $277,000.

DISCUSSION

In his Initial Decisions, the Presiding Officer found that the statutory requirements of section 8(e) of the Shipping Act of 1984 had been met[2] and granted Hapag-Lloyd's applications. However, these proceedings raise several issues not specifically addressed by the Presiding Officer.

The primary issue is whether Hapag-Lloyd should be required to prove as part of its special docket application that it actually arranged and paid for the inland service necessary to move the shipments from Michigan to New York or Baltimore. In *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Texas Turbo Jet, Inc.*, 24 F.M.C. 408 (1981), which was brought under section 8(e)'s predecessor, section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. §817(b)(3), the administrative law judge found that due to the carrier's failure to file an amendment to its intermodal tariff reflecting an agreed rate, the cargo moved under a conference port-to-port rate, and that the shipper arranged and paid for the inland movement. Nevertheless, the administrative law judge granted the carrier's application to refund part of the ocean freight charges to the shipper. The Commission reversed, stating:

> 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 [Italy] 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 joint ICC/FMC 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.

[2] He found that there was a clerical or administrative error in failing to file a new tariff; that NACFC filed corrective tariffs, effective August 7 and August 23, 1984, setting forth the intended rates; that the applications were timely filed; and that granting the waivers would not result in discrimination among shippers, ports or carriers.

> As a remedial statute Section 18(b)(3) needs to be liberally construed. The Commission, however, may exercise its discretionary powers only within the limits permitted by statute. In this instance, Lykes filed a tariff 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.

21 S.R.R. at 115 (footnotes omitted).

The principles stated above were followed more recently in *Application of Trans Freight Lines, Inc. for the Benefit of B.N.P. Distributing Co., Inc.*, 22 S.R.R. 475 (administratively final Dec. 16, 1983). In that case, Trans Freight Lines, Inc. (TFL) negotiated an intermodal rate for two shipments of wine from France through New York City and then to Syosset, New York, but failed to file that rate prior to the shipments. Furthermore, TFL rated and carried the shipments under its port-to-port tariff rather than under a general intermodal tariff that it had on file and in effect. TFL explained that it did this deliberately because the port-to-port rate was substantially lower than the intermodal general cargo N.O.S. rate. *See* 22 S.R.R. at 477. When the cargo arrived at New York, it was carried to Syosset by a motor carrier that was listed as a participating carrier in TFL's intermodal tariff. However, the importer, rather than TFL, paid the motor carrier for the inland movement and also paid TFL under the bills of lading rated according to TFL's port-to-port tariff. TFL sought permission to refund to the importer the difference between the total charges paid by him and the lower single factor intermodal rate that had been negotiated.

The administrative law judge denied the application on the ground that he was bound by the Commission's decision in *Texas Turbo Jet.* He found that there were some factual distinctions between the two cases, particularly that the motor carrier was a participant in TFL's tariff. Nevertheless, he concluded that "[i]n both cases, the carriers did not provide the intermodal service, instead providing a port-to-port service under a port-to-port tariff and under a port-to-port bill of lading. . . ." 22 S.R.R. at 477. He noted that TFL's motives in deciding to charge the lower port-to-port rate may have been commendable, but that it easily could have performed the intermodal service under its general intermodal tariff, collected only the negotiated rate, filed that rate promptly thereafter and sought permission from the FMC to waive the additional freight due under the general N.O.S. rate.

Section 8(e) of the 1984 Act is identical in substance to the special docket provisions of section 18(b)(3) of the 1916 Act, and Hapag-Lloyd's applications and supporting material (including the bills of lading) do not clearly demonstrate whether the carrier assumed responsibility for moving

the cargo from its origin points in Michigan to the U.S. ports of export. Thus, the *Texas Turbo Jet* principles could be applied fully to the instant cases.

However, these cases also present the Commission with an opportunity to reconsider *Texas Turbo Jet*. The practical effect of that decision is to require a carrier, such as Lykes in *Texas Turbo Jet*, which has negotiated an intermodal service with a shipper, but failed through clerical error to file a tariff covering that service prior to shipment, and which can comply with the jurisdictional requirements of the special docket procedure specified by the statute, to comply with an additional requirement of providing the full service without a tariff as a condition precedent to filing a special docket application for the benefit of its shippper. This non-statutory requirement places the carrier in the position of possibly violating the prohibition in section 8 of the 1984 Act against providing service without a tariff, particularly where, as in *Texas Turbo Jet*, the intended service is entirely new. If the carrier chooses not to incur such legal jeopardy, the innocent shipper who has been harmed by the carrier's error must, according to *Texas Turbo Jet*, be denied relief.

The carrier's dilemma may only be escaped if it happens to have on file and in effect at the time of shipment a general intermodal tariff (which generally requires higher rates than specific commodity tariffs) covering the desired inland origin or destination, as TFL did in the *B.N.P. Distributing* case, and if the cargo in fact moves under that tariff and via a motor or rail carrier named in that tariff. Even in that situation, there is nothing that requires the carrier to do as the administrative law judge suggested in *B.N.P. Distributing*, *i.e.*, collect only the agreed-upon rate and apply for a waiver.[3] On the contrary, the rule of *Texas Turbo Jet* may give a carrier in such circumstances a rationale for forcing the shipper to incur higher initial costs, and giving itself use of the shipper's money, by applying its N.O.S. intermodal rate in full before seeking special docket relief. In any event, the approach suggested in *B.N.P. Distributing* results in relief to the shipper turning entirely on happenstance, *i.e.*, its carrier must have in effect an N.O.S. intermodal tariff that can and was used to move its cargo (albeit at a possibly much higher rate).

The additional requirement or condition imposed by *Texas Turbo Jet* on special docket applications involving intermodal movements is not required by the terms of either the 1916 Act or the 1984 Act. The Commission has concluded that the continued application of that case is inconsistent with our obligation to administer the special docket procedure liberally with the goal of effectuating the procedure's remedial purpose, which is to relieve shippers from the burdens of carrier mistake or negligence. *Nepera Chemical, Inc.* v. *FMC*, 662 F.2d 18 (D.C. Cir. 1981). *Texas Turbo Jet*

[3] It should be noted that in the instant proceedings, the accession of the NACFC tariff in February 1984 makes it unlikely that Hapag-Lloyd retained an intermodal tariff under which the shipments of automobile parts could have moved.

erects an artificial barrier to shipper relief on the basis of concerns that are purely theoretical. The special docket procedure cannot be permitted to become a subterfuge for rate discrimination or rebates. If the new policy announced herein is shown in the future to facilitate such malpractices, the Commission will take corrective measures. At present, however, any abuses that might result from a lifting of *Texas Turbo Jet's* restrictions are difficult to conceive and are far outweighed by the concrete harm to shippers caused by that decision.

With reference to the particular facts before the Commission in these proceedings, we recognize that if General Motors' consignees did in fact arrange and pay for the movement of their shipments from Michigan to New York or Baltimore, they did not receive the complete service for which Hapag-Lloyd now seeks to waive a portion of the freight charges. However, it is clear that all concerned parties understood what that service *should* have been and that Hapag-Lloyd at least performed the port-to-port portion of its original undertaking. Under such circumstances, there is no apparent basis for suspecting unlawful collusion among the parties.[4] It is beyond the Commission's powers to remedy any inconvenience or out-of-pocket expense that General Motors' consignees may have suffered as a result of Hapag-Lloyd's error. But we can at least ensure that the final cost to them of transporting these 28 shipments of automobile parts is what they had originally agreed to.

Because *Texas Turbo Jet* will not be applied to these cases, the result of the Initial Decisions can be affirmed. As discussed below, there are other flaws in the carrier's applications not addressed by the Initial Decisions. However, these flaws can be resolved without the necessity for a remand.

First, the applications fail to include NACFC (or, more precisely, NACFC's successor, the Atlantic North Europe Conference) as a party. The Commission's regulations at 46 CFR § 502.92(a)(1) require that where the intended rate was to be offered under the authority of a conference, the conference must join with the individual carrier as an "indispensable party" to the special docket application. *Part 502—Rules of Practice and Procedure,* 21 F.M.C. 340, 343 (1978). In cases such as these, where the administrative or clerical error was committed by a conference member rather than by the conference itself, the requirement still applies because the conference in effect has ratified the intended rate by publishing a corrective tariff under its auspices. *See D.F. Young, Inc.* v. *Compagnie Nationale Algerienne de Navigation,* 21 F.M.C. 730 (1979). Accordingly, Hapag-Lloyd will be given thirty days to correct its applications to include the Atlantic North Europe Conference. However, Hapag-Lloyd's original

[4] Hapag-Lloyd's applications state that it is not aware of any shipper's similarly situated to General Motors. In addition, the Initial Decisions require that "appropriate notice of this matter and of the details of this waiver" shall be published in both the Conference's port-to-port tariff and its intermodal tariff. These constitute additional safeguards against discrimination among shippers.

applications remain valid insofar as is necessary to satisfy the 180-day time limit imposed by section 8(e) of the Shipping Act.[5]

There is also an issue whether the applications can be granted on behalf of General Motors. General Motors apparently was responsible only for paying the U.S. terminal charges. The format for special docket applications prescribed by 46 CFR § 502.92(a)(5) requires that applications must be filed for the benefit of the person who paid or is responsible for paying the freight charges. No distinction is drawn by the statute or the regulations between refunds and waivers, as the Presiding Officer has done. If the Commission permitted waivers to be granted to persons not responsible for paying the ocean freight, the remedial purpose of the special docket procedure would be obscured and opportunities for malpractices could be facilitated. Accordingly, either the overseas consignees must be substituted for General Motors as beneficiaries of the applications, or General Motors must submit an affidavit through Hapag-Lloyd that it is acting as agent for the consignees. *See Buckley & Forstall, Inc.* v. *Gulf European Freight Association for Combi Line*, 20 F.M.C. 343, 347–48 (1977).[6]

THEREFORE, IT IS ORDERED, That the Initial Decisions are hereby affirmed on condition that, within thirty (30) days from the date of this order, (1) Hapag-Lloyd amends its special docket applications to include the Atlantic North Europe Conference as an applicant; and (2) Hapag-Lloyd further amends its applications to substitute the overseas consignees for General Motors as intended beneficiaries of the applications or, alternatively, General Motors submits an affidavit through Hapag-Lloyd that it is acting as agent for the consignees or is otherwise entitled to receive the benefits of the applications.

IT IS FURTHER ORDERED, That if the condition described in the first ordering paragraph are not met by the 31st day following this order, the Initial Decisions will be vacated and Hapag-Lloyd's applications will be rejected for failing to meet the requirements of the Commission's regulations.

By the Commission.[7]

(S) BRUCE A. DOMBROWSKI
Acting Secretary

[5] Because the last shipment covered by these applications was dated August 2, 1984, new applications would be completely time-barred. Similar procedures designed to preserve timely but otherwise flawed applications have been employed in other cases. *E.g., Application of Atlantic Container Line for the Benefit of Clark, Int'l Marketing, S.A.*, 19 S.R.R. 1257 (Initial Decision, 1980).

[6] Although the consignees here are affiliates or subsidiaries of General Motors, the analysis remains the same. The consignees apparently are sufficiently separate from General Motors so that the contracts of sale provided that they pay nearly all the transportation charges on these shipments from their own accounts. That being the case, the consignees rather than General Motors should receive the benefit of any waiver. If the circumstances are different and General Motors and the consignees are actually integrated in all significant respects, General Motors should submit a statement to that effect.

[7] Commissioner Thomas F. Moakley dissents and will issue a separate opinion.

DISSENTING OPINION OF COMMISSIONER THOMAS F. MOAKLEY

The majority's decision in these special docket cases is a textbook example of result-oriented decisionmaking at its worst. It ignores the clear limits of the statute under which relief is sought and trods heavily upon a fundamental principle of transportation law. Moreover, it does so with conscious disregard for the facts pertinent to these cases and without consideration for the decision's broader ramifications on tariff integrity.

Hapag-Lloyd is seeking in both of these special docket applications, to apply intermodal rates for certain General Motors shipments which moved from the U.S. midwest to points in Europe. According to the applications, the carrier had agreed in October and November 1983 to reduced per-container rates on auto parts from points in Michigan to points in Europe at which various General Motors affiliates are located. At that time, Hapag-Lloyd was offering intermodal service under an independent tariff (FMC No. 210, ICC HLCU 210).[1]

On December 9, 1983, the Commission granted intermodal ratemaking authority to the North Atlantic/Continental Freight Conference (NACFC) of which Hapag-Lloyd was a member. On December 10 and 11, 1983, the members of the NACFC met to discuss implementation of their new intermodal authority. Member lines were required to submit any rate commitments they had with customers at the meeting of December 11. At that meeting, Hapag-Lloyd presented a list containing over 150 rates, including seventy-seven rates on auto parts but failed to list the nine rates which are the focus of these special docket applications. The NACFC published all seventy-seven of the auto parts rates as independent action rates for the account of Hapag-Lloyd only.

The new NACFC tariff was published on December 30, 1983 to become effective on February 1, 1984. Hapag-Lloyd's independent tariff (FMC No. 210) was simultaneously cancelled on February 1, 1984. Because the nine rates in question here had not been presented to the conference by Hapag-Lloyd, they were not reflected in the NACFC tariff.

Between February 18, 1984 and August 2, 1984, Hapag-Lloyd carried 28 shipments for General Motors consisting of some 152 containers of auto parts which are the subject of these two cases.

With the exception of the two shipments on August 2, 1984, each of the 28 shipments was somehow rated under one of the nine reduced intermodal rates, although none of those rates appeared in the NACFC tariff, which governed both the port-to-port and intermodal services of Hapag-Lloyd during that time. The tariff error was apparently not discovered

[1] While it is not clear from the applications here whether Hapag-Lloyd ever filed these rates in its independent tariff, a review of the Commission's tariff records indicates that the rates in question appeared on 2nd Revised Pages 25–A, 25–B and 25–C of that tariff, effective December 22, 1983. There is nothing in this record to indicate whether any cargo moved under those tariff rates prior to February 1, 1984.

until approximately July 26, 1984, at which time Hapag-Lloyd issued a "Manifest Corrector" for each of the affected shipments up to that date. These "Manifest Correctors" noted that the shipments should have been rated as port-to-port shipments under NACFC's port-to-port tariff in effect at that time, although it is not clear whether Hapag-Lloyd assumed responsibility for the through intermodal movement. The two shipments which took place on August 2 appear to have been rated from their inception as port-to-port shipments.[2]

On August 1, 1984 the NACFC filed, on behalf of Hapag-Lloyd, seven of the nine rates in question, to become effective August 7, 1984 (NACFC Intermodal Tariff FMC–10, ICC–NAC 300, Original Pages 518–A, 519–A and 520–B). On August 15, 1984 the conference filed the remaining two rates, to become effective August 23, 1984 (1st Revised Page 520–B). All of these rates were independent action rates, solely for use by Hapag-Lloyd.

Applications for waiver of the NACFC's *port-to-port* charges were dated August 2 and August 20, 1984 and received by the Commission on August 15 and August 23 respectively.[3] The Administrative Law Judge granted both applications although the NACFC had not joined Hapag-Lloyd in seeking relief[4] and the documentation accompanying the application did not indicate whether Hapag-Lloyd had performed the intermodal services which were allegedly intended.

Upon review, the majority of the Commission adopted the initial decision, on condition that the conference join in Hapag-Lloyd's application and that steps be taken to ensure that the waivers accrue to the persons responsible for paying the freight bills.[5]

With respect to the question of whether Hapag-Lloyd performed the intended intermodal service, the majority has concluded that that fact is irrelevant to special docket relief.

> "With reference to the particular facts before the Commission in these proceedings, we recognize that if General Motor's consignees did in fact arrange and pay for the movement of their shipments from Michigan to New York or Baltimore, they did not receive the complete service for which Hapag-Lloyd now seeks to waive a portion of the freight charges. However, it is clear that all concerned parties understood what that service *should* have been and that Hapag-Lloyd at least performed the port-

[2] Since these applications are only for waivers and not refunds, I can only assume that Hapag-Lloyd charged the lower intermodal rates for these shipments and not the rates set forth on the bills of lading.

[3] One of the numerous curiosities of these cases is the inclusion in the first application of bills of lading and other documents relating to shipments which apparently moved out of Baltimore on the same date that the application was signed.

[4] The requirement that a conference must join with an individual carrier as an "indispensable party" to a special docket application involving the conference's tariff is found in 46 CFR s. 502.92(a)(1).

[5] The applications were filed for the benefit of General Motors, the shipper, while the consignees in Europe were apparently responsible for the freight charges.

to-port portion of its original undertaking." (Majority Decision p. 10).

Section 8(e) of the Shipping Act of 1984 (46 U.S.C. app. s. 1707(e)) under which these special docket applications were filed, authorizes the Commission to permit a carrier or conference to refund or waive a portion of freight charges if

> "(1) 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* . . ." (Emphasis supplied)

This section provides limited relief from the requirements found in sections 8 and 10 of the Act that a carrier may charge only those rates and charges appearing in its tariffs for the service performed. For example, section 10(b)(1) of the Act (46 U.S.C. app. s. 1709(b)(1) provides that no common carrier may

> "(1) charge, demand, collect or receive greater, less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts . . ."

This is not a unique or esoteric principle. In fact, the requirement that a common carrier can only charge that rate which is applicable to the service performed is so fundamental to transportation law that the majority's decision here may be the first instance, since passage of the Interstate Commerce Act in 1887, that a transportation regulatory agency has deliberately concluded the opposite.[6]

Moreover, the majority has not limited the effect of its decision to the facts of this case. The order specifically denounces, for *future* special docket cases, the holding of a 1981 decision which applied this fundamental principle in the context of a special docket proceeding.[7]

In order to discard the principle that a carrier must have performed the service for which it seeks to apply a rate, the majority has erected, and addressed at length, a rather flimsy straw man. The order suggests that, in some cases, the requirement for the carrier to perform the intended service will force the carrier to violate the Act by providing a service without a tariff on file prior to applying for special docket relief. This

[6] There are a plethora of cases which hold that a carrier may only charge the rate shown in its tariff for the service performed. See, e.g. *Louisville & N. R.R.* v. *Maxwell*, 237 U.S. 94, 59 L. Ed. 853 (1915); *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478, 83 L. Ed. 1409 (1939); *United States* v. *Associated Air Transport Inc. et al.*, 275 F. 2d 827 (5th Cir. 1960); *General Motors Corp.* v. *Denver & Rio Grande Western R.R. Co. et al.*, 340 I.C.C. 112, 116 (1970). The majority cites *none* in support of its holding to the contrary and it appears that there is no precedent for such a holding.

[7] Application of *Lykes Bros. Steamship Co. Inc. for the Benefit of Texas Turbo Jet, Inc.*, 24 F.M.C. 408 (1981). The impact of the majority's ruling on *previous* special docket cases which have followed the line of reasoning in *Texas Turbo Jet* is far from clear. Likewise, the majority order fails to address the rejection of this principle as it may impact on port-to-port shipments, where it would seem to have equal application.

is a fictitious problem. Section 8(e) was designed to permit a carrier to carry out its intentions and to correct the tariff error after the fact. It was *not* designed to permit the carrier and the Commission to *pretend* that the intended service was provided.[8]

Contrary to the majority's assertions, relief under section 8(e) in cases such as this, does not turn on the "happenstance" of having available a cargo NOS rate under which the cargo may be carried in the absence of the intended rate (Majority Decision, p.9). There is no impediment whatsoever to a carrier performing the intended service, then filing the intended rate and applying for special docket relief. The existence, or lack thereof, of a cargo NOS rate is totally irrelevant to this issue.[9]

Section 8(e), as quoted above, is designed to permit correction of administrative or clerical errors. It is clearly not broad enough to correct operational errors, if in fact one occurred here. It is not clear from the record whether Hapag-Lloyd performed the intermodal service for the shipments in question. It is embarassing and irresponsible to say that we don't care.

If Hapag-Lloyd performed the intermodal service for which it seeks to apply the intermodal rates in question here, relief can be granted without turning the statute on its head.[10] If Hapag-Lloyd performed only a port-to-port service, relief cannot be granted by this Commission because it is beyond our authority to do so.

By its own terms, relief can only be granted under section 8(e) where it will not result in discrimination among shippers, ports, or carriers. If Hapag-Lloyd performed only a port-to-port service for General Motors, application of something other than the port-to-port rate will clearly discriminate against other port-to-port shippers. The majority expresses confidence (Majority Decision, p.10, note 4) that appropriate notices in both the port-to-port tariff and the intermodal tariff of the NACFC will provide adequate safeguards against such discrimination. The decision fails to explain, however, which shippers might be entitled to take advantage of rates for which a service might not have been performed. Who is similarly situated? Will the reduced rates be made available to any conference port-to-port shipper who might have chosen an intermodal service had that shipper known about the "intended" rates? If so, will other conference lines be forced

[8] In addition to the legal obstacles discussed here, the application of a rate for a service that was not performed would normally raise serious factual questions with respect to the credibility of the carrier's intentions. The facts presented here serve to demonstrate this point. If Hapag-Lloyd's arrangement with General Motors was legitimate, it is difficult to believe that the carrier would have forced the shipper to make inland arrangements for 152 containers over a period of almost six months.

[9] However, since the majority deems the existence of a cargo NOS rate to be significant, it is worth noting that the NACFC tariff did contain such a rate applicable from points in Michigan to points in Europe during this time period (NACFC Intermodal Freight Tariff FMC–10, ICC–NAC 300, Original Page 333). The statement by the majority (p.9, note 3) that it is "unlikely that Hapag-Lloyd retained an intermodal tariff under which the shipments of automobile parts could have moved," is therefore confusing, at best.

[10] On May 28, 1985, the conditions set forth in the majority's decision were met, thus correcting the other two deficiencies in these special docket applications.

to provide a refund on the basis of intermodal rates filed solely for the account of Hapag-Lloyd?

In addition, if General Motors or the consignees arranged and paid for inland transportation, it is impossible at this point, contrary to the majority's suggestion (Majority Decision p. 11) to ensure that the cost to them of transporting these 28 shipments is that to which they had originally agreed. If Hapag-Lloyd has not paid the inland carriers their division of the through rate, collection and retention of that entire through rate will result in a windfall to the carrier and, in effect, double payment by the shipper or consignee for the inland transportation.[11]

The equitable result that the majority was seeking would probably have been achieved without any adverse side-effects had this case been remanded to the Administrative Law Judge for a finding as to whether Hapag-Lloyd performed an intermodal service for these shipments. As indicated earlier, it would be very difficult to believe that Hapag-Lloyd's arrangement with General Motors was legitimate if the carrier did not perform the through service.[12]

However, the more important point here is that the Commission is not vested with general, equitable powers. We are a creature of Congress, charged with administering only those statutes which Congress has entrusted to us. If a particular statute produce an inequitable result, that is a problem that must be addressed by Congress.[13] It cannot be corrected by distorting the statute to fit a particular set of facts, or by ignoring the statute entirely.

Section 8(e) is a remedial statute and we have been directed to administer its provisions liberally.[14] However, to suggest that the special docket procedure may be used to permit a carrier to correct any operational or service error, and thus to charge a rate for a service that was never performed and a rate that has never been reflected in any tariff for the service that *was* performed, is beyond any plausible interpretation of the words of that section.

Finally, this decision significantly undermines traditional arguments for the retention of statutes required the filing of and adherence to tariffs. If a carrier may retroactively file and apply a rate for a particular shipper,

[11] For a vivid demonstration of the complexities involved in trying to unravel this type of factual setting, see *Application of United States Lines (S.A.) Inc. (Formerly Moore McCormack Lines, Incorporated) for the Benefit of Miles Laboratories, Inc.*, Special Docket No. 1168, Initial Decision of Seymour Glanzer, Administrative Law Judge served March 20, 1985.

[12] Even if the facts demonstrate that Hapag-Lloyd performed only a port-to-port service for these shipments, there is still a strong possibility that the shipper could recover damages in an action for breach of contract brought in an appropriate court. One theory of such an action for which some precedent exists, is that the carrier failed to perform the service to which he agreed, thus necessitating higher charges under the applicable conference tariff. See *Southern Pacific Company* v. *Miller Abattoir Company* 454 F. 2d 357 (3rd Cir. 1972) and generally, cases discussed in 83 American Law Reports 245, 260–267 and in 88 American Law Reports 2d 1375–1395.

[13] See, e.g. *Laning—Harris Coal & Grain Co.* v. *St. Louis & S.F. R.R.*, 15 I.C.C. 37 (1909); *Moore Co.* v. *L. & N. R.R.* 210 I.C.C. 305 (1935); and *Baldwin* v. *Scott County Milling Co.*, supra, note 6.

[14] *Nepera Chemical Inc.* v. *FMC*, 662 F. 2d 18 (D.C. Cir. 1981)

where the service performed does not match the rate filed, the value of tariffs is certainly brought into question.

For all these reasons, I dissent from the majority's decision and sincerely hope that the Commission will take advantage of the earliest opportunity to reconsider these fundamental questions of transportation law.

Federal Maritime Commission

SPECIAL DOCKET NO. 1220

APPLICATION OF HAPAG-LLOYD, AG FOR THE BENEFIT OF GENERAL MOTORS CORPORATION

Application for permission to waive a total of $220,193.51 of the applicable freight charges, granted.

Initial Decision [1] of Charles E. Morgan, Administrative Law Judge

Partially Adopted May 10, 1985

By application filed August 15, 1984, as amended [2] by letter dated August 16, 1984, the applicant, Hapag-Lloyd, AG for the benefit of General Motors Corporation (GM), seeks permission, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 8(e) of the Shipping Act, 1984 (the Act), to waive a total of about $220,193,51 of the applicable freight charges on 24 shipments, consisting of a total of 140 containers, of auto parts, from Romulus, Michigan, to Ruesselsheim, Germany, from Brighton, Michigan, to Antwerp, Belgium, from Romulus to Antwerp, from Dearborn, Michigan, to Rotterdam, The Netherlands, and from Romulus to Vienna, Austria, shipped during the period from February 18, 1984, through August 2, 1984.

The shipments moved intermodally, generally moving from Michigan via railroad to Baltimore or New York, thence via ocean carrier (Hapag-Lloyd) to the ports of Hamburg, Germany, or Antwerp, Belgium, or to Rotterdam, The Netherlands, and thence on carriage to the final destinations of Ruesselsheim, Antwerp, Rotterdam, or Vienna.

The shipments were consigned to various subsidiaries or affiliates of GM; namely, General Motors Austria Werke; Adam Opel, AG; General Motors Continental; General Motors Nederland B.V.; and General Motors Continental N.V.

The applicable rates and charges on the shipments herein are based on a combination of factors, including certain port-to-port rates of the North Atlantic Continental Freight Conference, Tariff No. FMC–9, in items numbers 732.0015.114 and 732.0030.000. In addition to these port-to-port rates, applicable charges include a terminal handling charge at U.S. ports, a container service charge on house-to-house containerized cargo payable

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

[2] The amendment withdraws the request for relief with respect to the rate of $1,572 from Romulus to Ruesselsheim and the rate of $1,434 from Romulus to Bochum, since new corrective tariffs had not as yet then been filed. Special Docket No. 1225 covers these rates.

in Europe, as well as U.S. inland charges, and on carriage charges in Europe.

Inasmuch as the port-to-port tariff contained two separate rates on auto parts, one rate on a measured ton of 40 cubic feet, minimum 800 cubic feet per container, and the other rate on a weight ton of 2,240 pounds (on automobile parts, new for assembly), the calculation of the applicable port-to-port rates depends on the *lesser* cost of the measurement or weight basis.

Such applicable port-to-port rates from and to all destinations herein, were $117 per ton (W) prior to March 1, 1984, $129 per ton (W) after March 1, 1984, minimum 40,320 pounds per container; or $71 per ton (M) prior to March 1, 1984, $78 per ton (M) after March 1, 1984, minimum 800 cubic feet per container.

The consignees were responsible for the payment of all freight charges, except that the shipper (GM) was responsible for payment of the U.S. terminal handling charge, which was $4.50 per ton (M) or $7.50 per ton (W) depending upon how the cargo was rated.

Container service charges were 275 Belgian francs, or 19.5 Dutch florin (gulden), or 19 German marks, per 1,000 kilos. For the purposes of the waiver herein, the European container service charge was *estimated* at $100 American per container, even though the gross weights of the various containers varied.

Inasmuch as this is an application for waiver, rather than an application for refund, the precise amounts of the waivers on the shipments need not be determined. What will be authorized to be waived is the total amount of applicable charges in excess of charges which were paid, and which were based on the precise intermodal through single factor rates intended and agreed on herein.

Further, while the authorized waiver or waivers are sought on behalf of GM, in truth they are largely for the benefit of the consignees (affiliates or subsidiaries of GM) because the consignees were responsible for all the applicable freight and miscellaneous charges, except for the U.S. terminal handling charges.

Hapag-Lloyd has charged and collected amounts based on the sought intermodal rates only, and thus it is immaterial moneywise for whom the waivers may be authorized, because Hapag-Lloyd will not be authorized herein to make any refunds.

The sought bases of charges are based on the seven intended negotiated intermodal through one-factor rates as follows:

Origin	Destination	Rate
Romulus	Ruesselsheim	$1,772—40 ft. container.
Brighton	Antwerp	$1,448—40 ft. container.
Romulus	Antwerp	$1,401—40 ft. container.
Romulus	Antwerp	$1,301—20 ft. container.
Dearborn	Rotterdam	$1,431—40 ft. container.

Origin	Destination	Rate
Romulus	Vienna	$1,754—20 ft. container.
Romulus	Vienna	$2,037—40 ft. container.

In the early part of 1983, Hapag-Lloyd offered independent intermodal rates in its North Atlantic service from the East Coast of the United States to countries in Northern Europe, as published in Hapag-Lloyd Tariff FMC No. 210.

On Friday, December 9, 1983, the Federal Maritime Commission granted authority to the North Atlantic/Continental Freight Conference (NACFC) to offer intermodal rates. The conference met the next day, Saturday, December 10, 1983, and scheduled a meeting for Sunday, December 11, 1983, to discuss conference intermodal rates to be charged. The decision was made to require all member lines to submit to the conference at the December 11 meeting, any rate commitments the member lines had with customers.

NACFC implemented its intermodal authority by filing rates from inland U.S. points, to become effective February 1, 1984, at which time all of Hapag-Lloyd's individual intermodal tariff rates for its North Atlantic service were canceled (replaced by the NACFC intermodal tariff filing).

On August 5, 1983, GM had requested Hapag-Lloyd to quote GM intermodal rates on various shipments of auto parts. By letter dated September 16, 1983, Hapag-Lloyd had quoted GM competitive rates over the requested routings, which GM accepted on October 24, 1983. On November 18, 1983, Hapag-Lloyd supplemented its rate offerings, and made clear its intent to offer these rates to GM for the period November 1, 1983, through October 31, 1984.

When the NACFC met on December 11, 1983, Hapag-Lloyd, as a member line, had prepared a list of its intermodal rate commitments, including those with GM.

The list was compiled by Hapag-Lloyd hurriedly in Hamburg, and sent by telex to the conference meeting. Due to clerical oversight the seven rates here in issue inadvertently were omitted from the telex. This error was made in spite of Hapag-Lloyd's intention that these rates also would become part of the conference's intermodal tariff.

As a result of the 24 shipments here in issue involving 140 containers moved without any intermodal rates on file for Hapag-Lloyd.

Hapag-Lloyd states that granting the application will not result in discrimination among shippers, because all shipments will come under the rates proposed here and intended to have gone into effect months ago. Hapag-Lloyd is not aware of any shippers other than GM, which have utilized or will utilize the rates in issue.

The revised Appendix A to the application is the summary of the waivers requested, listing the vessel, sailing date, origin of shipment, final destination, the intermodal total freight charges as agreed and as paid, the total freight charges applicable on the port-to-port rate basis plus miscellaneous

charges, and the differences between the two totals or the amount sought to be waived.

The total sought to be waived as shown on revised Appendix A for 140 containers is $220,193.51.

Appendix B to the application shows the detailed calculations upon which the figures in revised Appendix A are based.

For example, the last part of Appendix B concerns the shipment dated August 2, 1984, of automobile parts to General Motors Continental N.V. at Antwerp, Belgium, from Romulus, Michigan, on the vessel, STUTTGART EXPRESS, at the applicable port-to-port rate of $78 per measurement ton, minimum 800 cubic feet, on 835 cubic feet, or $1,628.25, plus terminal handling charge of $4.50 per measurement ton or $93.93, plus U.S. inland charge of $598, plus on carriage European charge of $111, plus $100 European container service charge, or a grand total of $2,531.18.

The sought through single-factor intermodal rate, inclusive of all charges is $1,301 per 20 foot container. Thus, the waiver sought to be authorized on this shipment is $2,531.18 less $1301 or $1,230.18.

The statutory requirements have been met. It is concluded and found that there was an error of administrative or clerical nature made by Hapag-Lloyd in failing to properly telex the conference (NACFC) to publish the seven agreed intended through intermodal single-factor rates on automobile parts herein, which caused higher freight charges to apply, based on port-to-port rates plus miscellaneous charges; that the intended agreed intermodal rates were made effective August 7, 1984, in NACFC Intermodal Tariff FMC–10, pages 520–B, 519–A, and 518–A, which was after the shipments herein moved, and prior to the filing of this application; that the application was timely filed; and that so far as the record shows, the authorization of a waiver will not result in discrimination among shippers, ports, or carriers.

The applicant, Hapag-Lloyd, is authorized to waive a total of approximately[3] $220,193.51 of the applicable freight charges on the shipments herein. Appropriate notices of this matter and of the details of the waiver shall be published in the pertinent tariffs of the conference, the port-to-port (FMC–9) and intermodal (FMC–10).

(S) CHARLES E. MORGAN
Administrative Law Judge

[3] As noted, the waivers are approximate because of approximations in dollars of the equivalent European money amounts of the European container service charges.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1225
APPLICATION OF HAPAG-LLOYD, AG FOR THE BENEFIT OF GENERAL MOTORS CORPORATION

Application for permission to waive $7,132.79 of the applicable freight charges, granted.

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

Partially Adopted May 10, 1985

By application filed August 23, 1984, the applicant, Hapag-Lloyd, AG, for the benefit of General Motors Corporation (GM), seeks permission, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 8(e) of the Shipping Act, 1984 (the Act), to waive a total of about $7,132.79 of the applicable freight charges on four shipments, consisting of a total of six containers, of auto parts, from Romulus, Michigan, to Ruesselsheim and to Bochum, Germany, shipped during the period from February 25, 1984, through March 31, 1984 (bill of lading dates).

This application is a companion to the application in Special Docket No. 1220. Some differences between the two applications are the dates of filing and the dates corrected tariff matter were made effective. Generally, otherwise the circumstances of the two applications are the same or similar.

The shipments moved intermodally from Romulus via railroad to Baltimore or New York, thence via ocean carrier (Hapag-Lloyd), to the port of Antwerp, Belgium, and thence on carriage to the final destinations of Ruesselsheim and Bochum.

The shipments were consigned to Adam Opel A.G.

The applicable rates and charges on the shipments herein are based on a combination of factors, including certain port-to-port rates of the North Atlantic Continental Freight Conference, Tariff No. FMC–7, in items numbers 732.0015.114 and 732.0030.000. In addition to these port-to-port rates, applicable charges include a terminal handling charge at U.S. ports, a container service charge on house-to-house containerized cargo payable in Europe, as well as U.S. inland charges, and on carriage charges in Europe.

Inasmuch as the port-to-port tariff contained two separate rates on auto parts, one rate on a measured ton of 40 cubic feet, minimum 800-cubic feet per container, and the other rate on a weight ton of 2,240 pounds

[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).

(on automobile parts, new for assembly), the calculation of the applicable port-to-port rates depends on the *lesser* cost of the measurement or weight basis.

Such applicable port-to-port rates to both destinations herein were $117 per ton (W) prior to March 1, 1984, $129 per ton (W) after March 1, 1984, minimum 40,320 pounds per container; or $71 per ton (M) prior to March 1, 1984, $78 per ton (M) after March 1, 1984, minimum 300 cubic feet per container.

The consignee was responsible for the payment of all freight charges, except that the shipper (GM) was responsible for payment of the U.S. terminal handling charge, which was $4.50 per ton (M) or $7.50 per ton (W) depending upon how the cargo was freighted.

Container service charges were 275 Belgian francs per 1,000 kilos. For the purpose of the waiver herein, the European container service charge was estimated at $100 American per container, regardless of the gross weights of the containers, except for one container where the estimate was $80. (One of the lighter weight containers was estimated at $100.)

Inasmuch as this is an application for waiver, rather than an application for refund, the precise amounts of the waivers on the shipments need not be determined. What will be authorized to be waived is the total amount of the applicable charges in excess of charges which were paid, and which were based on the precise intermodal through single-factor rates intended and agreed on herein.

Further, while the authorized waiver or waivers are sought on behalf of GM, in truth they are largely for the benefit of the consignee, Adam-Opel A.G., which presumably is a subsidiary or affiliate. This is so, because the consignee was responsible for all of the applicable freight charges and miscellaneous charges, except for the U.S. terminal handling charges.

Hapag-Lloyd has charged and collected amounts based on the sought intermodal rates only, and thus it is immaterial moneywise for whom the waivers may be authorized, because Hapag-Lloyd will not be authorized herein to make any refunds.

The sought charges are based on the two intended negotiated intermodal through one-factor rates as follows:

Origin	Destination	Rate
Romulus	Ruesselsheim	$1,572—20 ft. container.
Romulus	Bochum	$1,434—20 ft. container.

As recited in Special Docket No. 1220, in the early part of 1983, Hapag-Lloyd offered independent intermodal rates in its North Atlantic service from the East Coast of the United States to countries in Northern Europe, as published in Hapag-Lloyd Tariff FMC No. 210.

On Friday, December 9, 1983, the Federal Maritime Commission granted authority to the North Atlantic/Continental Freight Conference (NACFC) to offer intermodal rates. The Conference met the next day, Saturday,

December 10, 1983, and scheduled a meeting for Sunday, December 11, 1983, to discuss Conference intermodal rates to be charged. The decision was made to require all member lines to submit to the Conference on the December 11 meeting, any commitments which the member lines had with customers.

NACFC implemented its intermodal authority by filing rates from inland U.S. points to become effective February 1, 1984, at which time all of Hapag-Lloyd's intermodal tariff rates for its North Atlantic service were canceled (replaced by the NACFC intermodal tariff filing).

On August 5, 1983, GM had requested Hapag-Lloyd to quote GM intermodal rates on various shipments of auto parts. By letter dated September 16, 1983, Hapag-Lloyd had quoted GM competitive rates over the requested routings, which GM accepted on October 24, 1983. On November 18, 1983, Hapag-Lloyd supplemented its rate offerings, and made clear its intent to offer those rates to GM for the period November 1, 1983 through October 31, 1984.

When the NACFC met on December 11, 1983, Hapag-Lloyd, as a member line, had prepared a list of its intermodal commitments, including those with GM.

The list was compiled by Hapag-Lloyd hurriedly in Hamburg, Germany, and sent by telex to the Conference meeting. Due to clerical oversight, the two rates here in issue inadvertently were omitted from the telex. Hapag-Lloyd's intention was that these two rates also would become part of the Conference's intermodal tariff.

As a result the four shipments, totalling six containers, here in issue moved without any intermodal rates on file for Hapag-Lloyd.

Hapag-Lloyd states that granting the application will not result in discrimination among shippers, because all shipments will come under the rates proposed here and intended to have gone into effect months ago. Hapag-Lloyd is not aware of any other shippers, other than GM, which have utilized or will utilize the rates in issue.

Appendix A to the application is the summary of the waivers requested, listing the vessel, sailing date, origin of shipment, final destination, the intermodal total freight charges as agreed and paid, the total freight charges applicable on the port-to-port rate basis plus miscellaneous charges, and the difference between the two totals or the amount sought to be waived.

Appendix B to the application shows the detailed calculations upon which the figures in Appendix A are based.

For example, the last part of Appendix B concerns the shipment of four containers from Romulus to Ruesselsheim. The last container listed was one containing 16,800 pounds made on the vessel DUESSELDORF EXPRESS, which sailed from Baltimore March 19, 1984, to Antwerp. The applicable port-to-port rate on this container was $78 per ton (M), minimum 800 cubic feet. Based on 843 cubic feet, this basic charge was $1,643.85. The terminal handling charge (U.S.) of $4.50 per ton (M) was

$94.84. The U.S. inland charge was $590, and the on-carriage European charge was $382. The European container service charge was estimated at $80 American. The total applicable charges as calculated for the container are $2,790.69.

The sought through single-factor intermodal rate, inclusive of all charges, is $1,572 per 20-foot container. Thus, the waiver sought to be authorized on this container is $2,790.69 less $1,572 or $1,218.69.

The statutory requirements have been met. It is concluded and found that there was an error of administrative or clerical nature made by Hapag-Lloyd in failing to properly telex the Conference (NACFC) to publish the two agreed intended through intermodal single-factor rates on automobile parts herein, which caused higher freight charges to apply, based on port-to-port rates plus miscellaneous charges; that the intermodal intended agreed rates were made effective August 23, 1984, in NACFC Intermodal Tariff FMC–10, page 520–B, which was after the shipments herein moved, and prior to the filing of this application; that the application was timely filed; and that so far as the record shows, the authorization of a waiver will not result in discrimination among shippers, ports, or carriers.

The applicant, Hapag-Lloyd is authorized to waive a total of approximately[2] $7,132.79 of the applicable freight charges on the shipments herein. Appropriate notice of this matter and of the details of the waiver shall be published in the pertinent tariffs of the Conference, the port-to-port (FMC–9) and intermodal (FMC–10).

(S) CHARLES E. MORGAN
Administrative Law Judge

[2] As noted, the waivers are approximate because of approximations in dollars of the Belgian francs amounts of the European container service charges.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–34
SHIPPING CONDITIONS IN THE U.S./ARGENTINA TRADE

ORDER OF DISCONTINUANCE

May 13, 1985

This proceeding was instituted on the Petition of A/S Ivarans Rederi (Ivarans) for issuance of rules to meet alleged conditions unfavorable to shipping in the United States trades with Argentina, pursuant to section 19, Merchant Marine Act of 1920 (46 U.S.C. app. § 876). Ivarans' Petition alleged that certain laws, decrees and actions of the government of Argentina and certain Argentine-flag carriers, particularly relating to Argentine government Resolution 619 which restricts the carriage of Argentine export cargoes to members of a northbound pooling agreement, had resulted in conditions unfavorable to shipping which would preclude Ivarans from competing for cargoes in the northbound trade. Ivarans is not currently a member of the northbound pooling agreement.

The Commission published notice of the Petition in the FEDERAL REGISTER inviting public comment. (49 FR 40097, October 12, 1984). The Commission also asked the Departments of State and Transportation to attempt to reach an informal resolution of the problem through government-to-government initiatives. In addition, Ivarans itself entered discussions with the government of Argentina, and requested that the Commission defer consideration of its Petition while it pursued such discussions.

The Commission has now been notified by the Departments of State and Transportation that they have received assurances from Argentine authorities that "they are not enforcing and do not intend to enforce" Resolution 619. Ivarans has likewise informed the Commission that it has received assurances directly from Dr. Casado Bianco, Argentine Undersecretary for Maritime and River Transport, that neither Resolution 619 or other measures, including necessary clearances and export licenses, will be used to prevent it from loading cargo in Argentina.

Based on these assurances, Ivarans informs the Commission by an April 26, 1985 letter from its counsel that it "is satisfied that the primary purpose of its Section 19 petition in regard to the northbound trade has been achieved," and requests that the Commission terminate this proceeding. Because Ivarans will have continued access to the northbound trade from Argentina to the U.S., and no further regulatory purpose would therefore be achieved by continuing this proceeding,

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

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–1
CALIFORNIA CARTAGE COMPANY, INC.

v.

PACIFIC MARITIME ASSOCIATION

DOCKET NO. 82–10
CONTAINERFREIGHT TERMINALS COMPANY, ET AL.

v.

PACIFIC MARITIME ASSOCIATION

ORDER DENYING MOTION TO DISMISS AND REMANDING PROCEEDING

May 23, 1985

These consolidated proceedings are before the Commission on a Motion Addressed To The Commission Under The Shipping Act of 1984 To Dismiss The Proceeding (Motion to Dismiss) filed by Respondent, Pacific Maritime Association (PMA), and Intervenor, International Longshoremen & Warehousemen's Union (ILWU). Complainants, California Cartage Co., Inc., *et al.* (Cal Cartage),[1] have filed a Reply to the Motion To Dismiss and a Motion Addressed To The Commission For Expedited Consideration Of Their Case On The Merits (Motion for Expedition). Respondents have filed a Response to the Reply to the Motion to Dismiss and a Reply to the Motion For Expedition.

BACKGROUND

The complaints in these proceedings alleged that an assessment agreement, Agreement No. LM–81 (Agreement or LM–81), filed with the Commission by PMA on September 29, 1981, violates the substantive standards of the Maritime Labor Agreements Act (MLAA) (94 Stat. 1021), formerly codified in section 15, fifth paragraph of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. §814). Administrative Law Judge Joseph N. Ingolia (Presiding Officer) issued an Initial Decision on October 26, 1982, which held that LM–81 was not an "assessment agreement" as defined in the

[1] Cal Cartage is the Complainant in Docket No. 82–1. Complainants in Docket No. 82–10 are Containerfreight Terminals Company and Hawaiian Pacific Freight Forwarding.

MLAA and dismissed the proceeding for lack of jurisdiction. *California Cartage Co., et al* v. *Pacific Maritime Assoc.*, 21 SRR 1333 (1982). Exceptions to the Initial Decision were filed by all parties to the proceeding.

On exception, the Commission reversed the Presiding Officer's finding of lack of jurisdiction, holding that LM–81, in conjunction with a prior agreement, met the jurisdictional requirements of the MLAA. However, the Commission further found that Complainants lacked standing to file a complaint under the MLAA because they paid no assessments under the Agreement and generally were not within the protected "zone of interests."[2] The Commission accordingly dismissed the complaint. *California Cartage Co., et al.* v. *Pacific Maritime Assoc.*, 25 F.M.C. 596 (1983).

On Petition For Review, the U.S. Court of Appeals reversed the Commission's decision and remanded the case for further proceedings. *California Cartage Co.* v. *U.S.*, 721 F.2d 1199 (9th Cir. 1983), *cert. denied*, 1055 S.Ct. 110 (1984). The Court held that Complainants had standing to file a complaint under the "any person" standard of section 22 of the 1916 Act,[3] and that this standing had not been abrogated by the MLAA. The Court also found that Complainants could challenge LM–81 under the "detriment to commerce" standard contained in the MLAA.

Shortly after the Court's decision was issued, the Shipping Act of 1984 (1984 Act) (46 U.S.C. app. §1701–1720) was enacted. That Act included several amendments to the MLAA provisions. As relevant here, the 1984 Act deleted the "detriment to commerce" standard applicable to assessment agreements and made the MLAA remedies and regulatory standards exclusive in MLAA complaint proceedings.[4] It is on the basis of these statutory changes that PMA and ILWU now seek dismissal of the remanded proceeding.

POSITIONS OF THE PARTIES

Repondents

The Motion to Dismiss requests an application of the 1984 Act in accordance with the Notice issued by the Commission addressing the status of pending agency proceedings at the time the 1984 Act went into effect.[5]

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[2] Complainants are off-dock container freight stations which do not utilize ILA labor for container handling. As such, they are not subject to assessments under the Agreement. Similarly, they are not "shippers, carriers or ports," the entities specifically mentioned in section 15, fifth paragraph, of the 1916 Act. After reviewing the 1916 Act and its legislative history the Commission determined that Congress did not intend that a negotiated labor agreement subject to the MLAA be challengable by complainants on the basis of its competitive effects.

[3] Section 22 (46 U.S.C. app. §821) provides in pertinent part:

> "Any person may file with the [Federal Maritime Commission] a sworn complaint setting forth any violation of this Act . . ."

[4] *See*, section 5(d) of the 1984 Act (46 U.S.C. app. §1704(d)) at footnote 7 *infra*.

[5] On May 15, 1984 the Commission issued a Notice in the *Federal Register* advising that proceedings pending at the time the 1984 Act went into effect would be decided under the 1984 Act and not under the 1916 Act. *Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission*, 49 *Fed. Reg.* 21798 (1984). The Notice further stated that exceptions to this policy would be considered under the general rule established in *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974).

It is argued that no "manifest injustice" would result in an application of the new Act because no matured right, such as reparations, has accrued to Complainants under the 1916 Act and that any relief they would obtain would be prospective in effect, *i.e.*, disapproval or modification of LM–81. No statutory provision or legislative history of the 1984 Act is said to be contrary to this result because the savings provisions in the 1984 Act (section 20(e)(2)(A))[6] was made inapplicable to MLAA cases by operation of the assessment agreement provision (section 5(d)).[7] Respondents argue that section 5(d) indicates a retroactive application of the amended MLAA provisions and that the Commission's interpretation of the savings provisions (section 20(e)(2)) cannot operate to remove immunity retroactively, distinguish "assessment agreements" from other agreement cases under the 1916 Act, or apply to any cases other than pending suits for past damages for unapproved agreements.

It is further argued that an application of the substantive "assessment agreement" provisions of the 1984 Act requires dismissal of this proceeding. The "detriment to commerce" standard was intentionally omitted from the 1984 Act, and, therefore, allegedly removed the basis for the Complainants' standing to challenge LM–81. Respondents argue that Complainants are therefore precluded from arguing any other grounds now, including discrimination, because their cause of action was limited to a "detriment to commerce" theory by the decision of the Court of Appeals.

Finally, Respondents contend that Complainants cannot avail themselves of the "any person" standing standard of section 11(a)[8] of the 1984 Act because section 5(d) specifically excludes its application to assessment agreement cases. It is argued that this change from the 1916 Act close

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Bradley stands for the proposition that cases are to be determined according to the law as it exists at the time a final decision is issued unless applying a change in the law during a proceeding results in a "manifest injustice" to a party.

[6] Section 20(e)(2)(A) (46 U.S.C. app. § 1719(e)(2)(A)) provides:

(2) This Act and the amendments made by it shall not affect any suit—(A) filed before the date of enactment of this Act . . ."

[7] Section 5(d) of the 1984 Act (46 U.S.C. app. § 1704(d)) provides:

(d) ASSESSMENT AGREEMENTS.—Assessment agreements shall be filed with the Commission and become effective on filing. The Commission shall thereafter, upon complaint filed within 2 years of the date 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. The Commission shall issue its final decision in any such proceeding within 1 year of the date of filing of the complaint. To the extent that an assessment or charge is found in the 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. These 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. Except for this subsection and section 7(a) of this Act, this Act, the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, do not apply to assessment agreements.

[8] Section 11(a) (46 U.S.C. app. § 1710(a)) provides:

"Any person may file with the Commission a sworn complaint alleging a violation of this Act, other than section 6(g), and may seek reparation for any injury caused to the complainant by that violation."

in time to the Court of Appeals decision evinces a clear intent to overrule the Court's decision. Respondents conclude that the Court's finding that the "any person" standard was an alternative basis for standing for Complainants is no longer relevant.

Complainants

Complainants argue that the savings provisions of the 1984 Act (section 20(e)(2)(A)) preserves its rights to prosecute its complaint to completion. It states that the Commission's interpretation of the savings provision in its May 15, 1984 Notice, which provides that this provision applies only to pending antitrust suits, should not apply here because this case is the only one that can ever challenge LM–81. Dismissal of this case allegedly could result in the final and unchallengeable approval of a potentially unlawful agreement. It is argued that the MLAA, as it read prior to the 1984 Act, must apply to conduct occurring before the Act became effective. Once Complainants have standing, they argue, all standards and remedies under the 1916 Act are available including disapproval of LM–81 and reparations.

Because the Court of Appeals ruled in their favor, Complainants also maintain that they retain their standing to sue even if the 1984 Act's substantive standards apply. However, Complainants further argue that it would be a "manifest injustice" to apply the 1984 Act because of its final antitrust immunization of LM–81 and the resulting deprivation of a remedy to non-participating third parties relying on Complainants' challenge here.

Alternatively, Complainants argue that they have standing under the 1984 as "any person" even if the "detriment to commerce" standard is now found to be inapplicable. They note that the Court of Appeals found the "any person" criteria is an alternative, and, accordingly, argue that they may challenge LM–81 under the MLAA or any other relevant provision of the 1984 Act. The "any person" standard of section 11(a) allegedly is carried forward in assessment agreement cases under the 1984 Act because section 5(d) does not limit standing and, therefore, Complainants may raise any violation of the 1984 Act. They urge that this result be permitted in light of the broad antitrust immunity provided by the 1984 Act. To do otherwise, they argue, deprives injured non-parties to such agreements of any forum to challenge them.

Finally, Complainants reason that the language of section 5(d) does not preclude the application of section 11(a) to assessment agreement cases because such a reading would render other critical provisions of the 1984 Act (such as discovery, rulemaking and the effective date) also inapplicable. The relevant language of section 5(d), according to Complainants, was only intended to apply to the substantive standards and procedural remedies stated in other sections of the 1984 Act.

DISCUSSION

The 1984 Act and its legislative history require a determination that Complainants have neither standing nor a cause of action to pursue in these proceedings under the 1984 Act. The "detriment to commerce" standard is not included in section 5(d) of the 1984 Act and the "any person" standing provision of section 11(a) is not applicable to assessment agreement cases. Accordingly, both the bases of standing and the substantive cause of action found available to Complainants by the Court of Appeals have been removed by the 1984 Act. The timing of this change and its legislative history[9] indicate an intention to overrule the Court's decision in this case, at least as it operates prospectively.

The savings provisions of section 20(e)(2)(A) have previously been interpreted by the Commission as having no application to pending administrative cases.[10] Complainants' standing and statutory cause of action therefore appears to be extinguished under the 1984 Act and their attempt to expand their case is now rejectable as a matter of the "law of the case" here.[11]

Under the *Bradley* rule,[12] however, an exception to the application of the 1984 Act to pending administrative cases is recognized where dismissal of a proceeding would result in "manifest injustice" to Complainants. One accepted method of making this determination is to ascertain whether any right or claim has matured or become vested under the 1916 Act that would be retroactively taken away from the Complainants by application of the 1984 Act.[13]

Section 15 of the 1916 Act contained two basic remedies with regard to MLAA complaint cases, disapproval or modification of the agreement and assessment adjustments. Neither of these remedies could now be afforded Complainants. First, if LM–81 were now found to be "detrimental to commerce" the Commission could not retroactively disapprove or modify the Agreement.[14] Additionally, the Commission could not prospectively disapprove or modify LM–81 because to do so would be to enter an order of future effect that is inconsistent with current law at the time the order is issued.[15] Therefore, even if Complainants' rights to have LM–81 disapproved or modified had theoretically "matured" on the basis of the record before the Commission under the 1916 Act, supervening legal considerations preclude that remedy now.

Second, a reading of section 15 of the 1916 Act indicates that assessment adjustments were only available to remedy unjust discrimination in assess-

[9] *See*, H.R. Rep. No. 600, 98th Cong., 2d Sess. 30 (1984).

[10] *See*, footnote 5.

[11] *See*, *California Cartage Co.* v. *U.S.*, *supra*, 721 F.2d at 1205, 1206.

[12] *See*, footnote 5.

[13] *See*, *Indianapolis power & Light Co.* v. *I.C.C.*, 687 F.2d 1098 (7th Cir. 1982).

[14] *See*, *National Ass'n of Recycling Industries, Inc.* v. *American Mail Line, Ltd.*, 720 F.2d 618, 620 (9th Cir. 1983).

[15] *Ziffrion* v. *U.S.*, 318 U.S. 73 (1943); *See also*, *Sea-Land Service, Inc.* v. *I.C.C.*, 738 F.2d 1311, 1314–15 (D.C. Cir. 1984); *Central Freight Lines, Inc.* v. *U.S.*, 669 F.2d 1063, 1069 (5th Cir. 1982).

ment agreements.[16] Therefore, because the Court of Appeals has already found that Complainants could not advance such a cause of action,[17] this remedy at no time "vested" or "matured" with respect to their complaint.

However, the Court's analysis of the 1916 Act would appear to require that the Commission also examine section 22 to determine whether any potential right or remedy had accrued to Complainants that was not inconsistent with section 15.[18] The fundamental right to obtain reparations under section 22 of the 1916 Act, does not appear inconsistent with section 15 with regard to affording a remedy for an assessment agreement found to operate to the "detriment of commerce." Section 15 contains specific remedies for agreements found to be unlawfully discriminatory. While these displace the reparations authority of section 22 because they are "inconsistent" therewith, the same can not be said of reparations for an unlawful "detriment to commerce." Section 15 does not apply an express remedy for an assessment agreement found detrimental to commerce. Accordingly, reparations must be held to be a viable remedy for such unlawful agreements under the statutory scheme of the 1916 Act in this narrow context.

Finally, the Commission finds that complainants' "right" to a decision on the merits of their case and on their request for reparations had sufficiently "matured" or "vested" so as to preclude its dispossession by application of the 1984 Act. Although no decision on the merits was issued before the 1984 Act was passed, the record was complete, and "but for" a finding of no standing by the Commission, such a decision would have issued. Depriving Complainants of a decision on the merits and their potential reparations now as a result of a threshold decision on their standing to sue that has been overturned on appeal would appear to constitute "manifest injustice." An award of reparations for conduct that occurred prior to the effective date of the 1984 Act would not affect future conduct nor carry forward provisions of the 1916 Act that are inconsistent with the 1984 Act. Accordingly, the Commission will deny Respondents' Motion to Dismiss.

THEREFORE, IT IS ORDERED, That the Motion to Dismiss of Respondents, Pacific Maritime Association and International Longshoremen & Warehousemen's Union, is denied; and

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[16] Section 15, fifth paragraph, of the 1916 Act provides in pertinent part:

> 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.* (emphasis added).

[17] *California Cartage Co.* v. *U.S., supra,* 721 F.2d at 1205.

[18] In this remanded proceeding, it is appropriate that the rights and remedies available to Complainants under the 1916 Act be determined according to the statutory construction methodology utilized by the Court of Appeals. *See, Rios—Phineda* v. *U.S. Dept. of Justice, (I.N.S.,* 720 F.2d 529 (8th Cir. 1983); *City of Cleveland, Ohio* v. *F.P.C.,* 561 F.2d 344 (D.C. Cir. 1977).

IT IS FURTHER ORDERED, That the Motion for Expedition of Complainants, California Cartage Company, Inc., *et al.*, is denied;[19] and

IT IS FURTHER ORDERED, That this proceeding is remanded to the presiding Administrative Law Judge for further proceedings consistent with this Order; and

IT IS FURTHER ORDERED, That the remanded proceeding shall be decided upon the present evidentiary record supplemented by any memoranda of law the parties may file on the remanded issue of whether Complainants are entitled to an award of reparations for injuries sustained by them as a result of a "detriment to commerce" caused by Agreement No. LM-81 from its implementation date until June 18, 1984, and, if so, in what amount; and

FINALLY, IT IS ORDERED, That an Initial Decision on Remand be issued within 120 days of the date of this Order.

By the Commission.

(S) BRUCE A. DOMBROSKI
Acting Secretary

[19] The Motion for Expedition argues that because this proceeding is now three years old and the MLAA provision requiring a final decision within one year of the filing of their complaints has been carried forward into the 1984 Act expedited consideration on the merits is appropriate in this remanded proceeding. Complainants request an abbreviated schedule for the issuance of an initial decision, exceptions, replies to exceptions and a final Commission decision. Respondents' Reply agrees that if their Motion to Dismiss is denied, the case should be given expedited consideration. Respondents suggest, however, that an initial decision be dispensed with and the Commission issue a final decision on the present record after allowing the parties to brief the "detriment to commerce" issue. Alternatively, Respondents state that if an initial decision is deemed necessary, it should be confined to only the "detriment to commerce" issue on the present record with the standard clearly defined in any Commission remand order. They further suggest that the inquiry be limited to the period of time between the filing of Agreement No. LM-81 and the date of the 1984 Act took effect.

Respondents' alternative procedure appears to be the most appropriate and has been adopted except to the extent it would preclude the presiding Administrative Law Judge from making a full determination of what constitutes a "detriment to commerce."

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–8

EAST COAST COLOMBIA CONFERENCE ET AL.

v.

AGROPECUARIA Y MARITIMA SANTA ROSA LTDA.

NOTICE

June 3, 1985

Notice is given that no appeal has been taken to the April 25, 1985, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–8
EAST COAST COLOMBIA CONFERENCE ET AL.

v.

AGROPECUARIA Y MARITIMA SANTA ROSA LTDA.

COMPLAINT DISMISSED WITH PREJUDICE

Finalized June 3, 1985

Complainants and respondent have filed a motion asking that the complaint be dismissed with prejudice. The reasons for the motion are explained below.

On January 31, 1983, complainants, a Conference and three of its member lines, filed a complaint alleging that respondent Agromar had violated sections 16 Second, 17, 18(b) (1) and (3) of the Shipping Act, 1916, by allegedly carrying cargo and doing other things without always having a tariff on file with the commission. As the case progressed and complainants obtained more information through the Commission's discovery processes, it appeared that complainants were alleging that Agromar had not only operated without a tariff from December 1980 through August 1981 between certain ports but that Agromar had also made unjustly discriminatory contracts and allowed shippers to pay freight at other than the rates on file during the period December 1980 through June 1982. Complainants also asked for money damages.

Agromar denied any wrongdoing and defended its contracts with shippers, contending that it is permissible to be a contract and common carrier at the same time. At worst, Agromar stated that it may have committed some technical violations without intending to violate law and that it corrected its mistakes and defective tariff filings. Alleged deviations from its tariff on certain shipments, however, were not explained by Agromar.

Rather than proceed into lengthy evidentiary hearings in an effort to litigate the various issues, in mid-July 1983, both complainants and respondent moved that the proceeding be stayed to allow them to consummate a settlement agreement which would require the assistance of the Commission, specifically, by means of a Commission-instituted investigation. (See Proceeding Stayed, July 21, 1983.) I granted the motion. *Id.* However, on February 10, 1984, the Commission declined to begin a formal investigation. Instead, the Commission referred the matter to the Bureau of Hearing Counsel with instructions to enter into informal negotiations leading to possible compromise under 46 CFR 505.4. Later, in April of 1984, com-

plainants furnished Hearing Counsel with materials which complainants believed to be relevant to their allegations of violations, as the Commission's February 10 Order permitted. (See Order cited, at 7.)

Because of the apparent inaction toward settlement between Hearing Counsel and Agromar, I issued rulings designed to precipitate some action either by way of settlement or by proceeding to hearing and a decision on the merits of the complaint. (See rulings served November 20, December 31, 1984, and February 8, 1985.) However, before it became necessary to lift the stay and proceed to hearing, Hearing Counsel and respondent Agromar completed their negotiations and executed two compromise agreements, dated October 29, 1984, and March 15, 1985. The two agreements appear to follow the standard form set forth in the Commission's regulations. (See Appendix A following 46 CFR 505.7). In brief, without admitting that it committed any of the alleged violations, Agromar agrees to pay the Commission the aggregate total of $12,500 in compromise of all civil penalties arising out of violations of sections 14 Fourth, 16 Second, 17, 18(b)(1) and 18(b)(3) of the Shipping Act, 1916, that were alleged to have occurred at various periods between December 1, 1980, and June 30, 1982. The agreements represent the Commission's and Agromar's desire to settle the matters in controversy and to avoid the delays and expenses which would accompany agency litigation concerning the penalty claims.

The above agreements have apparently persuaded complainants that further pursuit of their complaint into the same matters will be unnecessary. Accordingly, complainants, as well as respondent, are seeking to have their complaint dismissed with prejudice. Under the circumstances there is no doctrine of law which I am aware which would require private complainants to continue to litigate.

Accordingly, the motion is granted and the complaint is dismissed with prejudice.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–32

KUEHNE AND NAGEL, INC.

v.

BARBER BLUE SEA LINE AND NEDLLOYD LINES

NOTICE

June 4, 1985

Notice is given that no appeal has been taken to the April 29, 1985, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–32

KUEHNE AND NAGEL, INC.

v.

BARBER BLUE SEA LINE AND NEDLLOYD LINES

SETTLEMENT APPROVED

Finalized June 4, 1985

This proceeding was remanded to me for further hearing by the Commission for the purpose of determining whether four shipments of rock crushing plants could be considered mobile rock crushing plants within the meaning of Item 1255 of the 8900 Rate Agreement Freight Tariff No. 8, FMC No. 8.

During the testimony of a witness, on respondents' case-in-chief at the hearing held on April 25, 1985, the parties determined that the case should be settled and they entered into stipulations on the record[1] whereby the respondents agreed to pay the complainant the sum of $18,334.54, the exact amount alleged to constitute the over-charges on the four shipments, and the complainant agreed to waive any entitlement to interest.[2] I indicated that the settlement appeared to be satisfactory to me but that final approval must await appropriate Commission action following the issuance of my written order of approval.

The background, facts and issues involved in this proceeding have been fully developed in my initial Decision of October 1, 1984, and the Order or Remand, served March 28, 1985, and will not be repeated except to the extent needed for clairity.

The complaint was filed on July 28, 1983. It alleged that there were four shipments of mobile rock crushing plants from Baltimore, Maryland, to Damman, Saudi Arabia, made in August and September, 1981; that Barber Blue Sea Line carried two of those shipments and overcharged complainant's assignor in the amount of $13,734.45 and the Nedlloyd Lines carried the other two shipments and overcharged complainant's assignor in the amount of $4,600.09, all in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3).

[1] A written paraphrase of the stipulation was presented to me after the record of hearing was closed. The paraphrase was lodged with the Secretary for filing in the docket.

[2] A complainant may elect to waive interest on its claim. *Consolidated International Corporation* v. *Concordia Line*, 18 F.M.C. 180, 181–182, n.3 (1975).

The ro/ro portions of the shipments were rated as "mobile rock crushing plants" under Item 1255 of the aforesaid tariff while all other portions were rated as stationary "rock crushing plants" under Item 765 of that tariff. Item 1255 carried a rate of $122.25 W/M while Item 765 carried a higher rate of $131.25. Kuehne and Nagel argued that the entirety of four shipments should be rated as mobile plants. The respondents argued that, by giving the shipper the benefit of the doubt, the shipments were properly rated, partly as mobile and partly as stationary plants, rather than as stationary plants in their entirety. I found that the plants were mobile and should have been rated as Item 1255 shipments. The Commission found that there was insufficient evidence to determine which tariff item applied, but did confirm that all of the shipments must be rated under a single item of the tariff.

As indicated, while respondents' witness was testifying, it became manifest to them, for the first time, that an ambiguity in the 8900 Rate Agreement Tariff could be perceived and that a shipper might possibly rely on that ambiguity to conclude that only the Item 1255 rate was applicable.

Accordingly, and in order to avoid any further expenses of litigation, the parties agreed to the settlement and asked that it be approved.

DISCUSSION

In determining whether settlements should be approved, it is well settled that the law encourages settlements and that every presumption is indulged in that favors their correctness, fairness and validity. However, as an added ingredient in section 18(b)(3) cases, the Commission insists upon striking a balance between the policy favoring settlement against the possibility of discriminatory rating practices which might result if settlements are approved in the absence of a finding of violation. Thus, in such cases the Commission follows the policy that parties should have the opportunity to settle disputes, but to prevent abuse, it must be established that the settlement is a bona fide attempt to terminate the 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. *Organic Chemicals* v. *Atlanttrafik Express Service,* 18 SRR 1536a (1979); *Ellenville Handle Works, Inc.* v. *Far Eastern Shipping Company,* 23 F.M.C. 708 (1981); *Celanese Corporation, Inc.* v. *The Prudential Steamship Company.* 23 F.M.C. 1 (1980).

Clearly this has been a vigorously contested proceeding. Following the service of the complaint and the answer, there were motions for summary judgment, a hearing on a stipulated record, exceptions to the initial decision and a partial oral hearing on remand. There existed a genuine dispute, which, absent a settlement, promised to involve a continuation of the evidentiary hearing, briefing and the filing of exceptions after another initial decision. The parties have carefully considered the potential expense of protracted litigation and the difficulties of sustaining the burden of persua-

sion and have decided to dispose of their differences in a rational and non-discriminatory manner.

I find that the settlement is a bona fide attempt by the parties to terminate the controversy and that it is not a device to obtain transportation at other than applicable rates and charges or otherwise circumvent the requirements of the Shipping Acts.

Accordingly, it is ordered that the settlement be approved. It is further ordered that within ten days after this order becomes final the parties furnish the Secretary with evidence that the settlement has been accomplished.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–6

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

NEW YORK SHIPPING ASSOCIATION, ET AL.

DOCKET NO. 84–8

PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO MARINE MANAGEMENT, INC.

v.

NEW YORK SHIPPING ASSOCIATION, INC.

ORDER DISCONTINUING PROCEEDING

JUNE 5, 1985

On February 27, 1985, the Federal Maritime Commission (Commission or FMC) issued a Report and Adoption With Modifications of Initial Decision and an implementing Order (February Report and Order) in these proceedings. The Commission found that an assessment agreement (LM–86) used by the New York Shipping Association, Inc. (NYSA) and International Longshoremen's Association, AFL–CIO (ILA) to fund longshoremen's benefits was "unfair" and "unjustly discriminatory" under the Maritime Labor Agreements Act of 1980 (MLAA) (Pub. L. No. 96–325) and ordered the agreement modified to remove the unfairness and unjust discrimination. It also directed that assessment adjustments be made in favor of Puerto Rico Maritime Shipping Authority/Puerto Rico Marine Management, Inc. (PRMSA/PRMMI) to compensate PRMSA/PRMMI to the extent it was assessed under LM–86 rather than the modified assessment agreement the Commission prescribed.

On April 29, 1985, pursuant to the February Order, NYSA and ILA filed with the Commission a modified assessment agreement (April Assessment Agreement) and a statement of assessment adjustments (April Assessment Adjustments) to be granted PRMSA/PRMMI. NYSA and ILA also, as required in the February Report and Order, set forth the means of "phasing out" the "excepted" man-hour assessment treatment for trans-

shipped cargoes.[1] In addition, they sought an extension of time until July 1, 1985 for implementation of the April Assessment Agreement and for submission of applications to defer imposition of the man-hour/tonnage assessment on transshipped cargo beyond September 30, 1986. On April 29, 1985, Massachusetts Port Authority (Massport) sought an extension of the transition period for phasing out the "excepted" treatment for Boston transshipment cargoes from September 30, 1986 to September 30, 1987.

By order served May 13, 1985, the Commission extended until July 1, 1985 the time for filing requests for extensions of the "phasing out period" from any party and until July 31, 1985 the time for responses to such requests. By orders served May 13 and May 21, 1985, the Commission also extended until May 28, 1985 the time for replies to issues raised by the April Assessment Agreement, the petition for extension of the effective date of that Agreement to July 1, 1985, and the document entitled "PRMSA's Assessment Adjustment."

On May 22, 1985, NYSA/ILA submitted a new assessment agreement (May Assessment Agreement), made effective by its terms on July 1, 1985, which is appended to a "Settlement Agreement" joined in by all of the private parties engaged in the litigation in these proceedings.[2]

The Settlement Agreement is made "in consideration of the assessment adjustment to be provided to PRMSA and the mutual promises herein contained . . . ." It provides that "all assessment litigation before the FMC and the courts is hereby settled," and that "At such time as notice is received that the FMC deems the matters in issue in . . . [these proceedings] have been concluded by virtue of this Agreement," all court proceedings brought to challenge the Commission's actions herein will be terminated (Section 3(a)).[3]

In addition, the Settlement Agreement provides for an assessment adjustment credit in favor of PRMSA, pursuant to our February Report and Order, of $4,667,000 for the period February 27, 1984 through June 30, 1985 made available immediately upon execution of the Agreement (Section 1). The Settlement Agreement also provides for the adoption of the appended May Assessment Agreement, and guarantees the Puerto Rican trade

[1] Section 17 of the April Assessment Agreement provides for the deferral of the tonnage portion of the assessment on transshipped cargoes until September 30, 1986, one of the options permitted by the Commission. See February Report and Order, pages 88–89.

[2] The Settlement Agreement was signed by NYSA, ILA, PRMSA, PRMMI, The Port Authority of New York and New Jersey, the Maryland Port Administration (MPA), Massport, and Sea-Land Service, Inc. MPA, however, preserves its right to challenge before the Commission "any future competitive situation which results from this settlement agreement."

[3] The Settlement Agreement also states "The parties hereto waive and release any and all claims which they have asserted or may have asserted against each other or any other named party in connection with the aforementioned litigation relating to the assessment formula for the funding of the costs of longshore fringe benefits in the Port of New York and New Jersey." (Section 3(b)). * * * * "Each of the parties hereto agrees to take no action whatsoever to overturn or nullify this settlement and/or the annexed NYSA–ILA Assessment Agreement." (Section 5(c)).

of substantial preservation of the treatment accorded it therein during the 1983–1986 and 1986–1989 contract periods (Section 2).

Finally, the Settlement Agreement states that it "shall not be deemed an admission of liability by any party" nor "an expression of opinion by any party as to the correctness or legality of this agreement, of the annexed NYSA–ILA Assessment Agreement, of the NYSA–ILA Assessment Agreement No. LM–86 or the February 27, 1985 Report and Order of the Federal Maritime Commission in Docket Nos. 84–6 and 84–8." (Section 4).

The May Assessment Agreement, which revokes and replaces the April Assessment Agreement, provides for a tonnage assessment of $5.85 per assessment ton, and a man-hour assessment for "excepted" cargo of $5.50 per man-hour. Transshipped/relayed containers are assessed $25.00 for each loading or unloading from a vessel in the Port of New York/New Jersey. "House Containers" (*i.e.*, those not stuffed/stripped on the pier) are assessed a $65.00 rate, and empty containers a $40.00 rate. House Containers and Empty Containers in the Puerto Rican trade are assessed $15.00. "Pier containers" (*i.e.*, those stuffed/stripped on the piers), containers not consigned to the Port which are restowed on the same vessel, and house containers (including house containers in the Puerto Rican trade) which originate at or are destined to points in the continental United States (excluding Alaska) more than 260 highway miles from the center of the Port are not subject to a container unit assessment. The NYSA–ILA Contract Board is empowered to alter the assessment levels, to grant special assessment for specific cargoes, and to alleviate peculiar and isolated hardships for specific carriers, trades or commodities.

On May 23, 1985, PRMSA/PRMMI advised that in light of the May Assessment and Settlement Agreements, "no further comment from PRMSA and PRMMI is required in respect of these proceedings."

Because the May Assessment and Settlement Agreements supersede the April Assessment Agreement and Assessment Adjustments, we need not make detailed findings on whether or not the earlier documents complied with the February Report and Order in all respects. The Commission found LM–86 unlawful and ordered assessment adjustments made in favor of PRMSA/PRMMI. Such adjustments have been made "pursuant to the February 27, 1985 Report and Order of the Federal Maritime Commission," and PRMSA/PRMMI, NYSA, and ILA agree that the amount of assessment adjustments due PRMSA/PRMMI is $4,667,000. Assessment credits have already been extended in that amount against future assessments. Insofar as the future is concerned, the May Assessment Agreement, which replaces both LM–86 and the April Assessment Agreement, has been agreed to by all parties and fully resolves all outstanding differences as between them.

Prior to the MLAA, settlement agreements with respect to assessments for longshoremen's benefits required approval pursuant to section 15, Ship-

ping Act, 1916 (46 U.S.C. app. 814). *See e.g., New York Shipping Ass'n* v. *FMC*, 571 F.2d 1231, 1236–1237, 1239–1240 (D.C. Cir. 1978); *New York Shipping Ass'n* v. *FMC*, 628 F.2d 253, 255–257 (D.C. Cir. 1980). This is no longer the case. Under the MLAA, assessment agreements are not subject to an affirmative act of approval by the Commission, but become effective by operation of law and can only be challenged on private party complaint and not on the Commission's own motion. *See* S. Rep. No. 854, 96th Cong., 2nd Sess. 13–14 (1980); S. Rep. No. 3, 98th Cong., 1st Sess. 25 (1983); Shipping Act of 1984, section 5(d), 46 U.S.C. app. 1704(d).

The May Assessment Agreement is an assessment agreement within the meaning of the MLAA and will become effective by its terms by operation of law on July 1, 1985. Similarly, so much of the Settlement Agreement as provides for the continued differentiated assessment treatment for the Puerto Rican trade is an assessment agreement within the meaning of the MLAA, and became effective when filed with the Commission on May 22, 1983.[4]

THEREFORE, IT IS ORDERED, That all pending petitions, motions and requests with respect to the April 29th filings are dismissed as moot; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

[4] Accordingly, the Commission need not and does not make any determination as to the merits of these Agreements.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–1

EXPORTRAN, INC.

v.

TEXAS GULF IBERIA NAVIGATION COMPANY, INCORPORATED

NOTICE

June 20, 1985

Notice is given that the time within which the Commission could determine to review the May 15, 1985, discontinuance of the complaint in this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–1

EXPORTRAN, INC.

v.

TEXAS GULF IBERIA NAVIGATION COMPANY, INCORPORATED

COMPLAINANT'S MOTION TO WITHDRAW COMPLAINT GRANTED

Finalized June 20, 1985

On May 3, 1985, Exportran, Inc., the complainant in this proceeding, filed a Motion to Withdraw Complaint regarding this proceeding. The complaint seeks relief from Texas Gulf Iberia Navigation Co., Inc. ("TGIN") for violations of the Commission's General Order 4, and section 44 of the Shipping Act, 1916.

In support of its Motion the complainant states that:

> During the course of the proceeding, counsel and Exportran, through negotiations with the relevant parties, obtained the release of all goods and documents of title which had been withheld as the result of misrepresentations by TGIN which thereby moots the counts contained in Paragraph IV of the Complaint.

The complainant also states that an action including the same issues involved in this proceeding was recently concluded in the District Court for the District of Columbia, and that by final order entered on April 22, 1985, the judge awarded $31,885.00 to Exportran. Further, the complainant notes that TGIN has not been operational as a licensed freight forwarder since May 27, 1984, when its license was revoked for failure to maintain a bond.

It is clear from all of the above and the entire record that the issues raised in this proceeding are moot. Consequently, the complainant's Motion to Withdraw Complaint is hereby granted and the proceeding is discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1206

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF PAGE & JONES, INC. AS AGENT FOR SONY MAGNETIC PRODUCTS, INC.

SPECIAL DOCKET NO. 1238

APPLICATION OF PACIFIC WESTBOUND CONFERENCE AND SEA-LAND SERVICE, INC. FOR THE BENEFIT OF TONE FORWARDING AS AGENT FOR MEARL CORPORATION

Application for permission in Special Docket No. 1206 to waive a portion of freight charges in the amount of $1,296.00 granted.

Application for permission in Special Docket No. 1238 to waive a portion of freight charges in the amount of $11,977.70 granted.

An application for waiver under section 18(b)(3) of the Shipping Act is appropriate where the application for waiver was filed within 180 days of the sailing date of the vessel even though the shipments were tendered to the carrier for inland movement more than 180 days prior to filing of application.

Claudia E. Stone for Sea-Land Service, Inc.

REPORT AND ORDER PARTIALLY ADOPTING INITIAL DECISIONS

June 26, 1985

By the Commission: (James J. Carey, *Vice Chairman;* Thomas F. Moakley, Edward J. Philbin and Robert Setrakian, *Commissioners*).

On January 18, 1985, Administrative Law Judge Seymour Glanzer (Presiding Officer) issued an Initial Decision (I.D.) in Special Docket No. 1206 denying Sea-Land Servicer, Inc.'s (Sea-Land) application submitted pursuant to section 18(b)(3) of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. §817) to waive collection of certain freight charges on the ground that the 180-day limitation contained in section 18(b)(3) precluded the Commission from granting the relief requested.[1] Similarly, on February 13, 1985, the Presiding Officer issued an I.D. in Special Docket No. 1238 denying another Sea-Land application on the same ground. The proceedings are before the Commission upon Exceptions to the I.D.'s filed by Sea-Land.

BACKGROUND

A. Special Docket No. 1206

[1] In all material respects, section 8(e) of the Shipping Act of 1984 (46 U.S.C. app. §1707(e)) is the same as section 18(b)(3) of the 1916 Act.

On October 21, 1983, Sea-Land officials instructed Sea-Land's tariff publication office to file a reduced rate on magnetic tape, applicable to all Continental ports, of $130 per 2240 pounds, subject to a 40,320 pound minimum per container. Rule 3 of the applicable tariff (Sea-Land Tariff No. 417, FMC No. 280) provides that: "The rate or charges to be assessed are those in effect the day origin carrier receives the cargo." (1st Revised Page 14).

On January 13, 1984 Sea-Land received a shipment of magnetic tape from Sony Magnetic Products, Inc. at Dothan, Alabama for transportation via Jacksonville, Florida to Le Havre, France. A second shipment of magnetic tape was received by Sea-Land on February 13, 1984. From Dothan each shipment was carried to Jacksonville by motor carrier where it was placed aboard the Sea-Land vessel LEADER. The first shipment moved on voyage 71E which sailed for Rotterdam on January 15, 1984. The second was moved on voyage 72E which sailed on February 14, 1984. Through an error the $130 rate was not published in the applicable section of the tariff at the time the shipments were tendered to the motor carrier. As a result, the then applicable rate for magnetic tapes of $166 per 2240 pounds (subject to a 40,320 pound minimum per container) was assessed on the shipments.

On July 12, 1984, Sea-Land filed a special docket application on behalf of Sony Magnetic Products, Inc. to waive collection of a total of $1296 due on the two shipments. The Presiding Officer concluded that the second shipment met all the requirements of section 18(b)(3) of the 1916 Act, and granted permission to waive $648. However, the application as to the first shipment was denied by the Presiding Officer on the ground that the 180-day limitation in section 18(b)(3) precluded the Commission from authorizing a tariff notice making the reduced rate effective from January 13, 1984, a date more than 180 days prior to the filing of the application.[2]

B. Special Docket No. 1238

Upon the request of Sea-Land, a member of the Pacific Westbound Conference (PWC), PWC agreed to establish a Special Rate applicable to "paints and pigments" of $160 per ton of 1,000 kilos (subject to a minimum of 18.5 kilotons per 40-foot container or 17.5 kilotons per 35-foot container) covering intermodal transportation from East Coast ports through West Coast ports to the Far East. (PWC Westbound Intermodal Tariff No. PWC–708–A, FMC–20). Rule 3 of the tariff provides that: "For cargo received by the carrier at CY, CFS, the applicable rates and charges are those in effect on the date of such receipt." (13th Revised Page 34).

[2] Section 18(b)(3) provides, in relevant part: "* * * That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

On March 9, 1984 a shipment of paints and pigments shipped by Mearl Corporation was received by Sea-Land at its container yard at Elizabeth, New Jersey. From Elizabeth it was carried overland to Seattle where it was loaded on board the Sea-Land vessel PATROIT on March 23, 1984 for transportation to Kowloon, Hong Kong. Due to an error, the Special Rate omitted "pigments" at the time the shipment was tendered to Sea-Land at Elizabeth. On September 18, 1985 Sea-Land filed a special docket application on behalf of Tone Forwarding as agent for Mearl Corporation to waive collection of $11,977.70 due on the shipment described above. The Presiding Officer denied the application as untimely filed for the same reasons stated above in connection with Special Docket No. 1206.

DISCUSSION

Section 18(b)(3) requires that applications for refund or waiver of otherwise applicable freight charges "must be filed with the Commission within one hundred and eighty days from the date of shipment." The "date of shipment" is defined in Rule 92 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.92(a)(3)) as "the date of sailing of the vessel from the port at which the cargo was loaded." In both Special Docket Nos. 1206 and 1238 the application was filed within 180 days *of the date the vessel sailed.* Thus, Sea-Land argues that it has complied with statue of limitation requirement of section 18(b)(3) as interpreted in Commission Rule 92.

The Presiding Officer acknowledges that the applications were filed within 180 days of the sailing date of the vessel. Nonetheless, he believes that relief is barred. He reasons in each instance that because the date of the carrier's receipt of the cargo is, by its own tariff, the date on which the rate for the assessment of charges became fixed, the Commission would have to authorize a tariff notice making the reduced rate effective from the date the cargo was received which is more than 180 days prior to the filing of the application. The Presiding Officer reads the Commission's decision in Special Docket No. 1102, *Application of United States Atlantic & Gulf-Jamaica and Hispaniola Steamship Freight Association and Sea-land Service, Inc. for the Benefit of United Brands for Chiquita International Trading Co.*, 26 F.M.C. 605 (1984) as precluding such an authorization.[3]

The facts of Special Docket No. 1102 were as follows. Sea-Land sought permission to refund $6,181.50 in freight charges on 38 shipments of pineapples. The shipments departed Elizabeth, New Jersey on April 9, April 30, May 7, and May 14, 1983, for Haina, Dominican Republic. Only five of the 38 shipments, those departing on May 14, 1983, occurred within 180 days of the filing of the application for refund. The Commission

[3] But *see Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Caterpillar Overseas,* Special Docket No. 1229 (F.M.C., administratively final November 5, 1984) where, in a similar situation, the Administrative Law Judge authorized a notice making the reduced rate effective more than 180 days before the filing of the application.

refused to allow the "intended rate" to "relate back" beyond the 180 days prior to the filing of the application to a date when the rate "should have been filed." In reaching this conclusion, the Commission observed the "180 days is a precise term that is not amenable to a variety of interpretations." 27 F.M.C. at 136. It noted, however, that "while the Commission in other cases had calculated the 180 days liberally in order to grant relief to shippers, *e.g., Sea-Land Service, Inc. for the Benefit of G.F. Tujague, Inc.*, _____ F.M.C. _____, 22 S.R.R. 619 (1984), there is no dispute or uncertainty over that calculation here." 27 F.M.C. at 136.

In Special Docket No. 1102, the Commission counted the 180 days from the date the vessel sailed as required by Rule 92 of the Commission's Rules of Practice and Procedure. The application was denied as the shipments moving on voyages which sailed *more than* 180 days prior to the filing of the application. The shipments here moved on voyages which sailed *within* the 180 day period. Thus, there is a critical factual distinction between the subject applications and those at issue in Special Docket No. 1102. No party in Special Docket No. 1102 contended that the 180 days ran from the date the cargo was received for carriage by the carrier and the Commission did not address the issue. Accordingly, Special Docket No. 1102 is inapposite.

We conclude that nothing prevents the Commission from authorizing a reduced rate to be effective more than 180 days before the application was filed provided the application was filed within 180 days of the sailing date. Because the Presiding Officer found that the applications met all other conditions as set out in section 18(3), the Commission will approve the applications.

THEREFORE, IT IS ORDERED, That the Exceptions of Sea-Land Service, Inc. are granted; and

IT IS FURTHER ORDERED, That, except to the extent noted above, the Initial Decisions served in these proceedings are adopted by the Commission; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. shall waive collection of ocean freight charges, in the amount of $648.00 due it from Sony Magnetic Products, Inc. in connection with a shipment of Magnetic tape it transported from Dothan, Alabama, via Jacksonville, Florida, to LeHavre, France on January 16, 1984; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. shall waive collection of ocean freight charges, in the amount of $11,977.70 due it from Tone Forwarding as agent for Mearl Corporation in connection with a shipment of pigments it transported from Elizabeth, New Jersey via Seattle, Washington to Kowloon, Hong Kong on March 23, 1984; and

IT IS FURTHER ORDERED, That in connection with Special Docket No. 1206, Sea-Land Service, Inc. shall publish the following notice within

thirty (30) days from the service of this Report and Order and an appropriate place in its tariff:

> Notice is hereby given as required by the decision in Special Docket No. 1206, that effective January 13, 1984, and continuing through April 30, 1984, inclusive, the rate on "Magnetic Tape" is $130.00 per 2240 lbs. minimum 40,320 lbs. per container. This notice is effective for purposes of refund or waiver of freight charges on any shipment of the goods described which may have been shipped during the specified time; and

IT IS FURTHER ORDERED, That in connection with Special Docket No. 1238, Sea-Land Service, Inc. shall publish the following notice within thirty (30) days from the service of this Report and Order in an appropriate place in its tariff:

> Notice is hereby given as required by the decision in Special Docket No. 1238, that effective March 9, 1984 and continuing through April 25, 1984 inclusive, the rate on "Pigments" is $160 per ton of 1000 kilos, minimum 18.5 Kilotons per 40 foot container of 17.5 kilotons per 35 foot container. This notice is effective for purposes of refund or waiver of freight charges on any shipment of the goods described which may have been shipped during the specified time; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. shall furnish the Secretary with evidence of each waiver along with copies of the above-described tariff notices within five days of the date charges are waived; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1206

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF PAGE & JONES, INC. AS AGENT FOR SONY MAGNETIC PRODUCTS, INC.

Application to waive collection of portions of freight charges granted for one shipment, denied for another.

Frank A. Fleischer for applicant, Sea-Land Service, Inc.

INITIAL DECISION[1] OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

Partially Adopted June 26, 1985

By application filed July 12, 1984, as supplemented, Sea-Land Service, Inc., seeks permission to waive collection of ocean freight charges in the respective amounts of $648.00, each, due it from Sony Magnetic Products, the shipper, in connection with two intermodal shipments of Magnetic Tape from Dothan, Alabama, via Jacksonville, Florida, to LeHavre, France.[2]

The shipments, weighing 38,883 pounds and 31,447 pounds, respectively, were loaded into containers by the shipper and were received by Sea-Land at Dothan on January 13, 1984, and February 13, 1984, respectively. From Dothan each shipment was taken to Jacksonville, by motor carrier, and loaded aboard the *Leader*, which sailed for Rotterdam on January 16, 1984 (V. 71E) and February 14, 1984 (V. 72E).

Sea-Land publishes an intermodal tariff from inland United States points via South Atlantic ports to points in Continental Europe and the United Kingdom. Until February 1, 1984, Intermodal Freight Tariff No. 417,[3] was in effect. On February 1, 1984, Tariff No. 417 was canceled and was replaced by Intermodal Freight Tariff No. 456.[4] As pertinent, Tariff No. 417 subdivided the destination ports by section. Section 2 of the tariff included ports located in Germany, The Netherlands and Belgium, while Section 3 included ports in France.[5] There was a rate for Magnetic Tape from Dothan to named ports in Section 2[6] and a rate to LeHavre

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

[2] In Europe, the shipments were transferred, at Rotterdam, The Netherlands, from the Sea-Land *Leader* (Voyages 71E and 72E) to the *Panarea* (Voyages 166S and 173S), which carried them to LeHavre.

[3] ICC SEAU 417, F.M.C. No. 280.

[4] ICC SEAU 456, F.M.C. No. 313.

[5] Tariff No. 417, 6th rev. p. 11, effective October 14, 1983.

[6] Id., p. 23–C.

in Section 3.[7] Rule No. 3 of Tariff No. 417, the so-called effective date of the rate rule, provided that, "The rate or charges to be assessed are those in effect the day origin carrier receives the cargo."[8]

On October 21, 1983, the responsible Sea-Land officials instructed Sea-Land's Tariff Publication office to file a reduced rate, applicable to all Continental ports, of $130 per 2,240 pounds (W), minimum 40,320 pounds per container.[9] Due to inadvertent clerical error, the reduced rate was published in Section 2 only.[10] The failure to publish in Section 3 left the rate to LeHavre at $166 (W), minimum 40,320 pounds per container.[11] The Magnetic Tape rates in effect when Tariff No. 417 was canceled were carried forward to Tariff No. 456. Thus, effective February 1, 1984, the rate to LeHavre remained at $166.[12]

The error was not discovered until both shipments had taken place. When it was discovered, it was corrected by publication of the $130 rate in Tariff No. 456.[13]

The invoices sent to the shipper were based on the applicable rate of $166. Intermodal freight charges at that rate amounted to $2,988.00 for each shipment.[14] Had the $130 rate been in effect, the charges would have been $2,340.00, each. The shipper (forwarder) paid the lesser amount for both shipments.[15]

The application states that Sea-Land will make any adjustment in freight forwarder compensation required and that approval of the application will have no effect on the intermodal division of revenue. Sea-Land states that there were no other shipments of the same or similar commodity during the relevant time period.

DISCUSSION

The first of the two shipments—the one which was received at Dothan on January 13, 1984, and sailed from Jacksonville on January 16, 1984—does not meet all the standards for approval under section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3)[16] and the Commission rules implementing that statute, 46 CFR 502.92(a). The second shipment—the one which was received on February 13, 1984, and sailed the following day—does meet the criteria for approval.

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[7] Id., p. 25–A–1.

[8] Id., 1st rev. p. 14.

[9] The $130 rate was scheduled to go into effect thirty days after a preliminary reduced rate of $114.70 was made effective.

[10] Tariff No. 417, 14th rev. p. 23–C.

[11] Thirteenth rev. R. 25–A–1.

[12] Tariff No. 456, 1st rev. p. 54. In Tariff No. 456, the rates to French ports appear in Section 2.

[13] Id. 2nd rev. p. 54, effective March 1, 1984.

[14] Other charges are not in issue.

[15] During negotiations in October, 1983, Sea-Land had agreed to the lower rate.

[16] In all material respects relevant to this application, section 8(e) of the Shipping Act, 1984, 46 U.S.C. app. 1707(e), is the same as section 18(b)(3) of the 1916 Act. Thus, the conclusion, which follows, would be the same under either Act.

The criteria are set forth in the four provisos of section 18(b)(3). Under the first proviso, it must appear that there was a qualifying error in failing to file a tariff provision and that the refund or waiver will not result in discrimination among shippers;[17] under the second proviso, it must be shown that the carrier filed a new tariff, setting forth the rate on which the waiver or refund is based, prior to filing the application; under the third proviso, the carrier must agree that if the application is granted, it will publish an appropriate tariff notice or take other steps, as required, which give notice of the rate on which the refund or waiver is based and that it will make additional refunds or waivers as prescribed; and under the fourth proviso, the application for refund or waiver must be filed within 180 days from the date of shipment.

Clearly, the second shipment meets all of the requirements of the four provisos: the failure to file the reduced rate in Section 3 of Tariff No. 417 was due to inadvertent error on the part of Sea-Land and, because there were no other shipments of the same or similar commodity during the relevant time period, approval of the application is not likely to result in discrimination among shippers,[18] and, in any event, the order, which follows, protects against discrimination; a corrective tariff setting forth the rate on which the waiver is based was timely filed before the application; under the regulation, 46 CFR 502.92(a), by filing the application, Sea-Land has agreed to take those steps which the Commission may require as a condition for granting relief; and the application was filed within 180 days of the date of shipment (sailing date).

The circumstances of the first shipment are more complex. At first glance it might appear that the requirements of the four provisos have been met, but on close analysis and with due deference to the Commission's decision in Special Docket No. 1102, *Application of United States Atlantic & Gulf-Jamaica and Hispaniola Steamship Freight Association and Sea-Land Service, Inc. for the Benefit of United Brands for Chiquita International Trading Co.*, Order Denying Petition for Reconsideration, 22 SRR 1266 (1984), it becomes manifest that the standards for approval have not been fulfilled. The rationale follows.

It is evident that the application was filed on the 178th day after the date the *Leader* sailed from Jacksonville. It is also clear that the application was filed on the 181st day after the shipment was received at Dothan—the date of receipt being the date on which the rate for the assessment of charges became fixed pursuant to Rule 3 of Tariff No. 417. What all this means is that in order to grant relief, the Commission must not only authorize Sea-Land to publish a tariff notice making the $130 rate effective as of January 16, 1984, it must authorize a notice making the

[17] Under section 8(e) of the Shipping Act, 1984, it must also appear that the refund or waiver does not result in discrimination among ports or carriers.

[18] There is no indication that there could be any discrimination among carriers or ports.

rate effective as of January 13, 1984. The latter authorization is proscribed by the teaching of Special Docket No. 1102, *supra.*

In construing the 180 day jurisdictional requirement of section 18(b)(3), the Commission held that " 'the rate upon which such refund or waiver would be based'—180 days is a precise term that is not amenable to a variety of interpretations." Special Docket No. 1102, 22 SRR at 1267. Simply put, the Commission enunciated the principal that the 180 day deadline may not be extended, there being no support for any construction of the fourth proviso which would allow for a result, in any case, which evades or ignores the 180 days requirement. Id. In order for permission to be given for Sea-Land to waive collection of monies due for the shipment, it would be essential for the required tariff notice to be backdated 181 days to include the period beginning January 13, 1984, because of Rule 3. The precedent established by Special Docket No. 1102 cannot be disregarded. The precise problem presented here was addressed in the Appendix to Special Docket No. 1186, *Application of Pacific Westbound Conference and Mitsui O.S.K. Lines, Ltd. for the Benefit of Mitsubishi International Corp.*, 22 SRR 1290, 1297 (I.D. 1984), administratively final, December 7, 1984, and it was expressly indicated that relief could not be granted pursuant to the standard established by Special Docket No. 1102.[19]

CONCLUSION AND ORDER

The application for permission to waive collection of portions of freight charges is denied as to the shipment of Magnetic Tape which was received at Dothan, Alabama, on January 13, 1984, and is granted as to the shipment of Magnetic Tape which was received there on February 13, 1984. It is ordered:

1. Sea-Land Service, Inc., shall waive collection of ocean freight charges, in the amount of $648.00 due it from Sony Magnetic Products, Inc., in connection with a shipment of Magnetic Tape it transported from Dothan, Alabama, via Jacksonville, Florida, to LeHavre, France, on February 14, 1984.

2. Sea-Land Service, Inc. shall publish the following notice at page 54 of Sea-Land Service, Inc. Intermodal Freight Tariff No. 456, ICC SEAU 456 F.M.C. No. 313:

> Notice is hereby given as required by the decision in Special Docket No. 1206, that effective January 14, 1984, and continuing through April 30, 1984, inclusive, for purposes of refund or waiver: The rate shown at page 23–C of the tariff known as Sea-Land Service Inc. Intermodal Freight Tariff No. 417, ICC SEAU

[19] Cf. Special Docket No. 1195, *Application of Sea-Land Service, Inc. for the Benefit of Hansa-Pacific, Inc. and Whitworth Holdings Limited,* I.D. served January 7, 1985, p. 4, n. 8, holding that, where the effective date of the rate rule provided that the rate to be charged is the rate in effect on the date received *or the date in effect when the ship sails, whatever is lower,* the problem encountered here is not presented.

417 F.M.C. No. 280, for ITEM NO. 891.2050 MBF, Magnetic Tape, From Dothan, AL, Minimum 40,320 lbs. per container, to European Ports in Section 2 is $130.00 W. Such rate is subject to all other applicable rules, regulations, terms and conditions of the said rate and said tariff.

3. Sea-Land Service, Inc. shall take such measures as are necessary to collect the balance of freight charges due in connection with the shipment received at Dothan, Alabama, on January 13, 1984.

4. Sea-Land Service, Inc., shall determine whether an adjustment in brokerage or compensation due brokers or freight forwarders is required in the light of this decision and shall take such measures as are necessary to effectuate such adjustment.

5. The waiver and other provisions of this order shall be effectuated within thirty days of service of notice by the Commission authorizing the same and Sea-Land Service, Inc., shall within five days thereafter (a) notify the Commission of the date and manner of effectuation of the waiver and (b) file with the Commission affidavits of compliance with paragraphs 1, 2, 3, 4, and 5(a) of this order.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1238

APPLICATION OF PACIFIC WESTBOUND CONFERENCE AND SEA-LAND SERVICE, INC. FOR THE BENEFIT OF TONE FORWARDING AS AGENT FOR THE MEARL CORPORATION

Application to waive collection of portions of freight charges denied.

Theresa M. Nardi for applicant, Sea-Land Service, Inc.

Patricia Petzar for applicant, Pacific Westbound Conference.

INITIAL DECISION [1] OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

Partially Adopted June 26, 1985

By application filed September 18, 1984, Sea-Land Service, Inc., seeks permission to waive collection of $11,977.70 of freight charges due it from Tone Forwarding as Agent for the Mearl Corporation, the shipper, in connection with an intermodal shipment of paints and pigments received by Sea-Land at its Elizabeth, New Jersey container yard (CY) on March 9, 1984, and carried overland to Seattle, Washington, where it was loaded aboard the Sea-Land *Patriot* which sailed from Seattle for Kowloon, Hong Kong, on March 23, 1984. Pacific Westbound Conference (PWC) joins in the application.

The cargo, consisting of paint, weighing 6,688 pound and measuring 215 cubic feet, and pigment, weighing 36,107 pounds and measuring 1819 cubic feet, was carried in a single 40′ container from origin to destination.

Sea-Land is a member of PWC and, as pertinent, participates in that Conference's tariff, PWC Westbound Intermodal Tariff No. PWC–708–A, FMC–20 (Tariff).

At Sea-Land's request, on February 15, 1984, PWC agreed to establish a Special Rate of $160.00 per ton of 1,000 kilos (W), minimum 18.5 kilotons per 40′ container or minimum 17.5 kilotons per 35′ container for both paints and pigments destined for Hong Kong. However, due to inadvertent clerical error, the Special Rate was published only for paints.[2] As a result, the applicable rate for pigments was $280.00 per cubic meter[3] plus a container handling charge of $5.00 W for paints and $5.00 M

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

[2] Tariff, 16th rev. p. 539, Item No. 474 0000 60, effective February 22, 1984.

[3] Id., 14th rev. p. 534, Item No. 472 0000 05. The pigment portion was erroneously rated at $210.00, but the concomitant billing error does not affect any calculations made in the disposition of this application.

for pigments.[4] At the applicable rates, the charges for the shipment amounted to $15,180.68.[5] Had the error not occurred, the charges would have amounted to $3,202.98.[6] The shipper paid $2,970.00. This means that the shipper still owes $232.98 for the shipment even at the lower rate, after allowance is made for the $11,977.70 to be waived.[7]

A corrected tariff reflecting PWC's February 15, 1984 determination was filed, effective April 25, 1984.[8]

The application states that there were no other shipments of the same or similar commodity during the relevant time period and that any necessary freight forwarder compensation adjustment will be made, upon approval.

DISCUSSION

The shipment does not meet all the standards for approval under section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3)[9] and the Commission rules implementing that statute, 46 CFR 502,92(a). The problem with this application is the same as the one encountered in Special Docket No. 1206, *Application of Sea-Land Service, Inc. for the Benefit of Page & Jones as Agent for Sony Magnetic Products, Inc.*, I.D. served January 18, 1985, and is governed by the same rationale.

The criteria are set forth in the four provisos of section 18(b)(3). Under the first proviso, it must appear that there was a qualifying error in failing to file a tariff provision and that the refund or waiver will not result in discrimination among shippers;[10] under the second proviso, it must be shown that the carrier filed a new tariff, setting forth the rate on which the waiver or refund is based, prior to filing the application; under the third proviso, the carrier must agree that if the application is granted, it will publish an appropriate tariff notice or take other steps, as required, which give notice of the rate on which the refund or waiver is based and that it will make additional refunds or waivers as prescribed; and under the fourth proviso, the application for refund or waiver must be filed within 180 days from the date of shipment.

The shipment seems to meet all of the requirements of the four provisos: the failure to file the special rate for Item No. 472 0000 05 was due to inadvertent error on the part of PWC and, because there were no other shipments of the same or similar commodity during the relevant time period,

[4] Id., p. 163, Rule No. 25.

[5] The breakdown is: Paints—$485.44; Pigments—$14,422.52; Container Charges—$272.72.

[6] The breakdown is: Paints—$485.44; Pigments—$2,620.48; Container Charges—$97.06 (based on a rate of $5.00 W for both paints and pigments). Under the tariff's mixing rule, ocean freight charges may be assessed proportionally on actual weight, 2nd rev. p. 172, Rule 35.

[7] The breakdown is: Ocean Freight—$11,802.04; Container Charge $175.66.

[8] Tariff, 15th rev. p. 534, Item No. 472 0000 25.

[9] In all material respects relevant to this application, section 8(e) of the Shipping Act, 1984, 46 U.S.C. App. 1707(e), is the same as section 18(b)(3) of the 1916 Act. Thus, the conclusion, which follows, would be the same under either Act.

[10] Under section 8(e) of the Shipping Act, 1984, it must also appear that the refund or waiver does not result in discrimination among ports or carriers.

approval of the application is not likely to result in discrimination among shippers,[11] and, in any event, were an order granting the application to issue, it would protect against discrimination among shippers; a corrective tariff setting forth the rate on which the waiver is based was timely filed before the application; under the regulation, 46 CFR 502.92(a), by filing the application, Sea-Land has agreed to take those steps which the Commission may require as a condition for granting relief; and the application was filed within 180 days of the date of shipment (sailing date).

Thus, it might appear that the requirements of the four provisos have been met. But on close analysis and with due deference to the Commission's decision in Special Docket No. 1102, *Application of United States Atlantic & Gulf-Jamaica and Hispaniola Steamship Freight Association and Sea-Land Service, Inc. for the Benefit of United Brands for Chiquita International Trading Co.*, it becomes manifest that the standards for approval have not been fulfilled. The rationale follows.

It is evident that the application was filed on the 179th day after the date the *Patriot* sailed from Seattle. It is also clear that the application was filed on the 193rd day after the shipment was received at Elizabeth—the date of receipt being the date on which the rate for the assessment of charges became fixed pursuant to Rule 3 of the Tariff.[12] What all this means is that in order to grant relief, the Commission must not only authorize PWC to publish a tariff notice making the pigment rate effective as of March 23, 1984, it must authorize a notice making the rate effective as of March 9, 1984. The latter authorization is proscribed by the teaching of Special Docket No. 1102, *supra*.

In construing the 180 day jurisdictional requirement of section 18(b)(3), the Commission held that "'the rate upon which such refund or waiver would be based'—180 days is a precise term that is not amenable to a variety of interpretations." Special Docket No. 1102, 22 SRR at 1267. Simply put, the Commission enunciated the principal that the 180 day deadline may not be extended, there being no support for any construction of the fourth proviso which would allow for a result, in any case, which evades or ignores the 180 days requirement. Id. In order for permission to be given for Sea-Land to waive collection of monies due for the shipment, it would be essential for the required tariff notice to be backdated 193 days to include the period beginning March 9, 1984, because of Rule 3. The precedent established by Special Docket No. 1102 cannot be disregarded. The precise problem presented here was addressed in the Appendix to Special Docket No. 1186, *Application of Pacific Westbound Conference and Mitsui O.S.K. Lines, Ltd. for the Benefit of Mitsubishi International Corp.*, 22 SRR 1290, 1297 (I.D. 1984), administratively final, December

[11] There is no indication that there could be any discrimination among carriers or ports.

[12] As pertinent, Rule No. 3 of the Tariff, the effective date of the rate rule, provides that, "For cargo received by the carrier at CY, CFS, the applicable rates and charges are those in effect on the *date of such receipt*." Tariff, 13th rev. p. 34.

7, 1984, and it was expressly indicated that relief could not be granted pursuant to the standard established by Special Docket No. 1102.

CONCLUSION AND ORDER

The application for permission to waive collection of portions of freight charges is denied. It is ordered:

1. Sea-Land Service, Inc., shall take such measures as are necessary to collect the balance of freight charges due in connection with the shipment of paints and pigments it carried from Elizabeth, New Jersey, via Seattle, Washington, to Kowloon, Hong Kong.

2. Sea-Land Service, Inc., shall determine whether an adjustment in brokerage or compensation due brokers or freight forwarders is required in the light of this decision and shall take such measures as are necessary to effectuate such adjustment.

3. This order shall be effectuated within thirty days of service of notice by the Commission authorizing the same and Sea-Land Service, Inc., shall within five days thereafter (a) notify the Commission of the date and manner of effectuation and (b) file with the Commission an affidavit of compliance with paragraphs 1, 2 and 3(a) of this order.

(S) SEYMOUR GLANZER
Administrative Law Judge

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