DECISIONS OF THE
FEDERAL MARITIME BOARD, AND MARITIME ADMINISTRATION DEPARTMENT OF COMMERCE

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UNITED STATES DEPARTMENT OF COMMERCE

WASHINGTON, D.C.

FEDERAL MARITIME BOARD

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FEDERAL MARITIME BOARD, AND MARITIME ADMINISTRATION DEPARTMENT OF COMMERCE

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FEDERAL MARITIME BOARD

No. 763

ALUMINUM PRODUCTS OF PUERTO RICO, INC.

v.

TRANS-CARIBBEAN MOTOR TRANSPORT, INC.

Submitted March 21, 1956. Decided May 8, 1956

Certain rates, charges, and practices of respondent found to be in violation of section 18 of the Shipping Act, 1916, and of section 2 of the Intercoastal Shipping Act, 1933. Cease and desist order entered.

Sections 14 and 16 of the Shipping Act, 1916, not shown to have been violated. Complainant not shown to have been injured and entitled to reparation.

Garland M. Budd for complainant.

Eric Rath and *Alan F. Wohlstetter* for respondent.

Leroy F. Fuller as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

In his recommended decision of February 17, 1956, the examiner found certain rates, charges, and practices of respondent Trans-Caribbean Motor Transport, Inc., to be in violation of section 18 of the Shipping Act, 1916 (1916 Act), and of section 2 of the Intercoastal Shipping Act, 1933, and recommended requiring respondent to cease and desist from such violations. In addition, the examiner found that complainant has not been injured by such violations and is not entitled to reparation. We concur in and hereby adopt the recommended decision.

A limited "exception" to the recommended decision has been filed by respondent. The examiner found that complainant had paid respondent $565.67 less than the amount due under applicable water tariffs alone, without consideration of the aomunt of additional charges which might be due respondent for services which were not a part of the water transportation and for which rates are not specified in the applicable tariff on file with us. In making the finding the examiner

stated that "The Shipping Act, 1916, does not give a carrier the right to file a complaint with the Board demanding reparation from a shipper, and the Board is without authority to order a shipper to make payments to a carrier." [1]

Respondent has an action pending in the Circuit Court of the Eleventh Judicial Circuit of Florida, involving the same shipments here under consideration. It urges, for this reason, that we clearly show that the above-mentioned finding concerning additional moneys due and owing to it is in no sense a prejudgment of the amount which may be due and owing it for services other than water transportation.

While we consider the examiner's recommended decision to be clear in this regard, we have no objection to declaring, and hereby state, that nothing in this report or in the examiner's recommended decision shall be construed as a prejudgment of respondent's claim for moneys due and owing to it for services other than water transportation.

An appropriate order will be entered.

[1] We limit the scope of the quoted language by stating that we do not here decide whether a carrier may seek reparation against a shipper for violation of section 16 of the 1916 Act. While shippers are not included in section 1 of the 1916 Act within the definition of the term "other person subject to this Act," the express subjection of shippers to section 16 may effect an inclusion of shippers within the term "other person subject to this Act" as it appears in section 22.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 8th day of May A. D. 1956

No. 763

ALUMINUM PRODUCTS OF PUERTO RICO, INC.

v.

TRANS-CARIBBEAN MOTOR TRANSPORT, INC.

This proceeding being at issue on complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Board, on the date hereof, having made and entered of record a report thereon in which the Board adopted the findings and conclusions of the hearing examiner in his recommended decision served in this proceeding on February 17, 1956, which report and recommended decision are hereby referred to and made a part hereof:

It is ordered, That respondent Trans-Caribbean Motor Transport, Inc., be, and it is hereby, notified and required to cease and desist and hereafter to abstain from engaging in the violations of section 18 of the Shipping Act, 1916, as amended, and from the violations of section 2 of the Intercoastal Shipping Act, 1933, as amended, herein found to have been committed by respondent; and

It is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Board.

(SEAL) (Sgd.) A. J. WILLIAMS,
Secretary.

APPENDIX

FEDERAL MARITIME BOARD

No. 763

ALUMINUM PRODUCTS OF PUERTO RICO, INC.

v.

TRANS-CARIBBEAN MOTOR TRANSPORT, INC.

Certain rates, charges and practices of respondent found to be in violation of section 18 of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933. Cease and desist order should be entered.
Sections 14 and 16 of the Shipping Act, 1916, not shown to have been violated.
Complainant not shown to have been injured and entitled to reparation.

Garland M. Budd for complainant.
Eric Rath for respondent.
Leroy F. Fuller as Public Counsel.

RECOMMENDED DECISION OF A. L. JORDAN, EXAMINER

This proceeding arises out of a complaint filed October 21, 1954, alleging that in March 1954 complainant entered into an agreement with respondent for the transportation of certain machinery, equipment and raw materials, by trailer ferry, from Miami, Fla., to Puerto Rico at $450 per trailer load of 15,000 pounds; that respondent transported the cargo and billed complainant in the amount of $8,572.53; that complainant did not agree with this billing; that respondent sent "corrected" invoices (billing) on July 15, 1955, in the amount of $13,610.32; that complainant has paid $6,271.78 for the account of the shipments involved; and that by reason of the foregoing, complainant has been and is subjected to the payment of rates for transportation which were, and still are, unjust, discriminatory or prejudicial in violation of sections 14, 16 and 18 of the Shipping Act, 1916, and in violation of section 2 of the Intercoastal Shipping Act, 1933. Complainant seeks a cease and desist order and reparation.

On January 3, 1955, respondent filed its answer to the complaint

denying that it agreed to transport the shipments at $450 per trailer load or any other agreement to perform carriage at other than its published tariff rates, denying all allegations of unlawfulness, and requesting that the complaint be dismissed.

Public hearing was held in Miami, Fla., from June 1 through June 4, 1955.

THE ISSUES

The issues are (1) whether any unfair or unjustly discriminatory contract was entered into in violation of section 14 of the Shipping Act, 1916; (2) whether respondent's rates, charges, and practices in connection with the shipments were (a) unduly prejudicial in violation of section 16, (b) unjust and unreasonable in violation of section 18 of said Act; (3) whether respondent charged or demanded a different compensation for the transportation from that specified in its tariff in violation of section 2 of the Intercoastal Shipping Act, 1933; and (4) whether complainant is entitled to reparation.

FINDINGS OF FACT

1. Complainant is a Puerto Rico corporation, with its principal place of business in San Juan, and is engaged in the manufacturer of aluminum windows, parts and components therefor.

2. Respondent is a common carrier by water, with its principal place of business in Miami, Fla., engaged in transportation of property between Florida and Puerto Rico, and is subject to the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

3. The cargo involved was complainant's aluminum plant at Miami which it desired dismantled and transported to Puerto Rico for reassembly, consisting of the plant machinery, equipment, raw materials, and supplies.

4. Negotiations between complainant and respondent for the transportation of the cargo started several weeks before the first of the five shipments involved was made on March 29, 1954. The testimony as to the negotiations was vague and conflicting. Complainant understood that respondent agreed to transport the cargo at $450 per trailer load of 15,000 pounds, and that there would be about 10 trailer loads, estimated by respondent. Respondent admits there was some discussion of such rate but states that it was to apply to aluminum products from Puerto Rico after the plant was established there, and that it would file such a rate with the Board, but it was not to apply to movement of the plant to Puerto Rico.

5. Both complainant shipper and respondent carrier were very careless in making arrangements for transporting the cargo involved. Complainant was unaware that respondent was a common carrier subject to charging tariff rates, and appeared not to have known or cared what the actual status of the carrier was. Respondent made little effort to inform complainant of what rates would be applicable, and made certain estimates of charges without proper consideration of the applicable tariff or the type of cargo to be carried.

6. At the time this cargo was transported respondent's operations were conducted under the name of two corporations, Trans-Caribbean Motor Transport, Inc. (Trans-Caribbean), and Trailer Marine Transportation, Inc. (Trailer Marine), and the designation "TMT" which appears on bills of lading and invoices is a trade name for both organizations. Trans-Caribbean operates as a motor carrier under ICC authority in Florida, and as a water carrier under a tariff filed with the Board. Trailer Marine was the Puerto Rican delivering agent for Trans-Caribbean at the time this cargo moved.

7. Respondent loaded the cargo onto trailers or sea vans and used the common carrier service of the M. V. *Ponce* for water transportation of four of the shipments from Port Everglades, Fla., to Ponce and San Juan, P. R., and the barge *Loveland 20* for one shipment direct from Miami to Puerto Rico, since the barge was in Miami for repairs.

8. At the time these shipments were made, in March, April, and May of 1954, respondent had only one tariff filed with the Board, FMB–F No. 1, which had been in effect since October 15, 1953. A tariff had been filed with the Board in the name of Trailer Marine Transportation, Inc., on April 19, 1954, to be effective May 19, 1954, which contained a rate of $450 per trailer load for "Products of Aluminum." This tariff, however, was not accepted by the Board for filing, and it was withdrawn before it became effective.

9. Respondent has filed a new tariff with the Board, FMB–F No. 3, in the name of Trailer Marine Transportation (TMT), Inc., effective June 24, 1955, and all prior tariffs, including FMB–F No. 1 which was in effect at the time the cargo was carried, have been canceled in their entirety.

10. Respondent sent separate freight bills to complainant for each of the five shipments involved, in the total amount of $8,572.53. The description of the cargo shown in the freight bills, and in the bills of lading, had been prepared by respondent who determined the description without instructions from complainant. Upon receipt of these freight bills complainant objected to the amount of the charges as

being more than it understood such charges would be, and refused to pay them. Discussions and negotiations followed and certain payments were made in the total amount of $6,271.78.

11. On July 15, 1955, respondent sent "corrected" freight bills to complainant increasing the total charges from $8,572.53 to $13,610.32. At the hearing respondent was unable to explain how the charges in the original bills were determined under its tariff in effect at the time the cargo moved, except that they were made out in error by its billing clerk who had been discharged for making errors in these and other billings. Respondent stated that after the errors were discovered, upon audit, "corrected" bills were sent to complainant, made on the basis of respondent's tariff FMB–F No. 1, which was in effect during the period of the shipments involved.

12. This tariff, FMB–F No. 1, was incorporated in the record by reference. It provides for four different types of rates: (1) "Express Rates" (Item 150 (a), 3d Revised Page 16), to apply to all shipments weighing up to 3,300 pounds (Item 15, Original Page 9); (2) "Package Rates" on door-to-door basis, nowhere in the tariff clearly defined (Item 150 (b), 3d Revised Page 16); (3) "Household Goods and Personal Effects," not here involved (Item 150 (c), 3d Revised Page 16); and (4) "Commodity Rates" (Beginning on 3d Revised Page 17) applicable on all shipments of over 3,300 pounds (Item 15, Original Page 9). This is a port-to-port rate and does not include pickup, inland freight, and delivery charges (3d Revised Page 17). Pickup charges in Miami and delivery charges in Puerto Rico outside of Ponce and San Juan are to be charged (Items 25 and 30, Original Page 9). No rate for pickup in Miami is given in the tariff, but a delivery charge for inland delivery at Guaynabo, P. R., is given (Item 150 (e), Revised Page 24). Inland freight charges for inland motor transportation in the United States are nowhere set forth in the tariff.

13. Complainant made reference at the hearing to "shipping tickets" which would show proper weights, cube, and description of these shipments, and respondent referred to "weight slips" and "dock receipts." Both were requested to present these documents or any other evidence which would accurately show the weight, cube, and description of the goods carried. Neither was able to present the documents referred to, and the only identificaton of the goods made available were certain invoices, bills of lading, export declarations, and voyage manifests, which had been prepared by respondent. Complainant produced a series of invoices purporting to contain a list of all items sold to it and carried in these shipments. It is impossible to

determine from these invoices exactly what was carried in each shipment.

14. Since neither complainant nor respondent produced any weight slips, dock receipts, or shipping tickets which would indicate the weight or cube of the shipments, the only bases for determining the proper transportation charges are the invoices, export declarations, and voyage manifests referred to. Upon consideration of these under respondent's tariff, FMB–F No. 1, in effect when the cargo was transported, the rates and charges applied by respondent and those which it should have applied are shown in Table I herein.

15. As before stated, complainant has paid respondent $6,271.78. Of this sum, $964.53 was paid to Leonard Bros. for services other than transportation (footnote 3). Complainant, therefore, has paid respondent $5,307.25 toward the transportation of the shipments, or $565.67 less than the amount due under applicable rates in the tariff on file with the Board and in effect during the period involved. This, however, is without consideration of any other amounts which may be due respondent for pickup in Miami, motor transportation from Miami to Port Everglades, redelivery of certain material to complainant's plant by truck, or advances made by respondent for the account of complainant.

POSITION OF PARTIES

Neither the complainant nor the respondent filed a brief. Public Counsel filed a brief and his position is embraced herein.

DISCUSSION AND CONCLUSIONS

Under section 2 of the Intercoastal Shipping Act, 1933, the only rate which can be properly charged by respondent for these shipments is the rate on file with the Board and in effect on the dates the shipments were carried. *Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400, 455; *Pacific Lumber & Shipping Co.* v. *Pacific Atlantic S. S. Co.*, 1 U. S. M. C. 624, 626. As before stated, the only tariff of the respondent filed with the Board and in effect during the time of these shipments was its Freight Tariff No. 1, FMB–F No. 1. This tariff by its terms, for lack of clarity under the types of rates referred to, and as pointed out in table I and footnotes under finding of fact No. 14, is ambiguous and difficult of construction.

It is a settled rule of tariff construction that where a tariff is ambiguous or doubtful it is to be construed against the carrier who prepared it. *The Gelfand Mfg. Co.* v. *Bull S. S. Line, Inc.* 1

U. S. S. B. 169; *Rubber Development Corp.* v. *Booth S. S. Co., Ltd.*, 2 U. S. M. C. 746, 748. A fair and reasonable construction, however, must be given. *Thomas G. Crowe et al.* v. *Southern S. S. et al.*, 1 U. S. S. B. 145, 147, and "neither the intent of the framers nor the practice of the carriers controls, for the shipper cannot be charged with knowledge of such intent or with carrier's canons of construction." *National Cable and Metal Co.* v. *American-Hawaiian S. S. Co.*, 2 U. S. M. C. 470, 473.

The cargo transported is found to be that described in column 3 of table I herein. Interpreting respondent's tariff here under consideration in its most reasonable construction, the applicable charges are those shown in column 9 of said table I.

The complaint alleges violations by respondent of sections 14, 16, and 18 of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933.

Section 14, Shipping Act, 1916

While the evidence shows confusion and misunderstanding on the part of both the complainant and the respondent, such evidence is insufficient to show that there was any arrangement or agreement to carry the cargo involved at rates other than the applicable tariff charges, in violation of section 14, Fourth; nor does the record indicate that any actions of respondent were retaliatory within the meaning of section 14, Third. Accordingly, this section is not shown to have been violated.

Section 16, Shipping Act, 1916

In order for there to be unreasonable preference or advantage, or unreasonable prejudice or disadvantage, there must be unequal treatment of two or more persons or shippers. *Afghan-Amer. Trading Co., Inc.* v. *Isbrandtsen Co., Inc.*, 3 F. M. B. 622; *Huber Mfg. Co.* v. *N. V. Stroomvaart Maatschappij "Nederland,"* 4 F. M. B. 343.

The record fails to show that any actions of respondent subjected complainant to any undue or unreasonable prejudice or disadvantage in relation to any other shipper. Accordingly, this section is not shown to have been violated.

Section 18, Shipping Act, 1916

This section requires—

> That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and traiffs, and just and reasonable regulations and practices relating thereto * * *.

TABLE I

(1) Number of pieces	(2) Kind	(3) Description of goods	(4) Weight in pounds	(5) Cube in feet	(6) Rate applied	(7) Rate applicable	(8) Charges assessed	(9) Correct charges
		Mar. 29, 1954, shipment						
3	TRL	Machinery 7 factory equipment uncrated—loaded shipper's load and count, including one fork truck.	37,920					
		Freight			$5 per 100 pounds [1]	$2.73 per 100 pounds [2]	$1,896.00	$1,035.22
		Advance to Leonard [3]					964.00	
		Documentation [4]					2.50	
		Exchange fee [5]					4.75	
		Delivery [6]				50 cents per 100 pounds.		189.60
		Apr. 9, 1954, shipment (in 3 parts)						
(1) 1	PC	Press brake machine—braced and crated in steel box 12' x 8' x 8'.	9,800	768				
		Freight			$1.10 per cubic foot [7]	$1.10 per cubic foot [7]	844.80	844.80
		Pickup [8]			50 cents per 100 pounds.		49.00	
		Delivery [6]			do	50 cents per 100 pounds.	49.00	49.00
		Heavy lift [9]			do	do	49.00	49.00
(2) 5	PCS	Federal press machine and parts	6,590	135				
		Freight			$2.73 per 100 pounds [2]	$2.73 per 100 pounds [2]	179.91	179.91
		Pickup [8]			50 cents per 100 pounds.		32.95	
		Advance [10]					45.00	
		Delivery [6]			50 cents per 100 pounds.	50 cents per 100 pounds.	32.95	32.95
		Heavy lift [11]				do	32.95	
(3) 8	PCS	Express goods—consisting of various aluminum parts.	5,047					
		Freight			$5 per 100 pounds [1]	$2.73 per 100 pounds [12]	252.35	137.78
		Pickup [8]			50 cents per 100 pounds.		25.24	
		Documentation [4]					2.50	
		Delivery [6]			50 cents per 100 pounds.	50 cents per 100 pounds.	25.24	25.24
		Apr. 21, 1954, shipment						
107	PCS	Express goods—consisting of aluminum jalousie parts.	14,005					
		Freight			$5 per 100 pounds [1]	$2.73 per 100 pounds [13]	700.25	382.84
		Pickup [8]			50 cents per 100 pounds.		70.03	
		Documentation [4]					2.50	
		Delivery [6]			50 cents per 100 pounds.	50 cents per 100 pounds.	70.03	70.03
		Segregation and handling [14]					60.00	

		Apr. 30, 1954, shipment (in 2 parts)						
(1) 2	PCS	Press machine Plate or sheet metal machine.	11,900 claimed by respondent.[15]					
		Freight			$2.73 per 100 pounds [16]	$2.73 per 100 pounds [16]	324.87	[15] 177.45
		Delivery [6]			50 cents per 100 pounds.	50 cents per 100 pounds.	59.50	[15] 32.50
		Heavy lift [9]			do	do	59.50	[15] 29.50
(2) 293	PCS	Express goods—consisting aluminum extrusions, insulation, bars, screws, etc.	115,562 claimed by respondent.[17]					
		Freight			$5 per 100 pounds [1]	$2.73 per 100 pounds [18]	5,778.10	[17] 1,872.73
		Pickup [8]			50 cents per 100 pounds.		577.81	
		Documentation [4]					2.50	
		Delivery [6]			50 cents per 100 pounds.	50 cents per 100 pounds.	577.81	[17] 342.99
		May 26, 1954, shipment						
82	Asst.	Express goods—consisting aluminum extrusions, machines, machine parts, weather stripping.	13,061					
		Freight			$5 per 100 pounds [1]	$2.73 per 100 pounds [18]	653.05	356.57
		Pickup [8]			50 cents per 100 pounds.		65.31	
		Documentation [4]					2.50	
		Delivery [6]			50 cents per 100 pounds.	50 cents per 100 pounds.	65.31	65.31
		Cost of redelivery of some of the goods to complainant.					52.58	
		Total					13,610.32	5,872.92

[1] "Commodity rate" called "Express Goods" of $5 per 100 pounds, Tariff Revised Page 19, is not defined or explained in tariff, and it cannot be properly applied to the shipment.

[2] The shipment was made up of various machinery and parts, thus commodity rate would be "Machinery and Parts, n. o. s.," Tariff Revised Page 20, $2.73 per 100 pounds. Rates apply weight of measurement whichever yields greater revenue, Original Page 6, item 5 (b). Cube of this and all shipments except parts of April 9 shipment is not shown.

[3] Payment to Leonard Bros. Transfer & Storage Co., Inc., Miami, for preparing and loading machinery for shipment. Complainant acknowledges that this payment was made through the respondent.

[4] A charge to the shipper for preparing and filing the Export Declaration, not shown or explained in the tariff.

[5] ¼ of 1 percent on collect shipments where money is transferred from Puerto Rico banks to the United States. It is passed on to the shipper as a charge made by the Puerto Rican banks. Second Revised Page 14, item 105.

[6] The rate for delivery to Guaynabo, P. R., is $0.50 per 100 pounds. Tariff Revised Page 24.

[7] Applicable commodity rate is "Machinery and Parts, n. o. s." Cubic foot rate at $1.10 is applicable since it produces greater revenue than weight rate at $2.73 per 100 pounds. Tariff Revised Page 20 and Original Page 6, item 5 (b).

[8] This charge for pickup in Miami is nowhere explained in the tariff.

[9] Heavy lift charge of 50 cents per 100 pounds is applicable since machine weighs in excess of 2,000 pounds. Tariff Original Page 7, item 5 (k).

[10] Charges paid to Acme Fast Freight for delivery of this machine.

[11] It is not shown that any 1 of the 5 pieces weighed in excess of 2,000 pounds. Therefore, no heavy lift charge is assessable. Tariff Original Page 7, item 5 (k).

[12] Commodity rate, "Not Otherwise Specified." Tariff Revised Page 21.

[13] Export Declaration shows shipment consisted of miscellaneous raw material and parts to be manufactured into jalousie windows, i. e., bundles of aluminum extrusions in 12- and 16-foot lengths, cartons of weather stripping, flat aluminum, boxes of screws, etc. Therefore, applicable rate was Commodity rate "Not Otherwise Specified." Tariff Revised Page 21.

[14] A charge for segregating cargo at the dock or warehouse and returning some of the equipment to the plant of complainant at its request. The charge was the actual cost to complainant.

[15] Export Declaration shows weight of the 2 pieces to be 6,500 pounds, 1 piece 5,900, other piece 600. These Export Declaration weights are found to be the correct weights. Therefore, heavy lift charges apply only to the piece weighing 5,900 pounds. Tarif Original Page 7, item 5 (k). Correct rate was applied.

[16] Applicable commodity rate is "Machinery and Parts, n. o. s." Tariff Revised Page 20.

[17] Export Declaration shows weight to be 68,598 pounds, which is found to be the correct weight.

[18] Commodity rate "Not Otherwise Specified." 2d Revised Page 21.

Complainant's tariff FMB–F No. 1, here involved, contains in the Commodity Rates section an item "Express Goods" with a rate of $0.99 per cubic foot and $5 per 100 pounds (Revised Page 19 and 2d Revised Page 19). This item is not defined or explained anywhere in the tariff, and it is impossible to determine what particular commodities will be charged this rate. The tariff also contains two different rates for commodities which are not otherwise specified in the Commodity Rates section:

1. "Cargo, n. o. s." $1.51 per cubic foot and $3 per 100 pounds. (Revised Page 18 and 2d Revised Page 18).
2. "Not Otherwise Specified." $1.10 per cubic foot and $2.73 per 100 pounds. (Revised Page 21 and 2d Revised Page 21).

Such rates are ambiguous and conflicting, they could lead to discrimination between and unequal treatment of shippers, and they are unjust and unreasonable rates and practices within the meaning of this section of the Act. Since, however, respondent's new tariff, FMB–F No. 3, which has superseded all of its prior tariffs, contains no "Express Goods" item, and has only one "Cargo Not Otherwise Specified" item, it is unnecessary to direct respondent to amend its tariff.

Respondent failed to determine the cube on all but a part of one of the five shipments. Since the tariff involved provides that charges shall be determined on the basis of cube or weight, "whichever basis yields the greater revenue" (Item 5 (b), Original Page 6), failure to properly determine the cube was clearly an unjust and unreasonable practice within the meaning of section 18, and respondent should be ordered to cease and desist from such practice.

In connection with the March 29 shipment, respondent billed complainant an "exchange fee" for transfer of funds from Puerto Rico bank to the United States on a collect shipment (Item 105, 2d Revised Page 14). Since no payments were made to respondent in Puerto Rico this exchange fee was improperly assessed, and was an unjust and unreasonable practice within the meaning of section 18, and respondent should be ordered to cease and desist from such practice.

In connection with the April 9 shipment, respondent billed a "heavy lift" charge (item 5 (k), Original Page 7) on the full weight of the shipment although it failed to show that any one of the five pieces weighed in excess of 2,000 pounds. Application of this charge was improper, and was an unjust and unreasonable practice within the meaning of section 18, and respondent should be ordered to cease and desist from such practice.

Section 2, Intercoastal Shipping Act, 1933

This section provides that no common carrier by water in intercoastal commerce shall—

charge or demand or collect or receive a greater or less or different compensation for the transportation of passengers or property or for any service in connection therewith than the rates, fares, and/or charges which are specified in its schedules filed with the Board and duly posted and in effect at the time.

Respondent charged and demanded a different compensation from that specified in its tariff on file with the Board during the period of the shipments involved. None of the original billing was based on the proper and applicable rates. The explanation of respondent that this billing was made through errors by its billing clerk does not change the fact that improper rates and charges were demanded of complainant. In some of the "corrected" bills, respondent charged and demanded a rate of $5 per 100 pounds, the "Express Goods" commodity rate shown in column 6 of table I. It is impossible to determine from the tariff that this rate could be applied to any of the shipments involved. The proper commodity rate for the shipments is shown in column 9 of table I. The charging and demanding of the inapplicable rates were in violation of section 2 of the Intercoastal Shipping Act, 1933.

In order to be entitled to reparation under section 22 of the Shipping Act, 1916, the complainant must show some direct pecuniary injury resulting from the violations alleged. *Eden Mining Co.* v. *Blue-fields Fruit & S. S. Co.*, 1 U. S. S. B. 41, 47; *J. G. Boswell Co.* v. *American-Hawaiian S. S. Co.*, 2 U. S. M. C. 95, 105. While the tariff filed by respondent, and its actions in connection with the shipments involved, were violative of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, as found herein, complainant has not shown that it has paid in excess of applicable tariff charges or has otherwise suffered injury as a result of such violations. Accordingly, complainant is not entitled to reparation under section 22 of the Shipping Act, 1916.

As to the finding herein that complainant has paid respondent $565.67 less than the amount due under the applicable tariff (finding of fact 15), the Shipping Act, 1916, does not give a carrier the right to file a complaint with the Board demanding reparation from a shipper, and the Board is without authority to order a shipper to make payments to a carrier. However, respondent is required by section 2 of the Intercoastal Shipping Act, 1933, to collect this undercharge of $565.67. Consideration need not be given the applicability of additional charges which may be due respondent for services performed in connection with the shipments which were not a part of

the water transportation, and for which rates are not specified in the applicable tariff on file with the Board. As pointed out in finding of fact No. 6, respondent has Interstate Commerce Commission authority for motor carrier operations in the State of Florida.

ULTIMATE CONCLUSIONS

Upon consideration of all the foregoing facts, it is concluded and found that certain rates, charges, and practices of respondent as herein pointed out are shown to be in violation of section 18 of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933. Cease and desist order should be entered.

Sections 14 and 16 of the Shipping Act, 1916, are not shown to have been violated.

Complainant is not shown to have been injured and entitled to reparation.

FEDERAL MARITIME BOARD

No. 776

LOPEZ TRUCKING, INC., ET AL.

v.

WIGGIN TERMINALS, INC.

No. 779

DANT AND RUSSELL SALES CO. ET AL.

v.

WIGGIN TERMINALS, INC.

Submitted April 11, 1956. Decided May 18, 1956

Respondent's proposed revision of its F. M. B. Tariff No. 5, Item 15–A, found to be an unreasonable regulation or practice in violation of section 17 of the Shipping Act, 1916.

Frank Daniels and *James E. Wilson* for complainants in Docket No. 776.

Joseph B. Wolbarsht for complainants in Docket No. 779.

John F. Groden, and *Charles C. Worth* for respondent.

Leander I. Shelley as *amicus curiae.*

Edward Aptaker as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

These proceedings arise out of similar complaints filed May 4 and May 13, 1955, and consolidated for hearing under Rule 5 (d) of the Board's Rules of Practice and Procedure. Both complaints allege that a proposed revision to F. M. B. Tariff No. 5 of Wiggin Terminals, Inc. ("Wiggin"), is unlawful in violation of sections 16 and 17 of the Shipping Act, 1916 ("the Act"). The proposed revision and addition is as follows, appearing as Item 15–A at 1st Revised Page 5:

All loading of lumber trucks shall be performed by labor and equipment supplied or designated by Wiggin, and shall be subject to its direction and control, except for the manner of placing on the vehicle and the quantity to be placed on the vehicle.

Public hearing was held in Boston, Massachusetts, from August 9, 1955, through August 12, 1955. The examiner found that proposed Item 15–A would result in violation of section 16, First, of the Act, and would be an unreasonable regulation or practice relating to the receiving, handling, storing, or delivering of property in violation of section 17 of the Act.

Exceptions to the recommended decision have been filed by Wiggin; replies thereto have been filed by complainants and by Public Counsel. Except as hereinafter particularly stated, we agree with the findings and conclusions of the examiner. Exceptions or recommended findings not discussed in this report nor reflected in our findings or conclusions have been considered and found unrelated to material issues or not supported by the weight of the evidence.

The facts are as follows:

1. Complainants in No. 776 [1] are motor carriers ("truckers") operating under authority of the Commonwealth of Massachusetts and the Federal Government in the transportation of lumber and related materials to Boston from points in Massachusetts and nearby States. Complainants in No. 779 [2] are corporations engaged in the wholesale lumber business who either receive lumber for their own account or purchase lumber from suppliers who receive it at Wiggin's facility.

2. Respondent is a person subject to the Act by virtue of its conduct of a lumber terminal operation at Castle Island, Boston, Massachusetts, an area of 101 acres owned by the Commonwealth of Massachusetts and leased to Luckenbach Steamship Company, Inc. ("Luckenbach"), under a 10-year lease. Wiggin's agreement with Luckenbach is also of a 10-year duration but subject to modification or termination on 90 days' notice by either party. Wiggin assumes full charge and responsiiblity for lumber terminal operation on Castle Island and agrees to save Luckenbach harmless from any losses, suits, damages, or judgments arising from any injury to or loss of property or death or injury to any person on or within the lumber terminal area, caused by any act or failure of Wiggin or any of its officers, agents, or employees, or by the condition of the premises. The agreement requires Wiggin to procure adequate insurance coverage for such purpose.

[1] Lopez Trucking, Inc., Cohenno, Inc., Thomas Cook & Sons, Inc., E. W. Larson & Sons, Inc., C. Malone Trucking, Inc., and William J. Coady, d. b. a. Coady Trucking Company.

[2] Dant and Russell Sales Co., L. Grossman Sons, Inc., Blanchard Lumber Company, Inc., Guernsey Westbrook Lumber Co., Gerrity Company, and Plunkett-Webster Lumber Co., Inc.

3. The lumber shipped to Castle Island moves under "tackle-to-tackle" rates. In contrast to general cargo, under lumber contracts of affreightment the carrying vessel is divested of custody of the cargo on delivery to the consignee, or to the terminal for the consignee, at the end of ship's tackle. Lumber is discharged from the end of ship's tackle onto a bolster, a platform similar to a pallet, picked up by a Wiggin straddle truck, and carried to a point of rest in the interior. While the record is not explicit in this respect, we infer from testimony of Wiggin representatives that discharged lumber is backpiled directly from ship's tackle and not from an intermediate point of rest. Essentially this is a backpiling operation, entailing maintenance of records of location, amount, and ownership of various lots of backpiled lumber. The records enable Wiggin to assess charges, fixed by its tariff, for parking [3] (storing) of lumber after free time. The lumber dealers in their use of lumber terminal services and facilities have no contract or other arrangement with Luckenbach.

Wiggin's manager testified that very little of the lumber discharged at Castle Island is signed or receipted for. He did not reveal whether it is a Wiggin employee who signs for lumber on those occasions when receipts are issued.

Wiggin pays Luckenbach 90 percent of the sums collected as usage on lumber vessels,[4] and 100 percent of the sums collected for wharf parking,[5] both at the rates specified in Luckenbach's terminal tariff. Wiggin also pays 100 percent of the sums collected for shed parking, and 75 percent of the sums collected for open yard parking, both at the rates specified in the Wiggin tariff. All charges assessed against cargo are contained in the Wiggin tariff, including, in addition to the parking fee, those for backhandling to the place of rest, movement of lumber from place of rest to another area within the terminal, truckloading, and others.

4. Under its present tariff [6] Wiggin loads lumber trucks by its

[3] F. M. B. Tariff No. 5, Original p. 2:
"The Term 'PARKING' refers to the monthly charge on any lots of lumber remaining in a place of rest."

[4] F. M. B. Tariff No. 5, Original p. 2:
"The Term 'USAGE CHARGE' refers to the charge on any lumber placed in a transit shed or on a wharf, or passing through, over, or under a wharf; or transferred between vessels or lighters; or loaded to or unloaded from a vessel at a wharf, regardless of whether or not wharf is used."

[5] F. M. B. Tariff No. 5, Original p. 2:
"The Term 'WHARF PARKING' refers to the daily charge on any lots of lumber remaining in shed or on a wharf in excess of free time allowed."

[6] Item 15–A of the present tariff provides:
"Upon request from the driver or other authorized representative of the operator of the truck or other vehicle concerned, truckloading service will be furnished at the rates

own labor and equipment on request of the lumber dealers who own the lumber or the truckers employed by such dealers. In the past, however, Wiggin has performed but a small part of the truckloading. Under its proposed tariff revision it would have the right to perform all truckloading on Castle Island.

5. The proposed tariff revision was issued on March 15, 1955, and filed with the Board on March 17, 1955, to become effective May 15, 1955. On April 26, 1955, the effective date was extended to June 15, 1955, and on June 2, 1955, it was postponed until after decision of the Board on the issue in the present proceedings.

6. There are three categories of persons who will be or may be affected by the proposed tariff revision: complainant wholesale lumber dealers, complainant truckers, and certain wholesale lumber dealers[7] ("resident tenants") who are competitors of complainants and who are permanently assigned particular areas on Castle Island for parking lumber.

7. The resident tenants have their own employees and equipment on Castle Island and perform their own truckloading. At times they also employ the truckers for loading and transporting. In 1954 the resident tenants received 54,384,000 net feet of lumber, or 41.4 percent of the total incoming lumber for that year.

8. The resident tenants have not protested the proposed tariff revision although they may be affected by it since Wiggin might take over their truck loading. Wiggin has not advised the resident tenants of such an intention, however, and has no determined policy or plan with respect to resident tenants' operations.[8] It is possible that Wiggin would allow the present method of truck loading to continue.

9. The truckers have performed their own truck loading with their own labor and equipment since the Wiggin lumber operation commenced there in 1947, except as noted in Finding 12. Prior to World War II, Wiggin conducted a lumber terminal operation at Charles-

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and subject to all applicable provisions of this tariff. The quantity of lumber loaded upon the vehicle and the manner of the placing thereof on the vehicle shall be as directed by the driver or other authorized representative of the operator of the truck or other vehicle. Such driver or other representative shall supervise and be responsible for the manner of loading. All loading service shall be furnished and loading performed at the sole risk and responsibility of the operator of the truck or other vehicle being loaded and a request for the furnishing of such service shall constitute an agreement by the operator of the truck or other vehicle involved to hold Wiggin harmless from all claims arising out of the load or the manner in which the load is placed and secured."

[7] Weyerhaeuser Sales Company, Shepard and Morse Lumber Company, City Lumber Company, and Twin Harbors Lumber Company.

[8] Although counsel for Wiggin, in oral argument before the Board, stated that under the proposed tariff revision Wiggin would control the truck loading of the "resident tenants," Mr. Sherman Whipple, Jr., president, and Mr. Paul Whipple, manager of Wiggin, testified that no decision concerning resident tenant loading had been reached.

town in the Port of Boston. While all mechanical truck loading at Charlestown was performed with gantry cranes owned by Wiggin, much of the truck loading was performed manually by the truckers. At that time the use of fork lift trucks for truck loading had not yet become common, and nearly 45 percent of the lumber which moved out of Charlestown was hand loaded.

From the commencement of the lumber operation at Castle Island, lumber trucks were loaded principally by truckers themselves, using fork lift trucks. While Wiggin initially was interested in controlling truck loading, it was unable to acquire a sufficient number of fork lift trucks to accomplish that objective.

10. The truckers, or some of them, have office space and maintain one or more fork lift trucks on Castle Island. Each fork lift truck is operated by a driver and two additional men. Together the truckers utilize eleven fork lift trucks, representing an original total cost of $87,548.89 and a present market value of $68,683.89. The truckers would need few of these fork lift trucks if the proposed tariff revision should become effective. Wiggin has offered to purchase these fork lift trucks at appraisal value, since effectuation of the proposed tariff amendment will require an additional 10 or 11 fork lift trucks. Purchase of new additional fork lift equipment would cost Wiggin nearly $100,000.

11. The truckers load and haul lumber for both wholesalers and retailers. Most commonly, however, it is the lumber retailer who issues instructions to the trucker and pays the trucking freight. When instructed to pick up lumber the trucker dispatches a truck to Castle Island and ascertains the location of the lumber from Wiggin's clerk at the gate. The trucker then advises his fork lift operator of the location of the lumber, and both the transporting truck and the fork lift truck proceed to the pile or piles from which the required items are loaded. On departing from Castle Island the truckdriver gives the gate clerk a signed slip stating the quantity of lumber on the truck. The gate clerk, however, does not tally the lumber. His responsibility to Wiggin is to determine, to the best of his ability, that the ownership of the lumber is as stated by the trucker, and this is done for the purpose of computing parking charges. Truckers cannot depart from Castle Island, however, without signing for the lumber on their trucks.

12. The present system whereunder truckers are able to load their own lumber trucks is satisfactory to them and to the lumber retailers and wholesalers. Although Wiggin has, on rare occasions, loaded trucks for the truckers when the truckers were too busy to perform

their own loading, Wiggin's loading has been unsatisfactory to the truckers due to the greater cost occasioned by: (1) using up to twice as many men as the truckers do to load a truck, and loading less lumber in the same period of time; (2) loss in detention time of truckers' equipment waiting through long coffee breaks and lunch periods; (3) shortages of lumber; (4) inefficiency in preparing loads; (5) haphazard loading which often necessitates reloading in order to meet highway safety requirements.

13. The truckers as a group are loading considerably less at Castle Island since the proposed tariff revision than they loaded and transported for comparable periods in 1954. During the first seven months of 1954, Wiggin received 83,398,526 net feet [9] of lumber. For the same period in 1955, 52,457,325 net feet were received, a decrease of 30,941,201 net feet or 37.2 percent as compared with the previous year. The decrease in the amount of lumber received by Wiggin and the decrease in the amount of lumber loaded and transported by the truckers have resulted from diversion of lumber from Boston to other New England ports and to rail, rather than water transportation, which has been caused by the apprehension of shippers and consignees that the proposed tariff provision might go into effect, by increases in water freight rates which have reduced the disparity between rail and water transportation costs, by a shortage of lumber-carrying vessels, and by strikes on the west coast.

The lumber dealers are apprehensive concerning the proposed tariff revision, principally because of the great increase in loading costs which they believe will result, and because of the delays in delivery which they believe will inevitably follow from the slower loading time, reduced actual working hours of Wiggin employees, frequent work stoppages, and the necessity for queuing-up for truck loading. In addition, truckers anticipate increases in truck rates because of detention time on their equipment.

As hereinabove stated, generally trucks which transport lumber for the wholesale lumber dealers are loaded by trucker employees. An exception, however, is L. Grossman Sons, Inc. ("Grossman"), a wholesale lumber dealer which maintains its own employees and truck-loading equipment on Castle Island. Grossman's loading costs, including labor and amortization of equipment, average about $0.85 per one thousand net feet of lumber and are far less than the proposed Wiggin rate of $1.65 per thousand gross feet, the equivalent of $2.10 per thou-

[9] The term "net feet" represents actual measurements of lumber after dressing; "gross feet," the measurement before dressing.

sand net feet.[10] For this reason, Grossman would accelerate its present policy and practice of diverting its incoming lumber shipments to other New England ports should the proposed tariff revision go into effect. Other lumber dealers such as Dant and Russell, National Lumber Co. (a retailer), and Gerrity Company have indicated an intention to reduce or discontinue shipments to Castle Island if the tariff revision is made effective.

15. In its backpiling and occasional truck-loading operations, Wiggin employs members of Local 926, an affiliate of the International Longshoremen's Association (ILA). Although the men are classified as lumber handlers and are paid lower hourly wages than men employed as longshoremen, they are hired as casual labor in the same manner as longshoremen and are employed only when lumber ships are to be unloaded. For this reason, in negotiations in early 1955 looking to a new labor contract between Local 926 and the Employers Group,[11] the union demanded either the right to perform all truck loading at Castle Island in addition to the backpiling and occasional truck loading or the right to receive longshoremen's wages for the work performed. The negotiations terminated in an hourly increase of $0.10 for the union members without a written commitment regarding exclusive loading. Shortly thereafter, Wiggin proposed the tariff revision here in dispute.

16. Local 926, since 1941, has sought exclusive control over the truck loading, an aim with which Wiggin, in the past, has been unsympathetic. In 1949, however, upon strong union urging, Wiggin sought controlled loading as now proposed. The proposal was then, as now, strongly opposed by the lumber dealers and by the truckers. This, plus the fact that Wiggin was in any case hesitant at that time to assume the necessary capital expense, and plus the failure of the union to appear in support of Wiggin at a meeting with Boston port authorities, at which time exclusive loading was to have been sought, caused Wiggin to drop the proposal.

Wiggin Local 926 employees consume up to twice as much time in truck loading as do the truckers' employees. In addition, Wiggin usually uses more men in truck loading than do the truckers' employees. The additional time consumed and the excess of men employed would materially add to the truckers' and to the lumber dealers' direct and indirect costs. Although the truck-loading employees of the resident

[10] Wiggin's present tariff rate is $1.85 per thousand gross feet

[11] A group composed of Wiggin, Weyerhaeuser Sales Co., Shepard & Morse Lumber Co., and The City Lumber Co. of Bridgeport, Inc., the last three of which are "resident tenants" who employ Local 926 members on a permanent basis.

tenants are members of Local 926, the same labor union as those of Wiggin, the resident tenants' employees work as efficiently and as expeditiously as do the truckers' employees, due probably to the permanent nature of their employment and to the supervision received from the resident tenants.

17. Luckenbach has urged Wiggin to take over truck loading as a good terminal practice, but has brought no pressure to bear on Wiggin. While Wiggin is reluctant to undertake exclusive truck loading, it considers that function essential to an efficient terminal operation.

18. Complainant truckers and lumber dealers state that Wiggin's terminal is inefficiently operated, which is admitted by Wiggin. Wiggin and the complainants, however, assign different reasons for the inefficiencies and dispute whether the proposed tariff revision will effect a cure.

Wiggin contends that free trucker access to parked lumber is responsible for most of the inefficiencies, while admitting poor housekeeping practices. The truckers deny that abuses result from free access, and state that Wiggin's poor housekeeping and careless backpiling are solely responsible for the conditions at Castle Island.

The lumber dealers consider both the truckers and Wiggin to be at fault, however, assigning the bulk of responsibility for the conditions to Wiggin's failure to exercise its right to supervise and control the truckers. Efficiency can be completely restored, it is urged, by effective supervision and policing of truckers' activities and by diligent housekeeping, without the necessity for Wiggin's performance of truck loading. Wiggin witnesses, as stated, urge that controlled truck loading is essential to an efficient lumber terminal operation, that it will correct most of the present terminal inefficiencies, and that it will give Wiggin complete control over the stored lumber. The following conditions contribute to the inefficiency of the terminal as a whole:

(a) The work of Wiggin Local 926 employees has frequently been interrupted by work stoppages (delays of less than one day) and by strikes (delays of greater than one day).

(b) The actual working hours of Wiggin employees are limited to about 5½ hours per day because of long coffee breaks and an unwillingness to begin truck loading as lunch or quitting time approaches.

(c) The few trucks handled by Wiggin employees are often unstable and improperly positioned, sometimes requiring reloading on the truck. Under both Wiggin's present tariff and the proposed revision thereto, however, Wiggin truck loading is performed under the supervision of the trucker's representative and at the risk of the trucker.

(d) Truckers frequently load and deliver wrong lots of lumber as well as incorrect quantities. This results from misdirection of lumber and placing lumber on the wrong piles in backloading by Wiggin, as well as from carelessness on the part of trucker employees in loading from piles owned by other lumber dealers.

(e) Piles of lumber are spilled or made unstable by the truckers' practice of bucking lumber on the blades of a fork lift truck against the pile in order to straighten out the load on the fork lift.

(f) Trucks are parked in streets and alleys, preventing access to or egress from the piles.

(g) Lumber has been strewn and allowed to remain on the wharf by Wiggin employees and in the roadways by both Wiggin and trucker employees.

(h) Lumber is transported by truckers on fork lift trucks, a hazardous practice conducive to spilled loads. A present tariff provision [12] requiring all lumber which is to be moved from one place of rest within the lumber area to be moved by Wiggin is ignored by the truckers. Wiggin states that the provision cannot be enforced as a practical matter or as a matter of right.

(i) Truckers occasionally load and carry more lumber than the amount to which the consignee is entitled, resulting in eventual shortages of lumber.

(j) Truckers occasionally remove partial lots and leave small piles lying around the terminal while at the same time signing out at the gate as having received a full lot. Wiggin annually or less frequently cleans up the yard by collecting such piles, and gives the lumber dealers an opportunity to identify and claim the lumber. Lumber so identified is released on payment of storage charges; the balance is sold for unpaid storage charges. In 1954 Wiggin realized $3,000 from the sale of unclaimed lumber. The record does not reveal whether Wiggin retained the entire sum or whether 75 percent of the sum was paid to Luckenbach.

(k) Wiggin often fails to repile spilled lumber, strewn laths, and crossers, and to clear the roads of such materials.

(l) The roadways are in poor condition and are neither maintained nor cleared of snow by Wiggin, who denies responsibility for either function.

19. Many of the aforementioned inefficiencies result from Wiggin's denial of responsibility for or duty to parked lumber, and its denial of custody of the lumber and control over the lumber area. Wiggin admits that it has a duty to clear roadways of strewn lumber, crossers,

[12] F. M. B. Tariff No. 5, Item 14, Original p. 5.

and laths, but it nevertheless has not always done so. The abuses of the truckers, such as blocking of streets, transportation of lumber on fork lift trucks, bucking lumber piles, spilling lumber piles, over-delivery of lumber by truckers, leaving small piles of lumber scattered throughout the parking area, and loading from the wrong piles can be prevented by adequate policing and an exercise of general control over the lumber area. Further, both Luckenbach, under its lease from the Commonwealth of Massachusetts, and possibly Wiggin, under its agreement with Luckenbach,[13] have the duty to maintain the roads in a state of repair equal to that shown by a survey made at the time of execution of the lease, and to clear the premises of snow.

20. Wiggin asserts that it is not the lessee of the premises, is a service organization only, and disclaims responsibility for shortage of or damage to lumber.[14] It claims that it now has authority to regulate truck traffic and operations on Castle Island but denies authority to enforce such regulations. Wiggin has never considered assessing penalties against truckers who violate tariff rules and provisions, and its witnesses state that it has no right to bar from Castle Island any trucker who engages in such practices.

21. Wiggin's proposed tariff revision contains a provision requiring compliance with all Wiggin regulations relating to traffic control, speed, hours of operation, and the like.[15] There is no comparable provision in the present tariff. Under the agreement between Luckenbach and Wiggin, however, Wiggin is granted full charge and responsibility for the conduct of a lumber terminal operation on designated parcels of land, agrees to maintain the lumber terminal section in good condition and repair, and agrees to "surrender" the lumber section in like good condition, ordinary wear and tear excepted.

22. Officials of six Atlantic coast lumber terminals[16] testified in

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[13] Article 3 (f) of the agreement between Luckenbach and Wiggin provides:

"WIGGIN will maintain the lumber terminal section and all improvements, facilities and equipment in good and serviceable condition and repair, will comply with all existing and future laws, regulations, orders and decrees pertaining to the occupancy of the premises, and upon the expiration of the term of this agreement will surrender said section, improvements, facilities and equipment in the same condition in which they now are, or as they may later be improved by LUCKENBACH or the COMMISSION, ordinary wear and tear excepted."

[14] Item 15C of Original Page 5, F. M. B. Tariff No. 5, provides:

"Wiggin, its officers, agents and employees shall not be responsible for any loss or damage to vessels, equipment, persons, lumber, merchandise or other property received, handled, or parked at the pier whether caused by theft, fire, water, action of the elements, or any other cause."

[15] Item 16B of 1st Revised Page 5, F. M. B. Tariff No. 5, provides:

"All trucks and persons using the lumber area shall comply with such directions, rules, and regulations as may be issued by Wiggin relating to the traffic control, speed, hours of operation, and the like."

[16] Bayway Terminal, Port Newark, Newark, N. J., Gowanus Lumber Terminal, Brooklyn, N. Y., Municipal Pier, Providence, R. I., Connecticut Terminal, New London, Conn.,

these proceedings. They backpile lumber and offer various lumber terminal services, including truck loading. They have public areas in which the terminal performs all of the truck loading and open areas where the truckers do the loading, and some have resident tenants who load their own trucks. These terminals have complete control of the lumber entrusted to their care. The truck loading is performed efficiently with a reasonably steady crew on the property. They have found that a permanent crew tends to increase the efficiency of those employed on a permanent basis as opposed to completely casual labor.

23. Approximately one-half of the Atlantic coast lumber terminals permit private loading of trucks; where it is permitted, the average is about 40 percent loading by the terminal and 60 percent by truckers and consignees. The terminal officials testified that the existence of a permanent truck-loading force on Castle Island would increase efficiency in loading. Since exclusive terminal-controlled loading would most probably entail maintenance of permanent crews, exclusive Wiggin-controlled loading would be more efficient than the present loading occasionally performed by Wiggin's casual personnel. Such exclusive loading by Wiggin, however, as elsewhere herein stated, would not be as efficient as loading by the truckers.

POSITIONS OF THE PARTIES

Principally, complainants maintain that the proposed tariff revision is unreasonable, within the meaning of section 17 of the Act, since exclusive Wiggin truck loading would result in increased truck-loading costs without corresponding increases in efficiency of terminal operation; that the revision would result in diversion of lumber shipments to New England ports other than Boston; and that the revision would result in financial loss to them without a corresponding gain by Wiggin.

Complainants allege that, since the proposed revision would be applicable to all lumber dealers except the resident tenants, it will unduly prefer the resident tenants, in violation of section 16 of the Act. They further allege that the diversion of lumber traffic to other ports or to rail, rather than water carriers, will result in undue preference to those ports and to that method of transportation and in undue prejudice to the Port of Boston. Finally, they allege that since truck loading of general cargo will not be controlled, the proposed revision will result in unjust discrimination against lumber commodities.

New Haven Terminal, New Haven, Conn., and Atlantic Terminals, Inc., Port Newark, Newark, N. J.

Public Counsel argues that the proposed revision will be an unjust and unreasonable regulation, in violation of section 17 of the Act, since the revision is not necessary to efficiency. Efficient operations can be restored, Public Counsel urges, by enforcement of existing and proposed tariff regulations relating to traffic control and by more responsible housekeeping.

Both complainants and Public Counsel assert that the real purpose of the proposed revision is to meet the demands of Local 926 rather than as an independent step toward greater operating efficiency.

Although the General Counsel to the North Atlantic Marine Terminals Conference filed a brief as *amicus curiae*, he made no attempt to evaluate the evidence but urged only that the Board in deciding the issues be guided by the following principles:

(a) That discrimination within the meaning of the Act can exist only where a terminal operator does not accord the same treatment to all of its customers alike; and that a failure to treat its customers in the same way as other operators treat theirs does not constitute discrimination.

(b) That the fact a regulation or practice is desired by a labor union or is adopted to resolve a labor problem is no evidence that it is unjust or unreasonable but on the contrary tends to prove that there was a reasonable basis for its adoption.

(c) That the Act does not require uniformity of regulations and practices among terminal operators, and that the existence of an alternate possible regulation or practice is no evidence that a regulation or practice is unjust or unreasonable.

The North Atlantic Marine Terminals Conference did not except to the examiner's recommended decision or orally argue its position before us.

DISCUSSION AND CONCLUSIONS

We cannot, as did the examiner, find that the proposed exclusive terminal loading tariff regulation itself will result in violation of section 16 of the Act. While, according to the testimony of Wiggin's president and its manager, it is unknown whether the exclusive loading regulation will be applied to the lumber of the resident tenants as well as to the other lumber dealers, counsel for Wiggin flatly asserted in oral argument that all lumber dealers would be treated alike. Since the tariff regulation on its face applies equally to all who utilize the lumber terminal, however, the regulation is not unduly preferential; the possibility that the equality contemplated by the tariff regulation will, in practice, be disregarded is relevant to the reasonableness of the regulation under section 17 of the Act.

The proposed exclusive loading regulation will not be unduly prejudicial to the Port of Boston, in violation of section 16 of the Act. No

evidence has been adduced showing or tending to show unequal treatment of localities by Wiggin. The evidence of diversion of traffic by lumber dealers which will or may be effected upon application of the regulation is immaterial to the allegation of violation of section 16 of the Act. Such evidence is, however, relevant to the issue of reasonableness of the regulation under section 17 of the Act.

The proposed regulation will not unduly prefer commodities other than lumber, in violation of section 16 of the Act. Neither injury to such cargoes nor an existing and effective competitive relationship between lumber and other commodities has been shown, as is required before such a violation may be established. *Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U. S. S. B. B. 538 (1936).

We find, however, the proposed revision of F. M. B. Tariff No. 5, Item 15–A, as well as the contemplated effectuation thereof, to be an unreasonable regulation and an unreasonable practice, respectively, relating to the handling, storing, and delivering of property, by a person subject to the Act,[17] in violation of section 17. As hereinbefore indicated, considerable uncertainty was expressed by Wiggin witnesses as to whether the proposed exclusive loading rule would be applied uniformly. Not only the potential discrimination in unequal application of a tariff regulation, but the mere possibility of a variance between regulation and practice, renders both regulation and practice unreasonable.

If the regulation should not be applied uniformly, the resident tenants, maintaining their own Local 926 personnel, would enjoy lower indirect loading costs by being able to supervise their loading operations, prepare lumber for loading prior to arrival of transporting trucks, avoid the loading delays attributable to the queuing-up of trucks for loading, and, at the present relative degree of efficiency of their own employees *vis-a-vis* Wiggin personnel, enjoy lower direct loading costs than other lumber dealers, all to their own advantage and to the competitive disadvantage of other lumber dealers. Obviously, the competitive disadvantage is not mitigated by the fact that the Wiggin loaders receive the same hourly wages as do the resident tenants' loaders, although an argument to that effect has been made by Wiggin counsel in exceptions.

The proposed regulation is equally unreasonable in other respects. The evidence establishes that exclusive Wiggin loading would result

[17] "An 'other person' may be *in connection with* a water carrier without being affiliated with, controlled by, or in a continuing contractual relationship with such carrier. *United States* v. *American Union Transport, Inc., et al.*, No. 44, October Term, Supreme Court, 1945 [327 U. S. 437]." *Status of Carloaders and Unloaders*, 2 U. S. M. C. 761, 767 (1946). See also *California* v. *United States*, 320 U. S. 577 (1944).

in substantially increased direct and indirect costs of truck loading and would divert lumber to New England ports other than Boston. In justification for these serious results, Wiggin maintains that controlled truck loading is essential to give Wiggin complete control over the lumber terminal and thus to restore efficiency of operations. We do not find this to be a valid justification here. Item 16–B, 1st Revised Page 5 of the proposed tariff revision, not objected to by any of complainants, requires compliance "with such direction, rules, and regulations as may be issued by Wiggin relating to traffic control, speed, hours of operation and the like." Ample control over the lumber terminal operation can be gained by vigilant enforcement of this rule without the concomitant increases in cost and diversion of lumber which will result from effectuation of the proposed exclusive loading regulation. Further, while the evidence indicates that truck loading itself would be more efficient than it is at present should Wiggin employ permanent rather than floating lumber handlers, the evidence does not support a reasonable probability that the physical loading of trucks by Wiggin employees would eliminate or reduce many of the inefficiencies described herein.

Since the disadvantages and injurious effects of the proposed exclusive loading regulation outweigh the benefits to be derived therefrom, which benefits may be secured by other uncontested and innocuous means, we find the proposed exclusive loading regulation unreasonable.

We are puzzled by Wiggin's assertion that, as a service organization, it lacks control over the stored lumber although it collects fees for such storage. Since Wiggin is directly compensated for its backpiling and other lumber handling services, and since no services are rendered to the lumber after deposit at the place of rest, it is difficult to understand the basis for publication and collection of a parking charge by Wiggin, a service organization, if it has no custody, possession, or right to possession of the lumber. Wiggin asserts that Luckenbach, as lessee of the land on which the lumber terminal is located, has possession of and control over the lumber. If this were correct, reasonableness would require that Luckenbach publish the lumber terminal tariff in order that consignees of lumber might know to whom to look for care of and responsibility to their lumber while at the terminal. The argument is refuted, however, by the fact that lumber consignees deal with Wiggin, not with Luckenbach,[18] and by the terms

[18] The Luckenbach terminal tariff, F. M. B. I.–1, provides:

"Item 3–A. WHARF PARKING: LUMBER—Refer to Wiggin Terminals' Federal Maritime Board Tariff No. 5."

"*Item* 7. CHARGES FOR HANDLING LUMBER: Luckenbach S. S. Co., Incorporated has contracted with Wiggin Terminals Inc. to handle and park lumber at Castle Island Terminal. Wiggin Terminals, Inc. publish their own tariff to cover these services."

of the agreement between Wiggin and Luckenbach. In that agreement, Wiggin undertakes to "assume full charge and responsibility for the lumber terminal operations," to save Luckenbach harmless in the event of "injury to or loss of property or death or injury to any person on or within the lumber terminal area *caused by any act or failure of* WIGGIN or any of its officers, agents or employees, *or by the condition of the premises*," and to make certain remittances to Luckenbach in "*payment for the use* of such portion of Castle Island Terminal by WIGGIN as a lumber terminal." [Emphasis supplied.] The sales by Wiggin of unidentified and unclaimed lumber for storage charges, and the fact that consignees may take possesion of stored lumber during the specified terminal hours only, are further indicia of Wiggin's dominion over stored lumber and control of the lumber terminal. We find then that, contrary to its assertion, Wiggin has control of the lumber terminal and custody of lumber stored thereon, after free time and prior to demand and payment by the consignee dealer of accrued storage charges. Having so found, it is abundantly clear that the inefficiencies hereinbefore stated to be the result of Wiggin's failure to exercise its control over the lumber and over the premises should be rectified through enforcement of Item 16–B and/or such other regulation dealing with traffic control or control over stored lumber as may reasonably be necessary to insure trucker cooperation. While Wiggin asserts that policing of Castle Island would be impractical and overly expensive, it would appear that, in the absence of such control, Wiggin furnishes no consideration in return for the storage or parking fees received from lumber dealers.

We conclude that Item 15–A of F. M. B. Tariff No. 5 is an unreasonable regulation relating to the handling, storing, and delivering of property, and that the contemplated effectuation of Item 15–A is an unreasonable practice relating to the handling, storing, and delivering of property, both in violation of section 17 of the Act.

As stated by the examiner, the testimony of representatives of other North Atlantic lumber terminals has no significant bearing on the issues in these proceedings, and the findings and conclusions herein are not intended to have any application or effect upon such other terminals. Further, while much testimony was adduced tending to establish that the proposed revision resulted solely from labor union demands, it is the reasonableness of the regulation itself and the contemplated practice thereunder which must be considered and not the motivating reason for the revision.

An appropriate order will be entered.

Chairman Morse was absent from the country at the time of oral argument, and accordingly, does not participate in this report.

ORDER

At a Session of the FEDERAL MARITIME BOARD held at its office in Washington, D. C., on the 18th day of May A. D. 1956

No. 776

LOPEZ TRUCKING, INC., ET AL.

v.

WIGGIN TERMINALS, INC.

No. 779

DANT AND RUSSELL SALES CO. ET AL.

v.

WIGGIN TERMINALS, INC.

These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That respondent be, and it is hereby, notified and required to cancel and hereafter abstain from publishing and putting into effect Item 15–A of F. M. B. Tariff No. 5, found herein to be an unreasonable regulation in violation of section 17 of the Shipping Act, 1916.

By the Board.

[SEAL] (Sgd.) GEO. A. VIEHMANN,
Assistant Secretary.

FEDERAL MARITIME BOARD

No. M–64 (Sub. No. 1)

PACIFIC FAR EAST LINE, INC.—APPLICATION TO EXTEND BAREBOAT CHARTER OF VESSELS

Submitted May 25, 1956. Decided May 28, 1956

REPORT OF THE BOARD

BY THE BOARD:

In *Pacific Far East Line, Inc.—Charter of War-Built Vessels*, 4 F. M. B. 785, we recommended granting the charter of seven vessels to Pacific Far East Line, Inc. ("PFEL"), having found, as more fully set out in that report, that (1) the service under consideration is in the public interest, (2) such service is inadequately served, and (3) privately owned American-flag vessels are not available for charter from private operators for use in such service. We recommended to the Secretary of Commerce, *inter alia*, that the charters provide for June 20, 1956, redelivery at a United States west coast port to be named by the Maritime Administrator, and that PFEL be prohibited from commencing a voyage which might extend beyond that date.

Subsequent to execution of the charters as recommended and the commencement of the contemplated iron-ore lift, PFEL was obliged to redeliver four of the seven vessels, as described in the following Notice of Application and Tentative Findings served in this proceeding on May 18, 1956:

Pursuant to section 5 (e) of the Merchant Ship Sales Act, 1946, as amended (Public Law 591, 81st Cong.) (50 U. S. C. App. 1738), seven (7) Victory type vessels owned by the United States were chartered to Pacific Far East Line, Inc. (Applicant), for the carriage of iron ore from Stockton, Calif., to ore ports in Japan; the charter contemplated two (2) voyages per vessel, a total of fourteen (14) voyages; four (4) of the vessels were recalled after completion of one (1) voyage; the applicant is obligated to redeliver said vessels on or before June 20, 1956.

Applicant seeks to use the three (3) vessels currently under charter to complete a sufficient number of voyages so that the total voyages accomplished under the charter will be the total of fourteen (14) contemplated by the Report of the Board dated March 20, 1956.

The Board has tentatively affirmed its findings of March 20, 1956, and has tentatively determined that its recommendation 6 in its Report of March 20, 1956, should be relaxed to permit applicant to continue using the three (3) vessels for additional voyages sufficient to accomplish a total of fourteen (14) under the charter.

Any interested party may be heard concerning these tentative findings in Room 4519, New General Accounting Office Building, 5th and G Streets, N. W., Washington, D. C., at 2 p. m., e. d. t., May 24, 1956. Said findings will become final if no protestant appears.

On May 24 and 25, 1956, as provided in the foregoing notice, American Tramp Shipowners Association and States Marine Corporation of Delaware appeared in opposition to the proposed extension. No evidence was adduced by the interveners tending to show that our tentative findings should not be made, or that our tentative determination and recommendation to the Maritime Administrator that recommendation 6 of our March 20, 1956, report should not be relaxed to permit PFEL to continue using the three vessels for additional voyages sufficient to accomplish a total of fourteen voyages under the combined charters. Accordingly, on the records in this proceeding and the earlier proceeding, we reaffirm, adopt, and hereby finalize the aforesaid tentative findings, determinations, and recommendations.

FEDERAL MARITIME BOARD

No. 725

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE ET AL.

No. 751

IN THE MATTER OF THE STATEMENT OF THE MEMBER LINES OF THE NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE FILED UNDER GENERAL ORDER 76

*Submitted June 28, 1955. Decided February 29, 1956**

Proposed exclusive-patronage contract/noncontract system of the North Atlantic Continental Freight Conference approved under section 15 of the Shipping Act, 1916.

The exclusive-patronage contract/noncontract system of the North Atlantic Continental Freight Conference not found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the Commerce of the United States, or to be in violation of the Shipping Act, 1916.

Approval granted under section 15 of the Shipping Act, 1916, contingent upon modification of the proposed exclusive-patronage contract to reflect the views of the Board.

Complaint of the Department of Agriculture dismissed since the proposed exclusive-patronage contract/noncontract system has not been found to be unlawful.

Henry A. Cockrum, Chas. B. Bowling, J. L. Pease, Chas. D. Turner, and *Charles W. Bucy* for the Secretary of Agriculture of the United States.

John J. O'Connor and *John J. O'Connor, Jr.*, for Isbrandtsen Company, Inc.

*As amended by order of March 30, 1956.

Edward Knuff, *James E. Kilday*, and *Stanley N. Barnes* for the Department of Justice.

Hymen I. Malatzky for himself.

M. W. Wells for Growers and Shippers League of Florida, Florida Citrus Commission, Florida Canners Association, and Florida Citrus Mutual.

Roscoe H. Hupper, *Burton H. White*, and *Elliott B. Nixon* for members of North Atlantic Continental Freight Conference.

John Mason, *Edward Aptaker*, *Richard J. Gage*, and *Richard W. Kurrus* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

Docket No. 725 arises out of a complaint filed on October 17, 1952, by the Secretary of Agriculture ("Agriculture"),[1] challenging the validity of the exclusive-patronage contract/noncontract rate system ("dual-rate system") proposed by North Atlantic Continental Freight Conference ("the conference") for use in the trade from United States North Atlantic ports to ports in Belgium, Holland, and Germany (exclusive of German Baltic ports). Agriculture alleges that the use of dual rates would violate sections 14, 16, and 17 of the Shipping Act, 1916 ("the Act"), and that the proposed dual-rate system may not be approved under section 15 of the Act.

Isbrandtsen Company, Inc. ("Isbrandtsen"), the Department of Justice ("Justice"), and Hymen I. Malatzky, doing business as Himala International (Malatzky), intervened in the proceedings. Although Malatzky filed a brief, he did not participate in the hearing before the examiner and filed no exceptions to the examiner's recommended decision.

Docket No. 751 is a proceeding arising out of a statement of the conference filed on February 25, 1954, pursuant to section 236.3 of our General Order 76,[2] and the comments thereto filed by Isbrandtsen, Agriculture, and Justice. The conference statement sets out the differential between contract and noncontract rates in the proposed dual-

[1] Filed pursuant to section 22 of the Shipping Act, 1916, and section 203 (j) of the Agricultural Marketing Act of 1946.

[2] 17 F. R. 10175, 46 C. F. R. 236.3 (Nov. 10, 1952): The section requires parties filing to initiate a dual-rate system to furnish a statement containing:

(a) The amount of the spread or differential in terms of percentages or dollars and cents;

(b) The effective date;

(c) The reasons for the use of contract/noncontract rates in the particular trade involved, and the basis for the spread or differential between such rates; and

(d) Copies of the form of all contracts pertaining thereto.

rate system complained of by Agriculture in Docket No. 725, the effective date of the proposed system, the reasons for the use of the system in the trade involved, the basis for the differential, and copies of the form contract proposed for use in the trade. Some of the matters encompassed in the statement, however, had been fully considered in our report in Docket No. 724, *Contract Rates—North Atlantic Con'l Frt. Conf.*, 4 F. M. B. 355 (1954), where a proposed 10-percent differential between contract and noncontract rates in this trade was found to be not arbitrary, unreasonable, unjustly discriminatory, nor in violation of the Act. The Board stated in that report, however, that "Nothing in this report shall be deemed to relieve the respondent conference from full compliance with the provisions of General Order 76 * * *."

The history of the controversy between the parties here was described in *Contract Rates*, *supra*, at p. 356, as follows:

> On October 1, 1948, respondents advised shippers in the trade that the carriers proposed to reinstate the exclusive-patronage contract and dual-rate system which had been in use in the trade prior to World War II. Isbrandtsen brought suit in the United States District Court for the Southern District of New York seeking an injunction and an order to set aside certain rulings of our predecessor, the United States Maritime Commission, which purported to authorize the dual-rate system. The District Court granted a temporary injunction to preserve the status quo and directed Isbrandtsen to file a complaint before us to challenge the validity of the system. This complaint was filed, and, after due proceedings, we issued our report in Docket 684 upholding the system and finding at page 247:
>
> "3. The use of the dual-rate system by the two conferences and their members is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters fom the United States and their foreign competitors, and does not operate to the detriment of the commerce of the United States, and is not in violation of the Shipping Act, 1916, * * *."
>
> Our order in Docket 684 was appealed to the District Court by Isbrandtsen, who urged that the dual-rate system was unlawful *per se* because in violation of section 14 (Third) of the Act. The court declined to find that the system could under no circumstances be valid, but granted a permanent injunction against the system on a point not argued before us, holding that the differential between the contract and noncontract rates offered to shippers had been arbitrarily determined and was therefore based on unreasoned conduct and so was unreasonable and unjustly discriminatory.[2]
>
> In July 1952 we instituted a rule-making proceeding to provide machinery for securing information from conferences of ocean carriers as to the circumstances and justification for the use of dual rates and the basis for the amount of any differential between contract and noncontract rates to be charged. Before our rule-making proceeding had been completed and a rule promulgated,[3] respondents announced their intention to institute a new exclusive-patronage dual-rate system effective October 1, 1952.
>
> Our order of investigation, issued as above stated on September 19, 1952, initiated these proceedings, and by our report filed September 29, 1952 (*Contract*

Rates-North Atlantic Cont'l Frt. Conf., 4 F. M. B. 98), we in effect directed the respondent carriers to defer the institution of the dual-rate system until the conclusion of these proceedings. Our order of September 19, 1952, as amended on October 3, 1952, outlined the scope of the investigation to embrace only the issue of "whether the differential in the rates of the proposed system is arbitrary and unreasonable and therefore unjustly discriminatory."

[2] *Isbrandtsen* v. *United States*, 96 F. Supp. 883 (1951), affirmed by an equally divided Supreme Court *sub nom. A/S J. Ludwig Mowinckels Rederi et al.* v. *Isbrandtsen Co., Inc., et al.*, 342 U. S. 950 (1952).

[3] Our General Order 76 was issued November 10, 1952.

In commenting on the statement presently before us, Isbrandtsen argued (1) that the dual-rate system proposed could not go into effect prior to full hearing and approval under section 15 of the Act, (2) that the matters considered in Docket No. 724 did not provide a sufficient basis for Board approval under section 15, (3) that the statement did not comply with the requirements of General Order 76, (4) that the proposed dual-rate system was violative of sections 14, 15, 16, and 17 of the Act, and (5) that the institution of the system would result in irreparable damage and injury to Isbrandtsen. The comments of Agriculture and objections of Justice are encompassed in Isbrandtsen's comments.

Oral argument on the statement and on the comments thereto was heard on March 29, 1954. In our order of March 30, 1954, we expressed doubt as to whether aspects of the proposed contract/noncontract rates, other than the amount of the proposed spread or differential between those rates, may be unjustly discriminatory or otherwise in violation of the Act, and we directed that the system be held in abeyance until further direction; we granted the requests of Isbrandtsen, Justice, and Agriculture for hearing on their comments on and objections to the statement, and we ordered that the hearing be consolidated with the hearing in Docket No. 725.

On April 15, 1954, at the request of the conference members and Public Counsel, we specified in the following manner the aspects of the proposed system as to which doubts had previously been entertained:

(1) Having determined that the differential between the proposed contract and noncontract rates is not arbitrary or unreasonable and not unjustly discriminatory, and that such differential is not in violation of the Shipping Act, 1916, as amended, there is nevertheless doubt as to whether the use of the proposed contract and noncontract rates in the trade described in Conference Agreement No. 4490, as amended, may be unjustly discriminatory or unfair as between carriers, shippers, exporters, or ports, or between exporters from the United States and their foreign competitors, or may operate to the detriment of the commerce of the United States, or may be in violation of the Shipping Act, 1916, as amended, and

(2) Having determined that the differential between the proposed contract and noncontract rates is not arbitrary or unreasonable and not unjustly discriminatory, and that such differential is not in violation of the Shipping Act, 1916, as amended, there is nevertheless doubt as to whether the use of the contracts pertaining to the proposed contract and noncontract rates as set forth in the Statement filed by the Member Lines herein, may be unjustly discriminatory or unfair as between carriers, shippers, exporters or ports or between exporters from the United States and their foreign competitors, or may operate to the detriment of the commerce of the United States, or may be in violation of the Shipping Act, 1916, as amended.

Hearings in the combined proceedings were held during the period April 27 to May 7, 1954. During the course of the hearing the examiner ruled that questions relating to the method by which the conference arrived at the differential between contract and noncontract rates and questions as to whether the differential was arbitrary could not be pursued. Counsel for Isbrandtsen and for Agriculture thereafter appealed the examiner's rulings under the provisions of Rule 10 (n) of our Rules of Practice and Procedure.[3] By order dated May 3, 1954, we sustained the examiner's rulings.

In a recommended decision served on November 24, 1954, the examiner found that the proposed system would not be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, would not operate to the detriment of the commerce of the United States, and would not be in violation of the Act. He further recommended that a memorandum of the agreement to establish the proposed dual-rate system should be filed for approval under section 15 of the Act, and recommended that an order be entered dismissing the complaint in Docket No. 725 and discontinuing the proceeding in Docket No. 751. Motions by Isbrandtsen and Malatzky to remand the recommended decision, with instructions to make further findings and conclusions, were denied by our order of February 1, 1955.

Exceptions to the recommended decision were thereafter filed by Justice, Agriculture, Isbrandtsen, and by the conference, and oral argument on the exceptions was heard. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

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[3] Rule 10 (n) provides:

"Right of parties as to presentation of evidence.—Every party shall have the right to present his 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 judgment such evidence or examination is cumulative or is productive of undue delay in the conduct of the hearing."

We find the following to be the facts in these proceedings:

The conference is a voluntary association of twelve common carriers by water [4] engaged in the transportation of cargo from United States North Atlantic ports to ports in Belgium, Holland, and Germany (exclusive of German Baltic ports). The conference operates under the authority of F. M. B. Agreement 4490, as amended ("the basic agreement"), approved in unamended form by our predecessor under section 15 of the Act on August 24, 1935.

Conference membership is open to any common carrier by water who has been engaged regularly in the trade or who furnishes evidence of ability and intention to maintain a regular service in the trade.

Article 3 of the basic agreement specifically provides for establishment of dual rates and authorizes the conference chairman or secretary to negotiate and execute such dual-rate contracts in the manner as may be authorized by the conference.

There are eight nonconference common carriers in this trade, Isbrandtsen, Meyer Line, Inc., States Marine Corporation ("States Marine"), Hamburg-Amerika Linie ("Hamburg-American Line"), Norddeutscher Lloyd ("North German Lloyd"), U. S. Navigation Company,[5] Mitsui Steamship Co., Ltd. ("Mitsui"), and Osaka Shosen Kaisa ("O. S. K.").[6] Of these, Hamburg-American,[5] Meyer Line, Inc., and North German Lloyd are the predominant carriers. Several other lines have in the past operated independent berth or tramp service in the trade but do not presently serve the trade. Isbrandtsen, an American corporation employing United States-flag vessels in this trade, although not in all of the trades which it serves, is the only nonconference common carrier appearing in these proceedings. Of the conference membership, Black Diamond Steamship Corporation, United States Lines Company, Waterman Steamship Corporation, Belgian Line, and Holland-America Line were most active at the time of hearing in Docket No. 724.

The independent lines collectively provide complete port coverage and frequent and regular service, as do the conference lines. While

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[4] Conference membership at the time of the recommended decision included A/S J. Ludwig Mowinckels Rederi (Cosmopolitan Line), Black Diamond Steamship Corporation, Compagnie Generale Transatlantique, Compagnie Maritime Belge, S. A./Compagnie Maritime Congolaise S. C. R. L. (Joint Service), The Cunard Steam-Ship Company Limited (Cunard White Star), Ellerman's Wilson Line, Ltd. (Wilson Line), Home Lines, Inc. (Home Lines), N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn," Osaka Shosen Kaisha, Ltd., South Atlantic Steamship Line, Inc. (U. S. flag), United States Lines Company (U. S. flag), (Fjell Line)—Joint Service of Aktieselskapet Luksefjell, Aktieselskapet Dovrefjell, Aktieselskapet Falkefjell, Aktieselskapet Rudolf.

[5] In 1955, subsequent to the close of hearings, North German Lloyd, Hamburg American Line, and United States Navigation Co. joined the conference. In the same year, Fjell Line and South Atlantic Steamship Line, Inc., resigned from conference membership.

[6] Mitsui's entry predates O. S. K.'s entry of February 1954.

large individual shippers may require more frequent service than any single independent line provides, it is unlikely that the needs of any shipper could not be met by utilization of services provided by all of the independents in the trade. While a witness for Agriculture testified that shippers in this trade need more service and greater port coverage than collectively provided by the independent lines, the witness had no familiarity with this trade or with shipping problems.

Some of the conference vessels are equipped with refrigerated space. A witness for Isbrandtsen indicated that Mitsui might be the only nonconference line which provides refrigerated service, but he further stated that of the independent lines he was certain of the facilities of his own vessels only.

There are between 3,500 and 5,000 shippers in this trade, including about 1,500 consignees in Europe as well as consignors in the United States. In this number are included some of the largest shippers in the world. Several witnesses refused to estimate the maximum service which might be required by any single shipper. One witness stated that some shippers use two to four sailings per week but indicated that their requirements did not demand such frequent sailings and might well be met by one sailing per week. Nationalistic preferences are not shown other than by Dutch receivers for Holland-America Line. While shippers are interested in low rates, they are more interested in uniform and stable rates.

There is a considerable volume of cargoes moving in this trade which are attractive to tramp vessels and for which conference and nonconference liners as well as tramp vessels compete. For several months prior to the hearing, the carryings of one conference line were 90 percent bulk and 10 percent general. For calendar year 1953, the bulk cargo carryings of the conference member lines represented 60 percent of their total carryings. The percentage of general cargo [7] carryings of conference member lines to total carryings of those lines has been substantially reduced since 1948. General cargo [7] in 1953 represented 24 percent of the total conference carryings as against 56 percent in 1948. Generally, bulk cargoes are less attractive and less remunerative than general cargoes.

As found in our report in Docket No. 724, and officially noticed herein, the amount of commercial cargo in long tons carried by liner services in the trade and the number of eastbound sailings for the years 1948 to 1952 are as follows:

[7] Exclusive of military cargo carried.

TABLE I

Year	1,000 tons	Conference	Nonconference	Total sailings	Conference sailings	Nonconference sailings
		Percent	*Percent*		*Percent*	*Percent*
1948	1,485	76	24	621	89	11
1949		66	34	642	84	16
1950	1,812	57	43	613	80	20
1951	2,590	74	26	559	83	17
1952	[1] 990	[2] 66	[2] 34	[3] 688	[3] 79	[3] 21

[1] January–June 1952 only.
[2] Percentage figures based on 9 months' statistics for conference lines and 11 months for nonconference lines.
[3] Estimated for full year, based on statistics mentioned in footnote 2.

Additional data introduced in this hearing indicates the following distribution of conference and nonconference sailings and commercial carryings in liner services for 1953:

TABLE II

	Sailings	Commercial cargo	Percent cargo to total	Percent sailings to total
Conference	485	1,318,947	64.5	72
Nonconference	190	726,006	35.5	28
Total	675	2,044,953	100.0	100

The foregoing tables [8] point to an unmistakable increase in nonconference sailings and carryings in this trade. The combined sailings of nonconference lines have increased from 70 in 1948 to 190 in 1953, an increase of 170 percent. During the same period, nonconference commercial-liner cargo carryings have increased by 145 percent. On the other hand, conference-liner carryings have increased 4.6 percent during the period 1948 through 1953 while conference sailings for the same period decreased 12 percent.

Freight rates quoted by all of the nonconference lines are lower than the uniform rates of the conference members. There is no fixed amount by which the conference rates are underquoted. Rates of independents generally have been 10 percent or more below conference rates. The rates of Isbrandtsen in particular, while lower than conference rates, are aimed at realizing a profit. Other of the independents in the trade charge rates which are lower than those of Isbrandtsen.

The conference employed a dual-rate system prior to World War II, using a spread of 20 percent between contract and noncontract rates. The system, as then employed, covered between 100 and 200 of the

[8] Tables I and II include bulk-type cargoes and exclude military and military-controlled cargoes.

2,700 or 2,800 items of the then-current tariff, those items presumably being the most highly competitive items moving in the trade. In the years during which the system was in effect, conference members had nonconference competition. As indicated in our report in Docket No. 724, prewar nonconference operators carried commodities covered by the conference dual-rate system.

When private operations of the conference ceased during World War II, existing dual-rate contracts became inoperative. Full private operation of the conference recommended in 1948, and in that year the conference endeavored to reinstitute a dual-rate system. The subsequent history of the conference's efforts in this regard is traced earlier in this report.

The proposed dual-rate contract differs from those in use by the conference prior to World War II, but doesn't differ in any material way from the contract approved by the conference in 1952 and submitted to the Board in Docket No. 724. Of the 1,500 or 1,600 commodities presently moving in the trade, the contract covers all except the following items, as specified in Article 6:

(a) Bulk Cargoes (Not Package Goods)—Coal; Coke; Grain; Oils, Petroleum and Liquid Petroleum; Salt Cake
(b) Effects or Goods, Household or Personal, packed, including lift vans
(c) Explosives
(d) Hay
(e) Livestock; Animals, etc.
(f) Specie, Gold, Silver and Bullion.
This contract does not apply to Human Ashes or Corpses.

Article 1 of the contract provides that the merchant shall ship all nonexcepted commodities by vessels of the conference carriers, "with equitable division of shipments among them." The conference does not view Article 1, however, as imposing any obligation on the shipper to divide his cargo proportionately among conference lines. The language hereinabove quoted was inserted in the hope that shippers would so divide their cargo. As a practical matter, the conference is unaware of any shipper who uses the services of one conference line exclusively. An additional provision in Article 1, whereby the carriers agree to maintain adequate shipping services, was viewed by the conference as enforceable by signatory shippers.

Article 3 provides as follows:

3. The Merchant agrees not to make any shipment hereunder for the benefit of any other Merchant or interest not a party to this contract or a contract substantially in this form with the undersigned Carriers; and agrees also not to ship any commodities covered by this contract by a carrier not a party to this contract, except as hereinafter provided.

Neither Article 3 nor any other article provides for liquidated damages in the event of carrier or shipper breach.

Objection to Article 3 was voiced by a shipper as legally invalid, if literally construed, as it would tend to bind an exporter or an importer to have goods carried by members of the conference even when the exporter or importer would have no legal right to select the carrier. The conference chairman indicated that a consignee, signatory to a contract, would be bound by his contract on any shipment when the consignee left the designation of the vessel to the consignor. He did not clearly indicate the effect of a consignee contract where a nonsigning consignor, with knowledge of the consignee's contract, should insist on routing a c. i. f. or c. and f. shipment via nonconference carrier. The chairman did indicate the conference's willingness to extend a dual-rate contract to the merchant who controls the routing of shipments, whether f. o. b. or c. i. f. Most of the cargo in this trade moves on a c. i. f. basis.

Article 4 permits the merchant to ship via nonconference vessel if, after 3 days following application to the conference office for space, none of the conference carriers are able to provide space on a vessel scheduled to sail within 15 days of the desired time.

Article 7 provides that:

> All shipments contemplated, tendered or made under this contract shall be governed by the provisions of the tariffs, permits, dock receipts, bills of lading and other shipping documents regularly in use by the Carriers. Receipt and carriage of dangerous, hazardous or obnoxious commodities shall be subject to the facilities and requirements of the individual Carriers, also to local laws and regulations.

Under Article 8, the contract would be in effect for an initial 9 months' period, and for successive 6 months' periods in the absence of a notice of termination given by either party 60 days prior to the termination of the initial or succeeding periods. Article 8 further provides that rates shall not be increased during the initial or any succeeding period of the contract. Rate increases may only be made on notice of 75 days prior to the end of any contract period, to become effective during the subsequent period.

Under the present single-rate system, shippers notifying the conference, or members thereof, of contemplated shipments are protected in the rate quoted by the conference during the current month and two next succeeding months. In addition, most of the lines in the trade, conference and nonconference, are accustomed to giving 60 days' advance notice of rate increases. Isbrandtsen gives 30-day assurance against rate increases. While no notice of rate decreases is now given by the conference or would be given under the contract, a shipper who

has received space at a higher rate receives the benefit of any rate reduction in existence at the time of actual shipment.

Rates of conference carriers in this trade have been stable, that is, free from appreciable fluctuation, since World War II. Rates of the independent carriers have been more or less stable during the same period except for an occasion in 1950 when Isbrandtsen's rates were increased on eight days' notice. During the postwar period the conference lines have provided frequent, regular, and dependable sailings.

The conference general rate level is lower today than it was in 1952. The average rate on general cargo is about $25. In October 1952 the conference, having previously announced the initiation of a dual-rate system, and having deferred initiation of the system at our request, announced a 10-percent rate reduction or discount from tariff rates, available to all shippers of general cargo. The discount rate is still in effect. If the conference is permitted to initiate a dual-rate system the discount rate will be the contract rate and will be 10 percent lower than the noncontract rate.

There are three methods by which the conference may meet independent competition. First, it may attempt, by uniform rate reduction, to meet the independent's rate; this method is not likely to succeed in view of the independent's ability to reduce his rates further, and has, in fact, met with unsatisfactory results. The conference has not specifically attempted to meet Isbrandtsen's rate since Isbrandtsen is not its sole or major competitor. Second, the conference could declare rates to be open and thereby precipitate a rate war, although a rate war would injure all carriers in the trade. At times various lines have urged the conference to meet the rate-cutting practices of the independents but the conference has refrained from thus engaging in a rate war until permission to institute a dual-rate system has been granted or denied. Third, the conference may initiate a dual-rate system. In attempting to institute such a system here the prime purpose is to meet nonconference competition. Dual-rate systems are considered by the conference to be the cornerstone of the conference system. It was also stated by a conference witness that the dual-rate system will aid in stabilizing rates, assure regular, dependable, and frequent sailings, provide reasonable guaranteed rates, and enable member lines to plan for the future.

Witnesses for the American Farm Bureau Federation and for the National Grange, as well as Agriculture witnesses, expressed opposition to dual-rate systems generally and to the dual-rate system proposed for use in this particular trade. It was stated by those witnesses that differences in rates charged to contract signers and nonsigners

might make cargoes of the nonsigners noncompetitive with those moving at lower rates. There is no indication, however, that the lower rates charged by nonconference lines in the past have imposed prohibitive competitive burdens on similar cargoes moving at the higher conference rates. The witnesses further stated that a dual-rate system would tend to eliminate nonconference competition, enabling the conference lines to charge excessively high freight rates. The witnesses indicated that producers of agricultural products are primarily interested in low freight rates, and to this end favored free competition in shipping in foreign commerce. They recognized, however, that in free and open competition Isbrandtsen and other American carriers might be driven from the trade since costs of operating American vessels greatly exceed operational costs of foreign-flag vessels. Further, the desire expressed by the witnesses for frequent sailings in high-quality vessels is somewhat inconsistent with the desire for completely unregulated competition, since elimination of carriers through rate wars will reduce service and since vessel improvement and replacement is difficult of achievement under rate-war conditions.

Cargo carried by members of the conference is competitive with cargo carried in the Canadian North Atlantic Eastbound Freight Conference, the South Atlantic Steamship Conference, the Gulf/French Atlantic Hamburg Range Freight Conference, and with cargo moving to the same ultimate destinations through Mediterranean gateways.

Conference witnesses estimated, based on long experience, that the conference might, under the dual-rate system, expect to get 75 percent or less of the general cargo moving in the trade. A witness for Isbrandtsen estimated that the conference, under a dual-rate system, would tie up 90 percent of the general cargo. About 2,400 of the less than 5,000 shippers in the trade have signed dual-rate contracts in anticipation of the system going into effect. Both importers and exporters are numbered among the present signers. Many shippers will elect not to sign. There were, prior to World War II, big shippers who declined to sign a dual-rate contract.

The conference considers that the assurance of patronage of the contract signers and the additional cargoes which it will carry will permit the conference economically to allow a 10-percent discount. The conference presented no facts and figures, however, as to the amount of revenue which might be realized from the anticipated increased amount of general cargo. Isbrandtsen's witness declined to give his opinion on whether a saving would be effected by the conference lines even assuming carriage, by conference lines, of 90 percent of the general cargo in the trade. The question can be answered only

by weighing the increased volume of general cargo that probably would be obtained against the reduction in rates to contract signers. The record does not indicate the 1953 proportion between general cargo and bulk cargo carried by nonconference liners. The record does show, however, that Isbrandtsen presently carries a greater amount of general cargo than bulk and military-controlled cargo. Nonconference lines for the aggregate years 1948 through 1952 carried substantially more general than bulk cargo,[9] and only in 1951 did the independent lines carry more bulk than general cargo. On the other hand, during the same aggregate period conference lines carried substantially more bulk cargo than general cargo.[9] Only in 1948, the first year of record, did general cargo carryings of the conference lines exceed their bulk carryings. For the entire period independent lines carried approximately 32 percent of the total general cargo moving while maintaining less than 18 percent of the total sailings. General cargo carried by nonconference lines amounted to more than 49 percent of the total cargo, including military tonnage carried by them. In contrast, general cargo obtained by conference lines amounted to 36 percent of the total cargo, including military tonnage, carried by those lines. Bulk cargo carried by all lines in the trade slightly exceeded general cargo carryings by all liners.

There is no difference in cost of service as between signing and nonsigning shippers of like cargo, identically destined, but insofar as the system increases conference average carryings, unit costs of carriage of all cargo, whether or not carried under contract, will be reduced.

While there is no dual-rate system in domestic transportation, entry into that field is regulated, as are transportation rates. In contrast, any carrier may enter the field of ocean transportation in foreign commerce and enjoy freedom from minimum or maximum rate regulation.

DISCUSSION AND ULTIMATE FINDINGS

Since, in Docket No. 724, we found that the 10-percent differential between contract and noncontract rates in the dual-rate system proposed by the conference is not arbitrary or unreasonable, unjustly discriminatory, or in violation of the Act, we consider that those questions are removed from these proceedings. The issues remaining for our consideration in Docket No. 751 are: (1) whether the initiation of a dual-rate system is necessary or required as a competitive measure to insure stability of rates and service to shippers; (2) if necessary, whether the use of contract and noncontract rates or the use of the dual-rate contract here proposed would be unjustly discriminatory or

[9] Exclusive of military-controlled cargo.

unfair as between carriers, shippers, exporters, or ports, or between exporters from the United States and their foreign competitors, or would operate to the detriment of the commerce of the United States, or would be in violation of the Act. The issues raised in Docket No. 725, including the question of the legality *per se* of the dual-rate system in this trade and otherwise, parallel the issues remaining for our consideration in Docket No. 751.

In the recent case of *Contract Rates—Japan/Atlantic-Gulf Freight Conf.*, 4 F. M. B. 706, we determined that under section 15 of the Act we may approve the initiation of a dual-rate system in any trade if, under the facts adduced, the system as sought to be employed would not be unjustly discriminatory or unfair, detrimental to the commerce of the United States, or in violation of the Act. We consider our discussion in that report on the legality of dual-rate systems *per se* to be a full and sufficient answer to the arguments advanced here in support of the proposition that the Board may never, under section 15, approve such a system.

We consider the initiation of a dual-rate system to be necessary as a competitive measure to offset the effect of nonconference competition in this trade. The percentage of participation of nonconference lines in the total commercial liner movement has in each year exceeded the percentage of nonconference sailings to total sailings. Nonconference participation in the total commercial movement has increased from 24 percent in 1948 to 35.5 percent in 1953, the year of highest nonconference percentage participation except for 1950, when nonconference lines carried 43 percent of the cargo on 20 percent of the sailings. Conference carriage of general cargo has decreased from approximately 841,000 tons in 1948 to approximately 539,000 tons in 1952, while nonconference lines show an increase in volume of general cargo in 1952 as compared with 1948. While general cargo in 1948 represented 56 percent of the total conference carryings, such cargo represented only 24 percent of the conference total in 1953. Since general cargo is more remunerative than bulk-type cargo, it is clear that the competition of nonconference lines is felt even more keenly than the 11½-percent decrease in total carryings from 1948 to 1953 would appear to indicate. Without a dual-rate system, the conference may suffer the loss of still more general cargo to nonconference lines.

Although rates in this trade have been stable from 1948 to 1953, they have remained so only because the conference as a whole did not yield to the urging of some of its members to meet or better the rates of the nonconference lines. Such a measure, as indicated by past experience in this and other trades, would have been countered by

further rate reductions by nonconference lines, and inevitably would have culminated in a rate war whether the rates of conference lines were uniformly reduced or individually reduced under open rates. The competitive pressure on the conference lines has increased during the years of record despite the surface stability of rates. Where faced with formidable nonconference rate-cutting competition, and without a dual-rate system, as in this trade, it is impossible for conference lines to maintain stability of rates and at the same time a proportionate share of the desirable cargo. In such circumstances, a volume of cargo must be sacrificed for stability of rates or stability sacrificed for volume. Disastrous rate wars or initiation of a dual-rate system will reduce, for the period of the contract, the economic pressure on the conference lines to reduce rates on general cargo by creating a basic core of cargo on which the conference may rely. The guarantee of rates for a 6 months' period will facilitate forward trading by shippers and minimize the threat of rate wars, with their disastrous effects on carriers and on shippers.

The use of dual rates in this trade will not be unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Although the use of such rates is *prima facie* discriminatory, the discrimination will not be unjust since the shippers will retain complete freedom of choice between signing and not signing. No shippers will be preferred since all have equal opportunity to avail themselves of contract rates. There will be no coercion on shippers to sign since collectively the nonconference carriers provide complete port coverage and frequent and regular service. The difference between contract and noncontract rates will place no greater handicap or economic burden on cargoes moving at noncontract rates than the handicap on cargoes moving on conference vessels as compared with those moving on nonconference lines at rates lower by 10 percent or more than conference rates. Further, there is no indication that, collectively, nonconference vessels do not offer the same types of facilities as those offered to the public by vessels of the conference lines.

The use of the contract and noncontract rates here proposed will not be unfair as between carriers. Membership in the conference is and always has been open to independent common carriers regularly operating, or furnishing evidence of intention to operate regularly, in the trade. The principal reason for remaining outside of the conference appears to be the rate advantage which can be maintained by the independents over the conference lines. The independent carrier retains complete freedom to maintain its rate advantage or to enjoy,

as a conference member, the benefits of dual-rate contracts. But even if the independent carriers desire to remain outside of the conference there is no indication that initiation of a dual-rate system will eliminate any independent carriers from the trade. First, as found herein, there is in this trade a large volume of bulk-type commodities which will not be subject to the dual-rate system; second, the independent carriers, because of their comprehensive coverage and service in the trade, will remain able to compete for cargoes with conference carriers; and, third, it is probable that, under dual rates, conference vessels will carry no more than 75 percent of the total liner cargo. This probability is strengthened by our requirements with respect to the treatment of f. o. b. and f. a. s. shipments, as hereinafter discussed.

The use of contract and noncontract rates as proposed will not result in detriment to the commerce of the United States. The rates of the conference carriers will remain stable for at least successive 6 months' periods, and will enable nonconference carriers to stabilize rates at customary lower levels if such stability is considered by them to be desirable. Although, as hereinabove found, it is probable that the total nonconference carryings will be decreased, we do not share the views of those witnesses who fear that an increase in amounts of cargo carried on conference vessels will bring about a general increase in rates charged to shippers. We find such a result highly improbable in view of (1) the effectiveness of nonconference competition, (2) the effectiveness of the competition of other carriers and other conferences serving the ports of discharge in this trade from ports of loading not served by this conference, (3) the effectiveness of carrier competition at other gateways to areas served by this conference, and (4) the power of the Board over conference rates which are found by us to be detrimental to the commerce of the United States.

Since the form of the agreement between the conference carriers and particular shippers substantially affects the manner in which the proposed dual-rate system would be used, we have carefully examined the proposed contract and find the following provisions to be ambiguous or objectionable for other reasons, as hereinafter indicated.

Article 1 binds the merchant to move all of his shipments by vessels of the conference carriers. Article 3, in addition, prohibits shipments made for the benefit of a merchant not a party to the contract. Article 1, when construed with article 3, under a conceivable construction might require a signatory exporter to refuse to sell his products to an f. o. b. or f. a. s. buyer if the buyer should insist on routing shipments via nonconference carrier. The testimony of the chairman on this matter was not clear. Accordingly, the contract provision should

be clarified to avoid ambiguity. In place of those articles, we will require a provision which limits the restriction of the contract to ship exclusively via conference vessels to those circumstances wherein the contract signatory is in fact the shipper and which states, in the absence of fraud, that the person indicated as shipper in the ocean bill of lading shall be deemed the shipper. As we stated in the *Japan/Atlantic* decision, *supra*, p. 740:

> In the situation where the contract signer appears as shipper in the bill of lading, it is no mere matter of form to say he is the shipper in fact. In c. and f. or c. i. f. sales the problem does not arise because there the contract signer is in fact the shipper, but in f. o. b. or f. a. s. sales we deem it undesirable to have the answer to this problem turn on the complicated questions of law as to risk of loss or when title passes in determining when a given shipment is or is not covered by the shipper's agreement. We deem it highly desirable that simple tests and standards be applicable.

The amended provision must not prevent shipments by an exporter as agent for the buyer, at the buyer's request and expense, where the exporter merely renders aid in obtaining the documents required for purposes of exportation.

In Article 7, all shipments under the contract are governed by the provisions of the tariffs, permits, dock receipts, bills of lading, or other shipping documents in use by the carriers. Such shipping-document provisions may not be controlling over provisions of the shipper contract in any case where they may (a) operate directly or indirectly to change the amount of spread between contract and non-contract rates, (b) impose on contract shippers additional requirements not imposed on all shippers, or (c) otherwise be inconsistent with the provisions of the shipper contract.

In *Swayne & Hoyt* v. *United States*, 300 U. S. 297 (1937), the Supreme Court upheld an order of the Secretary of Commerce cancelling proposed schedules of rates which were conditioned upon the execution of a dual-rate contract. In so doing, however, the Supreme Court stated at page 304:

> In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter. This was clearly recognized in the report upon which the present order is based. It states that the danger of cut-throat competition was lessened by § 3 of the Intercoastal Shipping Act of 1933, and that the contract system tends to create a monopoly. In view of the assurance of reasonable rate stability afforded by the Act of 1933, the Secretary concluded that this was the real purpose of the contract rate.

Applying the test of the *Swayne & Hoyt* case, and balancing the foreseeable advantages against the foreseeable disadvantages, we find the latter outweighed by the former. While the increased carriage of cargo by conference lines might under other circumstances tend toward monopoly, we find no such likelihood here in view of the number of active independent competitors in the trade, the large volume of free cargo for which both independents and conference lines will compete, and the existing direct and indirect rate competition to the conference lines on cargoes originating in areas other than those served by conference vessels. These factors will act as a strong and effective deterrent against the imposition of exorbitant freight rates and against arbitrary conference action. On the other hand, the existence of the contracts with shippers guaranteeing levels of rates for the period of the contract or extension thereof will decrease the pressure on conference lines to wage a rate-reduction battle with non-conference lines. The genuine stability of rates which will ensue from the guarantee of rates and the assurance to conference lines of a basic core of cargo on which to rely will enable conference lines to put improved service on berth and more efficiently to plan sailings and service.

The conference has not considered its filing under General Order 76 to be a filing for approval under section 15 of the Act, arguing that the earlier approval of the basic agreement with its provision for dual rates makes any further approval unnecessary. The conference overlooks the facts, however, that it does not presently employ the dual-rate system and that its present filing is an application to institute or at least to reinstitute a dual-rate system. To this extent, we are unable to distinguish these circumstances from those before the court in *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D. C. Cir. 1954), where an agreement to institute dual rates was held to be an agreement or modification of an agreement between carriers which required approval under section 15. We will deem the conference's General Order 76 statement to have been filed for our approval under section 15, however, since the entire proceeding in Docket Nos. 725 and 751 has been conducted on this basis.

We incorporate herein the determinations made by us in Docket No. 724 wherein, as hereinbefore stated, the proposed differential was found to be not arbitrary, unreasonable, unjustly discriminatory, nor in violation of the Act.

The application of the conference to institute or reinstitute a dual-rate system in the trade from United States North Atlantic ports to ports in Belgium, Holland, and Germany is approved since we have

found the system will not be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, will not operate to the detriment of the commerce of the United States, and will not be in violation of the Act. Our approval is contingent, however, upon amendment of the proposed shipper's contract in conformity with our opinion herein.

Approval will be effective April 2, 1956.

Since the proposed dual-rate system has been found to be not unlawful, the complaint of Agriculture will be dismissed.

An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its offices in Washington, D. C., on the 29th day of February A. D. 1956

No. 725

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE ET AL.

No. 751

IN THE MATTER OF THE STATEMENT OF THE MEMBER LINES OF THE NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE FILED UNDER GENERAL ORDER 76

The case docketed as No. 725 being at issue upon complaints and answers on file, and the case docketed as No. 751 having been instituted by the Board on its own motion, and the cases having been consolidated for hearing and duly heard, and full investigation of the matters and things involved having been had, and the Board on the date hereof having made and entered a report stating its decision and conclusions thereon, which report is hereby referred to and made a part hereof; and the Board having therein incorporated its report in Docket No. 724, *Contract Rates—North Atlantic Cont'l Frt. Conf.*, 4 F. M. B. 355, which report is hereby referred to and made a part hereof insofar as it is not inconsistent with the report of the Board entered on the date hereof:

It is ordered, That the agreement evidenced by the aforesaid statement filed by the North Atlantic Continental Freight Conference be, and it is hereby, approved under the provisions of section 15 of the Shipping Act, 1916, as amended, excepting that (a) the exclusive-patronage contract/noncontract rate system contemplated therein shall not apply to shipments which are made on an f. o. b. or f. a. s. basis unless the person, whether seller or buyer, named in good faith

as shipper in the ocean bill of lading, is a contract signatory; and (b) that the aforesaid agreement may not be altered by incorporation of provisions of tariffs, bills of lading, or other shipping documents which may operate directly or indirectly to change the amount of spread between contract and noncontract rates, or which may be otherwise inconsistent with the terms of the aforesaid agreement; and

It is further ordered, That the approval hereby granted shall be effective April 2, 1956, at 12:00 noon, eastern standard time; and

It is further ordered, That the complaint of the Department of Agriculture in the case docketed as No. 725 be, and it is hereby, dismissed; and

It is further ordered, That the case docketed as No. 751 be, and it is hereby, discontinued.

By the Board.

(Sgd.) GEO. A. VIEHMANN,
Assistant Secretary.

FEDERAL MARITIME BOARD

No. 792

AGREEMENT AND PRACTICES PERTAINING TO LIMITATION ON MEMBERSHIP—PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT 5200)

Decided May 14, 1956

REPORT OF THE BOARD ON DEMAND FOR BILL OF PARTICULARS

BY THE BOARD:

By order of April 5, 1956, we directed the members of Pacific Coast European Conference [1] ("the conference") to show cause, at a hearing before an examiner, why we should not (1) find that the effectuation without our approval of an agreement to condition admission of Mitsui Steamship Company, Ltd. ("Mitsui"), on Mitsui's withdrawal from pending litigation, in which its position is opposed to that of the conference, is in violation of section 15 of the Shipping Act, 1916 ("the Act"), (2) find that the agreement should be disapproved as unjustly discriminatory and unfair as between carriers or detrimental to the commerce of the United States, and (3) order the condition to be cancelled by the conference.

The order recited the circumstances in the matter, insofar as they had been revealed to the Board, in the following manner:

1. On November 30, 1955,[2] Mitsui filed an application for membership in the conference.

2. On December 16, 1955, the conference notified Mitsui that the member lines had agreed to admit Mitsui to membership effective February 1, 1956, upon receipt of information satisfactory to the conference that Mitsui had withdrawn from pending litigation in which its position was opposed to that of the conference.

3. On December 21, 1955, Mitsui notified us of the condition to conference membership and stated that "it withdraws" from the pending litigation.

[1] Membership of the conference identified in the Appendix.

[2] By inadvertence our order of April 5, 1956, recited November 20 rather than November 30 as the date of Mitsui's application.

4. On December 28, 1955, our Regulation Office advised Mitsui and the conference that it considered the agreements to set a condition on Mitsui's membership and Mitsui's acceptance thereof to be new agreements or modifications of agreements between carriers requiring approval under section 15 of the Act prior to effectuation.

5. On January 7, 1956, the conference advised the Regulation Office that it was unable to concur in the view expressed by the Regulation Office.

6. On March 5, 1956, under our direction, the conference was advised by letter that the condition on admission to conference membership may not be a "just and reasonable cause" within the meaning of section 10 of the basic conference agreement,[3] that it may be unjustly discriminatory or unfair as between carriers, and that it may operate to the detriment of the commerce of the United States. The conference was notified that a show cause order would be issued unless the condition should be withdrawn within twenty days of receipt of the letter.

7. On March 23, 1956, the conference advised us that its action, in its view, was proper in all respects.

On April 9, 1956, the conference advised us that it had suspended the condition imposed on the admission of Mitsui pending determination of whether the condition constitutes an unapproved section 15 agreement.

Our order to show cause was served on the conference by registered air mail on April 13, 1956. The conference responded, on April 27, 1956, by filing the document here under consideration, a demand for a bill of particulars "defining with certainty, in accordance with the law, the particular matters of law and fact alleged against * * *" the conference in that "* * * respondents are unable to frame a responsive answer because of the vagueness, generality and uncertainty of the terms of the order * * *." The conference relied on the provisions of section 5 (a) (3) of the Administrative Procedure Act (APA). Section 5 (a) provides:

> *Notice.*—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties,

[3] Section 10 of F. M. B. Agreement No. 5200, approved on May 26, 1937, provides:

"*Membership.*—Any person, firm or corporation regularly operating, or giving substantial and reliable evidence of intention to operate regularly, as a common carrier by water in the trade covered by this agreement may become a member of the Conference upon the agreement of three-fourths of the members entitled to vote and by affixing his, their or its signature thereto, or to a counterpart thereof. No eligible applicant shall be denied membership except for just and reasonable cause and no membership shall become effective until notice thereof has been sent to the governmental agency charged with the administration of section 15 of the U. S. Shipping Act, 1916, as amended."

other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

Although the conference has not expressly so stated, we assume that reliance is also placed in Rule 5 (m) of our Rules of Practice and Procedure, which provides:

Bill of particulars.—Within ten (10) days after date of service of the complaint, respondent may file with the Board for service upon complainant a request for a bill of particulars. Within ten (10) days after date of service of such request, complainant shall file with the Board and serve upon respondent either (1) the bill of particulars requested or (2) a reply to such request, made in conformity with the requirements of rule 5 (p), setting forth the particular matters contained in the request which are objected to and the reasons for the objections. The time for filing 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 the Board's disallowance of the request therefor. The time limits prescribed above are subject to rule 7 (d). For good cause shown, request for a bill of particulars also may be filed after answer is made and within a reasonable time prior to hearing.

Section 5 (a) of the APA requires us to give sufficient notice of the issues with which a party is to be confronted as well as to grant sufficient time to consider the issues and to prepare a defense. The purpose of section 5 (a) has been ably described by Tom C. Clark, Attorney General of the United States at the time of passage of the APA, in a letter to the Chairman, Senate Judiciary Committee, in the following manner:[4]

Section 5 (a) is intended to state minimum requirements for the giving of notice to persons who under existing law are entitled to notice of an agency hearing in a statutory adjudication. While in most types of proceedings all of the information required to be given in clauses (1), (2), and (3) may be included in the "notice of hearing" or other moving paper, in many instances *the agency or other moving party may not be in position to set forth all of such information in the moving paper, or perhaps not even in advance of the hearing, especially the "matters of fact and law asserted."* * * * [Emphasis supplied.]

The minimum requirements stated in section 5 (a) do not necessarily contemplate issuance of bills of particulars on demand of a respondent to an agency pleading. The APA is an attempt to bring into practice those principles of due process that have been enforced in the courts.[5] The granting of bills of particulars, however, has been

[4] Senate Report No. 752, 79th Cong., 1st Sess., Appendix B with appendix.

[5] See statement of Congressman Gwynne of Iowa in the House of Representatives on May 24, 1946, 92 Cong. Rec. 5656.

held by the courts to be discretionary in both judicial [6] and quasi-judicial proceedings.[7]

Pleadings instituting agency actions do not require the particularity of an indictment or an information. All that is requisite in a valid agency proceeding is that there be a statement of the things claimed to constitute the offense charged in order that respondent may put on his defense.[8] That this requisite does not contemplate the specificity of a bill of particulars is clear from the analysis of the Attorney General, *supra*, when he states that the agency may not always be in position to particularly allege the matters of fact and law involved.[9]

Since the standards of section 5 (a) of the APA are minimum standards, and in the absence of a command in the APA, the method of protecting a respondent in an agency proceeding from surprise as a result of ambiguous agency pleading is in the sound discretion of the agency. While, in the exercise of our discretion, we have authorized the filing of requests for bills of particulars in proceedings commenced by *complaint*, we have not authorized such requests in Board-initiated proceedings.[10]

The absence of a rule for a bill of particulars does not, of course, permit this agency, by ambiguous pleading, to limit a respondent's opportunity to frame a reply or to prepare his case. In such a case, respondent may resolve his uncertainties as to matters alleged by informal request, in prehearing conference,[11] by motion to terminate the proceeding,[12] or by other motion. A right of this nature is clearly distinguishable from the right to a bill of particulars. The right extends only to clarification of ambiguity or vagueness as to material

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[6] *Muench* v. *United States*, 96 F. 2d 332 (8th Cir. 1938); *McKenna* v. *United States Lines*, 26 F. Supp. 558 (S. D. N. Y. 1939).

[7] *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862 (2d Cir. 1938).

[8] *National Labor Relations Board* v. *Piqua Munising W. Prod. Co.*, 109 F. 2d 552 (6th Cir. 1940). See also Administrative Law, Davis, 1951, section 80, pp. 278, 279:

"The most important characteristic of pleadings in the administrative process is their unimportance. And experience shows that unimportance of pleadings is a virtue. In the judicial system the long-term movement has been from the common-law system of pleading to formulate issues, to the early code ideal of stating all material facts, to the view now prevailing in the federal courts that fair notice is the objective. 'The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved.'" (Footnotes omitted in quote.)

[9] See footnote 4.

[10] "Complaints" are distinguished from other methods of initiating proceedings in Rule 5 (a) of our Rules of Practice and Procedure.

[11] Rule 6 (d) of our Rules of Practice and Procedure provides for consideration of simplification of issues and the necessity or desirability of amendment to the pleadings, among other matters.

[12] Rule 5 (o), Rules of Practice and Procedure.

issues and does not, as does a bill of paticulars,[13] extend to amplification of ultimate facts in pleadings.

While Rule 12 (c) of the Federal Rules of Civil Procedure formerly contained a provision authorizing motions for bills of particulars, by amendment effective March 19, 1948, the provision was eliminated. The present Rule 12 (c) provides only for a motion for more definite statement. The distinction between the two provisions, under the rules, was this: a bill of particulars serves the function of enabling a party to prepare for trial as well as to prepare responsive pleadings; a motion for more definite statement serves only the latter function.[14] It has been said that the presence of the former and eliminated provision "sometimes placed a premium upon strategic maneuvering of counsel rather than upon the merits of the issues involved." [15]

Strategic maneuvering is even more unseemly in agency proceedings, which involve investigative as well as judicial functions.[16] The duty to investigate violations of regulatory statutes and other matters affected with a public interest makes it imperative that agency-instituted actions be not hampered by overly refined pleading techniques or mired in pleading contests. Section 5 (a) of the APA does not require notice provisions of this nature.

Even if we were to assume the conference's demand to be in nature as well as in name [17] a demand for bill of particulars, and even assuming that our rules, issued under section 5 (a) of the APA, provided for such relief, we think it clear beyond question that this is not a proper case for the relief requested. The movant has a burden of showing that it is entitled to a bill of particulars and that the demand is made in good faith and not for the purpose of delay.[18] The burden has not been met here in any of these respects. Our order to show cause is in all respects clear and unambiguous and requires no clarification of any kind.

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[13] *Jessup & Moore Paper Co.* v. *West Virginia Pulp & P. Co.*, 25 F. Supp. 598 (D. Del. 1938); *Massachusetts Bonding & Ins. Co.* v. *Harrisburg T. Co.*, 27 F. Supp. 987 (M. D. Pa. 1939).

[14] *Citrin* v. *Greater New York Industries*, 79 F. Supp. 692, 696 (S. D. N. Y. 1948): "The definitiveness required of allegations [in motions for more definite statement] is only such as will be sufficient to enable defendant to prepare his answer."; Moore's Federal Practice, 12.17 [1] p. 2281; 16 Cal. State Bar Journal 156.

[15] Moore's Federal Practice, 12.17 [1] p. 2280.

[16] *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134 (1940); *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951).

[17] Since the conference has pleaded inability "to frame a responsive answer," its request would, under the Federal Rules prior to amendment, have constituted a motion for more definite statement rather than a motion for bill of particulars.

[18] *Brinley* v. *Lewis*, 27 F. Supp. 813 (M. D. Pa. 1939). The same standards apply to any request for clarification or similar remedy available before this agency.

Examination of the demand and the order in question leads us to the inescapable conclusion that most of the particulars demanded relate to matters wholly and peculiarly within the knowledge of the conference, its members, officials, or employees. The conference has indicated no uncertainty over the issue; it has merely indicated a desire that the agency confirm details of the subject matter which are well known to the conference. The information, if received, would serve no useful purpose to the conference; the conference is presently well able to frame a reply to our order and is well apprised of the issues which it must defend. Such matters as the specific terms of the agreement (paragraph 1 of the demand), the names of the carriers parties to the agreement (paragraph 2), the dates of effectuation of the agreement (paragraph 3), the status of Mitsui's attempt to withdraw from pending litigation [19] (paragraph 4), and the name of the carrier injured (paragraph 16) by discrimination (paragraph 11) or unfair treatment (paragraph 13) are all matters fully within the knowledge of the conference and are, as well, matters clearly set forth, where material, in our order to show cause.

Matters referred to in paragraphs 6, 8, 10, 11, 12, 13, 14, and 15 are unmistakably put in issue by our order. Paragraph 5 requests substantially the same information requested in paragraph 6. The order plainly indicates that the condition to conference membership may be beyond the scope of the conference agreement, and as plainly indicates that the condition may be in violation of section 15 of the Act for that reason. It is equally clear that the portion of the commerce of the United States which may suffer detriment is that served by the conference, and that the unfairness and discrimination between carriers as well as the detriment to the United States results from the imposition of the condtion to conference membership. While these matters are set out expressly or by necessary implication in our order, we do not consider that full amplification thereof is necessary to proper notice.

Paragraph 9 requests a statement as to whether the word "or" in the phrase "unjustly discriminatory and unfair as between carriers or detrimental to the commerce of the United States" is conjunctive or disjunctive. In view of correspondence between the parties previously set out in the order in which we stated, and the conference denied, both possibilities, the request serves no apparent purpose.

Paragraph 7 is incomprehensible. Most astonishing, however, is the conference's demand for specification of the particular portion or

[19] We replied to Mitsui's letter stating that it withdrew from the aforementioned litigation by advising Mitsui that its attempt to withdraw was not in compliance with our Rules. Copy of our reply was furnished the conference.

portions of section 15 of the Act alleged to be violated. The conference is lawfully organized and existing solely by virtue of section 15 and Board approval, under that section, of the basic conference agreement. It is only reasonable to assume that the conference knew, since it is charged with such knowledge, that section 15 may only be violated by effectuation of an unapproved or disapproved agreement between carriers.[20] We cannot believe that the conference is truly in doubt in this respect.

We conclude that the demand for a bill of particulars is not authorized, is not justified even if authorized, and has done nothing more than delay compliance with the Board's order served on April 13, 1956.[21] The delay is particularly unseemly here. While conference suspension of the condition has tolled the civil penalties of $1,000 per day per carrier, which may be collected by the United States in a civil action should this agreement be found to be unapproved under section 15 of the Act, the uncertainty over the status of Mitsui as a conference member and over the legality of the condition needs quickly to be resolved in the interests of shippers in this trade and the trade itself.

The demand is denied. We will require the conference to file with us its reply to the show-cause order before 5:00 p. m. e. d. s. t., May 24, 1956.

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[20] Section 15, Shipping Act, 1916; *City of Portland* v. *Pacific Westbound Conference*, 4 F. M. B. 664.

[21] By motion dated April 25, 1956, counsel for the conference requested postponement of oral argument in Docket Nos. 764 and 773 until the termination of this proceeding. By this demand for a bill of particulars, the conference would delay this proceeding as well.

APPENDIX

REGULAR MEMBERS, PACIFIC COAST EUROPEAN CONFERENCE

Anglo Canadian Shipping Co., Ltd.
Blue Star Line, Ltd.
Canadian Transport Co., Ltd.
Compagnie Generale Transatlantique (French Line).
The East Asiatic Company, Ltd. (A/S Det Østasiatiske Kompagni).
Fruit Express Line A/S.
Furness, Withy & Co., Ltd. (Furness Line).
Hamburg-Amerika Linie (Hamburg American Line).
"Italia" Societa Per Azioni di Navigazione (Italian Line).
Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth, Skibsaktieselskapet Ogeka (Knutsen Line—Joint Service).
Nippon Yusen Kaisha.
Norddeutscher Lloyd (North German Lloyd).
N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij (Holland-America Line).
Osaka Shosen Kaisha, Ltd.
Fred Olsen & Co. (Fred Olsen Line).
Rederiaktiebolaget Nordstjernan (Johnson Line).
Royal Mail Line, Ltd.
Seaboard Shipping Company, Ltd.
States Marine Corporation, States Marine Corporation of Delaware (States Marine Lines—Joint Service).
Westfal-Larsen & Company A/S (Interocean Line).
Western Canada Steamship Company, Limited.
Hanseatische Reederei Emil Offen & Co./Vaasan Laiva Oy (Hanseatic-Vaasa-Line).
Willy Bruns G. m. b. H. Reederei (German Fruit Line).
Mitsui Steamship Co., Ltd.

ASSOCIATE MEMBER, PACIFIC COAST EUROPEAN CONFERENCE

American President Lines, Ltd.

FEDERAL MARITIME BOARD

No. S-58

ARNOLD BERNSTEIN LINE, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 8, SERVICE NO. 1 (NEW YORK/ANTWERP-ROTTERDAM)

Submitted May 25, 1956. Decided June 8, 1956

Under section 605 (c) of the Merchant Marine Act, 1936, as amended:

1. Arnold Bernstein Line, Inc., is not an existing operator on Trade Route No. 8, Service No. 1, and its proposed service would be in addition to the existing service or services.
2. United States-flag service on Trade Route No. 8, Service No. 1, is inadequate, and in the accomplishment of the purposes and policy of the Act additional vessels are required to be operated thereon.

Section 605 (c) of the Act is not a bar to an award of an operating-differential subsidy to Arnold Bernstein Line, Inc., on Trade Route No. 8, Service No. 1.

Joseph A. Klausner and *Roger S. Kuhn* for applicant.

Robert E. Kline, Jr., and *David P. Dawson* for United States Lines Co., intervener.

Leroy F. Fuller as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

Exceptions have been filed by United States Lines Company ("U. S. Lines") to the recommended decision of the examiner and oral argument thereon has been heard. The following is the recommended decision of the examiner, with which we agree:

"This is a proceeding in which the Board is asked to make findings required under section 605 (c) of the Merchant Marine Act, 1936, as amended, in connection with the application of Arnold Bernstein Line, Inc., for financial aid in the operation of vessels in the foreign

trade of the United States. The applicant proposes to operate vessels in combined passenger and cargo service on Trade Route 8, Service No. 1, between New York and Antwerp/Rotterdam making 20 voyages per annum with the first vessel, a Mariner-type converted to passenger capacity of approximately 900 passengers, with the contemplation of adding sufficient ships to make weekly sailings.

"Pursuant to the Board's notice of hearing, leave to intervene was granted to United States Lines Co. (U. S. Lines). Hearing was duly held in New York commencing December 15, 1955, and continuing for 2 days.

"Section 605 (c) inhibits the Board from granting a subsidy contract under Title VI 'with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the (Board) shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon.' The second clause of section 605 (c) is inapplicable to the present proceeding since that clause 'applies only where the applicant is an existing line furnishing services on the trade route with respect to which it asks Government aid.' *Arnold Bernstein Line, Inc.—Subsidy, Route 8.* 3 U. S. M. C. 362, 363.

"This proceeding is one in which a new service is proposed by a line not yet in operation, and which would therefore be in addition to the existing service within the meaning of the first clause of section 605 (c).

"THE ISSUES

"The issues are (1) whether the service already provided by vessels of United States registry on Trade Route 8, Service No. 1, is inadequate, and (2) whether in the accomplishment of the purposes and policy of the Act additional vessels should be operated on such route.

"FINDINGS OF FACT

"*Existing Passenger Service*

"1. The Holland-America Line, a Netherlands corporation, provides the only regular passenger service on Trade Route 8. Its passenger carryings for the period 1951–54 were as follows:

"TABLE I

	Inbound	Outbound	Total
1951	16,085	11,956	28,041
1952	23,337	18,534	41,871
1953	25,735	19,107	44,842
1954	23,844	17,851	[1] 41,695

[1] Reduction is due, in substantial part, to the *Veendam* leaving the service, indicating that number of accommodations influences passenger traffic. This vessel carried approximately 5,000 passengers in the previous year on this trade route.

"2. American- and foreign-flag freight vessels for the years 1951, 1953, and 1954 (1952 figures not available) carried passengers as follows:

"TABLE II

	U. S.	Foreign	Total	Percent U. S.
Inbound:				
1951	289	667	956	30.2
1953	234	671	905	25.9
1954	172	673	845	20.4
Outbound:				
1951	89	420	509	17.5
1953	65	777	842	7.7
1954	104	811	915	11.4

"3. The passenger statistics of record on Trade Route 8 go back to 1925. The [Board] made section 605 (c) determinations concerning this Trade Route in 1949. *Arnold Bernstein Line, Inc.—Subsidy, Route 8, supra.* It is unnecessary to make an analysis here of such prior statistics.

"4. The trend in travel on Trade Route 8 during the past few years has been sharply upward, and it should continue to rise.

"*Existing Cargo Service*

"5. All cargo carried by combination passenger and freight vessels on Trade Route 8 for the period 1951–54 was carried by foreign-flag lines. United States-flag participation in cargo (tons of 2,240 pounds) carried on this Trade Route for the same period (including foreign for comparison) was as follows:

"TABLE III

	U. S	Foreign	Total	Percent U. S.
Inbound:				
1951	176,453	912,332	1,088,785	16.2
1952	89,844	562,189	652,033	13.7
1953	139,356	763,827	903,183	15.4
1954	93,348	479,394	572,742	16.3
Outbound:				
1951	513,992	709,117	1,223,109	42.0
1952	327,056	702,180	1,029,236	31.8
1953	227,036	1,169,074	1,396,110	16.3
1954	233,302	1,278,229	1,511,531	15.4

"POSITION OF PARTIES

"The positions of counsel for applicant and of Public Counsel on the limited issues are embraced herein.

"Counsel for U. S. Lines, intervener, contend and propose as conclusions that under section 605 (c) no subsidy contract may be made with respect to the applicant's proposed vessels because—

"1. Applicant's proposed service is not an essential service.

"2. The existing service is adequate.

"3. Applicant has not established that in the accomplishment of the purposes and policy of the Act its proposed vessels should be operated on the proposed service.

"4. The effect of the proposed subsidy contract would be unduly prejudicial between citizens in the operation of vessels in competitive routes or services.

"DISCUSSION AND CONCLUSIONS

"As to U. S. Lines' contention that applicant's proposed service is not an esential service, U. S. Lines' counsel sought to go into the question of whether Trade Route 8, Service No. 1, is essential under section 211 of the Act. This was not permitted because this proceeding is under section 605 (c) only, and the [Board] has previously determined the route and service to be essential. *Arnold Bernstein S. S. Corp.—Subsidy, Routes 7, 8, 11*, 3 U. S. M. C. 351, 352; *Arnold Bernstein Line, Inc.—Subsidy, Route 8, supra.*

"As to the contention of counsel for U. S. Lines that the existing service is adequate, they state that whether it is adequate must be measured in terms of essential trade route standards, and that since there cannot be any determination on the present record that the proposed or any other service on Trade Route 8, Service No. 1, is essential, it follows that there can be no determination that the existing service, measured in terms of the proposed service or any other service, is inadequate.

"The question of essentiality of the Trade Route is settled as shown above. As to adequacy of the existing service, it is not claimed by U. S. Lines that American-flag service on trade routes other than Trade Route 8 supplies adequate American-flag service on Trade Route 8. There is no American-flag 'combination passenger and freight vessel' service on Trade Route 8, and participation by United States-flag freighters in both passenger and cargo carryings is small (findings of fact 1, 2, and 5). Upon findings of fact 1 through 5 it is concluded and found that the service provided by vessels of

United States registry on Trade Route 8, Service No. 1, both as to passengers and cargo, is inadequate.

"As to the contention of U. S. Lines that applicant has not established that in the accomplishment of the purposes and policy of the Act its proposed vessels should be operated on the proposed service, counsel for U. S. Lines state that there can be no such determination unless the proceeding is reopened and U. S. Lines is given a full hearing on the basis of the data it requested concerning essentiality of the trade route and as to whether the proposed service would be a practical operation within the purposes and policy of the Act. The question of essentiality has already been discussed. Data under this and other questions sought by counsel for U. S. Lines, but not permitted or required to be furnished, falls under sections of the Act other than 605 (c) and is not required to be considered here. As already found and concluded, the existing service is inadequate with respect to both passenger and cargo services. 'This defect cannot be remedied unless suitable vessels are introduced into the trade.' *Arnold Bernstein Line, Inc.—Subsidy, Route 8, supra.* In *Bloomfield S. S. Co.—Subsidy, Routes 13 (1) and 21 (5)*, 4 F. M. B. 305, 324, the Board stated that—

> "Having thus found inadequacy of service on the routes, little need be said as to the other finding required under the first paragraph of section 605 (c) of the Act, i. e., 'that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon.' The finding of inadequacy of United States-flag service is the primary reason for making this second finding required under the section.

"The Board applied this same principle in *American President Lines, Ltd.—Ports North of Cape Hatteras in the Round-the-World Service*, Docket No. S–51, decided November 21, 1955, not yet reported. Accordingly, it is concluded and found that in the accomplishment of the purposes and policy of the Act additional vessels should be operated on Trade Route 8, Service No. 1.

"It follows that section 605 (c) of the Act does not interpose a bar to grant of the application.

"As to the contention of counsel for U. S. Lines that the effect of the proposed subsidy would be unduly prejudicial between citizens in the operation of vessels in competitive routes or services, this question falls under the second clause of section 605 (c) earlier found herein to be inapplicable to the present proceeding.

"ULTIMATE CONCLUSIONS

"Upon consideration of all the foregoing facts it is concluded and found, and the Board should so conclude and find, under section 605 (c) of the Act:

"1. That Arnold Bernstein Line, Inc., is not an existing operator on Trade Route, Service No. 1, and its proposed service would be in addition to the existing service or services.

"2 That United States-flag service on Trade Route 8, Service No. 1, is inadequate, and in the accomplishment of the purposes and policy of the Act additional vessels are required to be operated thereon.

"3. That section 605 (c) of the Act is not a bar to granting the application."

On analysis it is apparent that U. S. Lines places principal reliance in its exceptions on the contentions that Trade Route No. 8, Service No. 1, is not an essential service within the meaning of section 211 of the Act, that the examiner erred in refusing to reevaluate a prior determination of essentiality under section 211, that he refused to admit in evidence the data relied on in the section-211 determination, and that he ruled that he had no jurisdiction over the question of the essentiality of the proposed service.

In our report of this date in *States Marine Corp.—Subsidy, Tri-Continent Service*, 5 F. M. B. 60, we decided substantially similar issues in a manner counter to the arguments advanced here by U. S. Lines, determining (1) that jurisdiction to make or modify section 211 trade route findings has been vested exclusively in the Maritime Administrator, and (2) that section 211 trade route findings define, as a matter of transportation policy, the trade routes on which subsidy is to be granted, are binding upon the Board, and are not subject to review in a section 605 (c) proceeding before the Board. Having so determined, we held that neither a section-211 determination nor the data on which it is based is admissible in evidence in a section 605 (c) proceeding.

In January 1955 the Maritime Administrator published in the Federal Register tentative findings in reaffirmance of the essentiality of Trade Route No. 8, among other trade routes, and in the exercise of discretion extended to interested persons an opportunity to be heard. U. S. Lines did not avail itself of that opportunity, although it was to the Maritime Administrator rather than to the Board that the present arguments of U. S. Lines should have been addressed.

Other arguments of U. S. Lines are addressed to specific facts as found by the examiner. These exceptions provide no basis, however, for modifying the examiner's decision. Accordingly, we hereby adopt the examiner's findings of fact and make them our own. We likewise adopt the examiner's conclusions, as follows:

1. Arnold Bernstein Line, Inc., is not an existing operator on Trade Route No. 8, Service No. 1, and its proposed service would be in addition to the existing service or services.

2. United States-flag service on Trade Route No. 8, Service No. 1, is inadequate, and in the accomplishment of the purposes and policy of the Act additional vessels are required to be operated thereon.

3. Section 605 (c) of the Act is not a bar to granting the application.

FEDERAL MARITIME BOARD

No. 744

TERMINAL RATE STRUCTURE—PACIFIC NORTHWEST PORTS

*Submitted April 30, 1956. Decided June 8, 1956**

Modification of Freas Formula for use at Pacific Northwest Ports is required, such modification to reflect a proper service charge consistent with this report and to establish a separate handling charge to be assessed against that party receiving the benefit thereof under the ocean contract of carriage.

Approval of the Freas Formula will be given as not in violation of section 17 of the Shipping Act, 1916, upon resubmission of the formula suitably modified.

Robert W. Graham, *Thomas J. White*, and *John Prince* for Northwest Marine Terminal Association and members thereof, *James E. Lyons* and *Charles W. Burkett, Jr.*, for Southern Pacific Company, *Alan B. Aldwell* for Luckenbach Steamship Company, Inc., *Albert E. Stephan* for American Mail Line Ltd., and *H. B. Penewell* for Matson Terminals, Inc., respondents.

Leonard G. James, *Alexander D. Calhoun, Jr.*, *Joseph J. Geary*, *Allan E. Charles*, *Edward Ransom*, *Alan B. Aldwell*, *Harry S. Brown*, and *Thomas J. Callahan* for interveners.

John Mason and *Allen C. Dawson* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

Oral argument has been heard on exceptions filed to each of the conclusions of the examiner in his recommended decision, appended hereto and hereby incorporated in and made a part of this report, except insofar as inconsistent herewith.

FIRST CONCLUSION

The Board should approve the Freas Formula as a proper method of segregating terminal costs and carrying charges, and apportioning such costs and charges to the various wharfinger services at Pacific Northwest ports

*Amended August 13, 1957.

Public Counsel, various offshore steamship conferences ("the conferences"), and Pacific American Steamship Association ("PASSA") have each excepted to the first conclusion although on somewhat dissimilar grounds.

Public Counsel asserts that the examiner erred in recommending, without apparent qualification, that we approve the Freas Formula as a proper method of segregating terminal costs and carrying charges, pointing out that the examiner himself has recognized that charges against the vessel for use of working areas in connection with the terminal's handling operation are properly assignable to the handling rather than to the dockage charge.

Witness Linnekin clearly indicated his views that some changes in the Freas Formula would be logical in the allocation of costs in this respect, and, in its reply to exceptions, the Northwest Marine Terminal Association ("the Association") agreed that such change was necessary. It is the view of the Association that, in view of the examiner's express discussion and ruling on this point, the recommended change is implicitly included in the examiner's first conclusion. We agree; we need only add that such a change is also necessary to insure assessment of all costs relating to handling against the person for whom handling has been performed.

It is PASSA's view that, even assuming that the handling adjustment should be made, the resultant decrease in the Northwest dockage charge will create a disparity between Northwest and California dockage charges which should preclude application of the Freas Formula in the Northwest. We do not share this view since, first, the level of terminal rates is not at issue in this proceeding, and second, it is obviously the total of terminal charges against a shipper or carrier rather than the level of a single charge which affects competition between the two areas.

The conferences have a more fundamental exception to the first conclusion. They argue that this Board has no jurisdiction to approve or disapprove a system of cost allocation such as the Freas Formula since such approval is necessarily a preliminary step in rate fixing, a function not vested in the Board.

Without deciding the extent of our authority over rates of terminal operators,[1] we cannot sustain the contention of the conferences. This proceeding, patently, has not been initiated for the purpose of fixing rates. Its purpose is to ensure that the regulations and practices of the terminal operators of the Association, as other persons subject to the Shipping Act, 1916 ("the Act"), conform to a standard of justice

[1] See *California* v. *United States*, 320 U. S. 577 (1944).

and reasonableness as required in section 17 thereof. We believe it captious to assert that a system of cost accounting which may result in assessment of charges against persons not directly benefited by services rendered may not be an unjust and unreasonable practice within the meaning of section 17, or may not be subject to our jurisdiction.

SECOND CONCLUSION

The Board should require those California and Pacific Northwest terminal operators which make a service charge to adopt a uniform definition and/or description of such charge consistent with that recommended by witness Linnekin herein

Exceptions to this conclusion have been filed by Public Counsel, the conferences, and PASSA.

Public Counsel, while not in apparent dispute as to the desirability of adopting a uniform definition as between California and Northwest ports, disputes the validity of the definition as actually recommended. He points to the examiner's finding, at page 17, that a practice of charging for unperformed checking is unreasonable, as standing in diametric opposition to the examiner's approval of a charge for unperformed checking if included with other items in a service charge. Since checking is the most expensive service included under the service charge, Public Counsel urges that a separate charge for checking be established in order that it be not assessed where checking is not performed.

PASSA objects to this conclusion on three grounds: (1) the conclusion purports to affect California terminals which are not parties to the proceedings; (2) it is unreasonable to permit a terminal, through a service charge, to realize revenues properly allocable to other operations; and (3) under the examiner's view a service charge could be assessed even if none of the services should be performed, an obvious injustice. The principal objection of the conferences is that the notice of proceeding in this matter did not alert interested persons to the possibility that such a finding might be made.

In view of the high proportion of nonchecked cargo which moves through Pacific Northwest public terminals, we agree with Public Counsel that the examiner has not recommended a proper service charge. Since checking may or may not be performed, reasonableness and justice requires that the checking charge be assessed only when earned and only against the party for whom the service was performed. We agree also with PASSA that no order entered in this proceeding may bind terminals which have not been made parties hereto. We

cannot find, however, that the conferences have had inadequate notice that recommendations would be made concerning the service charge; it is amply evident that such matters were contemplated in the notice of hearing and were recognized as being in issue in the conferences' petition to intervene herein. We also agree with PASSA that the terminals may not recover, through a service charge, deficiencies in revenue attributable to a totally different operation. Since some of the component elements of the service charge may fall on either party to the contract of affreightment, dependent on its terms, it is manifestly unjust to recover a deficiency in dockage, always a charge against the vessel, through a charge which may, under tackle-to-tackle rates, fall on the shipper.

As indicated in *Intercoastal S. S. Frt. Ass'n* v. *N. W. M. T. Ass'n*, 4 F. M. B. 387 (1953) ("Docket 720"), and in *Terminal Rate Increases—Puget Sound Ports*, 3 U. S. M. C. 21 (1948), "providing terminal facilities" is too broad a term and should be eliminated from the service charge definition. Similarly, "arranging berth for vessel" is an administrative expense connected with dockage and should be eliminated from the service charge.

Another exception of PASSA reaches a fundamental assumption in this proceeding and in our report in *Terminal Rate Structure—California Ports*, 3 U. S. M. C. 57 (1948), an assumption which may be misunderstood by some of the parties hereto. In that proceeding the Maritime Commission stated at page 61: "As a general principle expenditures were assigned to the activities in whose furtherance they have been incurred." In this regard, the Freas report itself provides, at page 9:

> Division of responsibility as between shipper and carrier is of little consequence in a study of this nature. The concern is with the responsibility of each to the wharfinger. The study proceeds *on the assumption* that the vessel is responsible to the wharfinger for all usages and services from, but not including, the point of rest on outbound traffic and to, but not including, the point of rest on inbound traffic. All other wharfinger costs are assessed against the cargo. [Emphasis supplied.]

The foregoing language is, as asserted in brief by Public Counsel, an express recognition by its draftsman that the function of the Freas Formula is not to delineate or abridge the right of ship and cargo to enter lawful contracts relating to the carriage of goods. The division of responsibility is assumed only, and, where the assumption is rendered inapplicable by express contract between shipper and carrier, as in a tackle-to-tackle contract of affreightment, the terminal's charges must be adjusted to fall on that party for whom, under the contract of affreightment, they have been incurred. Recognition that

the point of rest does not necessarily delineate responsibility between carrier and shipper or consignee is not tantamount to a denial of compensation to the terminal for services performed as encompassed in the service charge. Where such services are performed, the terminal is entitled and obliged to recover compensation therefor, *from the person for whom the services have been performed.*

THIRD CONCLUSION

The Board should find that respondents operating publicly owned terminals are entitled to a fair return on investment

Exceptions to the third conclusion have been filed by the conferences. It is again their position that such a conclusion is necessarily dependent on rate-fixing authority. While we would agree that a conclusion that public terminals are entitled to a fair return on investment is, although requested, unnecessary here, our power to make such a finding is inherent in our authority, under section 17 of the Act, to find regulations and practices of terminal operators subject to our jurisdiction to be unjust and unreasonable. It appears to us to be indisputable that a terminal practice of cost allocation whereunder no allowance is made for terminal equipment maintenance, depreciation, and replacement, and which thereby threatens future steamship operations and port efficiency, is *prima facie* unreasonable and a matter for our attention.

FOURTH CONCLUSION

The Board should reverse the findings and conclusions in Docket 720

Exceptions to the fourth conclusion have been filed by Intercoastal Steamship Freight Association ("Intercoastal"), Public Counsel, PASSA, and the conferences. In this conclusion the examiner has resolved the single issue most important to the parties hereto. In arriving at this conclusion the examiner reasoned that the determination in Docket 720 was based upon a limited record, that the present proceeding has revealed a general deficiency in revenue, and that accordingly there is no basis upon which reparation could be paid.

Intercoastal points out (1) the Board in Docket 720 specifically denied an Association petition for reconsideration of its report and order and for a stay of action, and (2) that no notice has been given in this proceeding that a reversal of Docket 720 was possible as an outcome of the proceeding. Public Counsel succinctly states that the examiner's reasoning appears to require a conclusion that only a venture which was profitable could be illegal, reasoning with which he

totally disagrees. PASSA supports the views of Intercoastal, as do the conferences, in principle.

We reject the examiner's fourth conclusion as unwarranted. First, we see no reason for doing collaterally that which we have declined to do when in issue. Second, the premises upon which the conclusion was based are faulty; we see no necessary relationship between profit and illegality. Third, and most important, assuming that we could in this proceeding properly set aside the report and order in Docket 720, we have been presented with no valid reason for doing so. The principal portion of the report in Docket 720 was premised on the theory that a terminal may not assess charges for checking not performed for the carrier. Implicit also in the report, in relation to other component elements of the service charge, is a similar but more fundamental principle, namely, 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.[2] No evidence was adduced or argument advanced which would require us to depart from that principle. We did not determine in Docket 720, however, that terminals may not recover from the person for whom performed the cost of performance of those services which were rejected as charges against carriers.

FIFTH CONCLUSION

The Board should complete the record and dispose of the issues remaining to be decided in the California case

We agree with PASSA that the fifth conclusion of the examiner is erroneous; we cannot in this proceeding "dispose of the issues remaining to be decided in the California case" since, as stated, the California terminals are not party to this proceeding.

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[2] In our memorandum in opposition to a petition for an interlocutory injunction against and judicial review of our order in Docket 720, filed with the United States Court of Appeals for the 9th Circuit in *Northwest Terminals Ass'n. et al.* v. *Federal Maritime Board and United States of America* (decided January 17, 1955), we interpreted Docket 720 in the following manner:

"* * * the Board held that in the carriage of lumber 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."

While the court did not pass on the merits of our report and order in Docket 720, finding that the Association's petition had not been filed timely, the foregoing view is consistent with the prior pronouncement of the Maritime Commission in *Transportation of Lumber Through Panama Canal*, 2 U. S. M. C. 143, 148 (1939).

SIXTH CONCLUSION

The Board should give consideration to instituting a nation-wide rule-making proceeding under section 4 of the Administrative Procedure Act and the Shipping Act, 1916, to make as uniform as possible the allocation of terminal charges between ship and cargo, and as uniform as possible the definition of tariff services offered by all persons carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water throughout the United States, its Territories and possessions

We reserve decision on the sixth conclusion until completion of an informal investigation of terminal practices currently being conducted.

Luckenbach Steamship Company, which operates terminals only in connection with its own steamship operations, will be dismissed from this proceeding; since Matson Terminals, Inc., previously has been dismissed from the proceeding, no order may be entered against that company at this time.

From the foregoing we conclude:

1. The Freas Formula, if modified to reflect the views expressed herein in regard to separation of the handling charge from the dockage charge, and if modified by definition of a service charge, the incidence of which will fall on those persons for whom services have been performed, will be approved as not unreasonable or unjust within the meaning of section 17 of the Act.

2. Under tackle-to-tackle rates, terminals may not assess charges against carriers for services performed or facility usage incurred prior to delivery within reach of ship's tackle or subsequent to delivery at the end of ship's tackle.

3. A uniform service charge to be applied to California terminals not party to this proceeding may not be prescribed here.

4. We may not on this case reverse the findings and conclusions in Docket 720 or dispose of issues remaining to be decided in the California case.

5. We will not at this time act on the examiner's recommendation that a nation-wide rate-making proceeding be instituted.

The proceeding is dismissed without prejudice to subsequent reopening for approval of a modification of the Freas Formula consistent with this report, if submitted by the terminals.

An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 8th day of June A. D. 1956

No. 744

TERMINAL RATE STRUCTURE—PACIFIC NORTHWEST PORTS

This case having been instituted by the Board on its own motion, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on June 8, 1956, having made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That this proceeding be dismissed without prejudice to a subsequent reopening of the proceeding for approval of a modification of the Freas Formula consistent with this report, if submitted by the terminals.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

APPENDIX

FEDERAL MARITIME BOARD

No. 744

TERMINAL RATE STRUCTURE—PACIFIC NORTHWEST PORTS

Freas Formula approved as a proper method of segregating terminal costs and carrying charges, and apportioning such costs and charges to the various wharfinger services at Pacific northwest ports.

Uniform definition of service charge recommended.

Publicly owned terminals found entitled to a fair return on investment.

Reversal of Board decision in *Intercoastal S. S. Frt. Ass'n* v. *N. W. M. T. Ass'n*, 4 F. M. B. 387, recommended.

Completion of record and disposition of undecided issues in *Terminal Rate Structure—California Ports*, 3 U. S. M. C. 57, recommended.

Nation-wide rule making proceeding to determine uniformity of allocation of terminal charges between ship and cargo and tariff definitions recommended.

Robert W. Graham, *Thomas J. White* and *John Prince* for Northwest Marine Terminal Association and members thereof; *James E. Lyons* and *Charles W. Burkett, Jr.*, for Southern Pacific Company; *Alan B. Aldwell* for Luckenbach Steamship Company, Inc.; *Albert E. Stephan* for American Mail Line Ltd., and *H. B. Penewell* for Matson Terminals, Inc., respondents.

Leonard G. James, *Alexander D. Calhoun, Jr.*, *Joseph J. Geary*, *Allan E. Charles*, *Edward Ransom*, *Alan B. Aldwell*, *Harry S. Brown* and *Thomas J. Callahan* for interveners.

John Mason and *Allen C. Dawson* as Public Counsel.

RECOMMENDED DECISION OF ROBERT FURNESS, EXAMINER

The Northwest Marine Terminal Association, hereinafter called the Association, is a voluntary association of persons carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with common carriers by water in the States of Washington and Oregon, and are subject to the provisions of the Shipping Act, 1916, as amended, hereinafter called the Act.

The members of the Association [1] are parties to Agreement No. 6785, approved by the Maritime Commission, hereinafter called the Commission, pursuant to section 15 of the Act. The Association was formed for the following purposes: (1) to promote fair and honorable business practices among those engaged in the marine terminal industry; (2) to more adequately serve the interests of the public at Northwest ports, i. e., ports in the States of Washington and Oregon; (3) to establish and maintain just and reasonable, and, so far as practicable, uniform terminal rates, charges, classifications, rules, regulations and practices at Northwest ports in connection with waterborne traffic; and (4) to cooperate with the marine terminal operators of other districts, either individually or through their associations, to the end that the purposes set forth above may be achieved by such other terminal operators. Members of the Association, as well as other terminals in the Northwest are in competition with California terminal operators for business originating in or destined to the interior, and the Northwest operators compete with each other.

By petition filed November 23, 1953, the Association and its members asked the Board to enter upon a proceeding of inquiry similar to that conducted by the Commission in *Terminal Rate Structure—California Ports*, 3 U. S. M. C. 57 (1948), hereinafter called the *California* case, wherein the Commission employed Mr. Howard G. Freas, then Rate Expert of California Public Utilities Commission and presently a member of the Interstate Commerce Commission, to study wharfinger functions (receiving, holding, and delivery of cargo), and to make a tentative cost formula, hereinafter called the Freas formula, segregating terminal costs and carrying charges and apportioning such costs and charges to the various wharfinger services. Allocation of terminal charges between ship and cargo under the Freas formula was described in general by the Commission on page 59 as follows:

> All expenditures were apportioned to vessel and cargo in proportion to the use made of the facilities provided and of the service rendered. The vessel was held responsible to the wharfinger for all usages and services from, but not including, the point of rest on outbound traffic and to, but not including, the point of rest on inbound traffic. All other wharfinger costs were assessed

[1] Alaska Terminal & Stevedoring Co., Seattle, Wash.; Albina Dock Co., Inc., Portland, Oreg., Ames Terminal Co., Seattle; Arlington Dock, Inc., Seattle; Baker Dock Co., Tacoma, Wash.; Columbia Basin Terminals Co., Portland Commission of Public Docks of Portland, Oreg.; G & S Handling Co., Seattle; Ocean Terminals, Portland; Olympic Steamship Co., Inc., Seattle; Port of Astoria, Astoria, Oreg.; Port of Bellingham, Bellingham, Wash.; Port of Everett, Everett, Wash.; Port of Longview, Longview, Wash.; Port of Olympia, Olympia, Wash.; Port of Port Angeles, Port Angeles, Wash.; Port of Seattle; Port of Tacoma; Port of Vancouver, Vancouver, Wash.; Salmon Terminals, Inc., Seattle; Shaffer Terminals, Inc., Tacoma; Tait Tidewater Terminals, Seattle; Virginia Dock & Trading Co., Seattle; Williams, Dimond & Co., Portland.

against the cargo. The point of rest is the location at which the inbound cargo is deposited and outbound cargo is picked up by the steamship company.

The Commission approved the formula and found that respondents operating publicly owned terminals are entitled to a fair return on investment.

The petition herein was filed primarily because of the Board's decision in *Intercoastal S. S. Frt. Ass'n* v. *N. W. M. T. Ass'n*, 4 F. M. B. 387, hereinafter called the Intercoastal case, which found that the collection of a terminal "service charge" from the ship by Association members in connection with lumber moving in eastbound intercoastal commerce was an unjust and unreasonable regulation or practice in violation of section 17 of the Act. This decision "places petitioners in substantial doubt" as to the applicability of their service charge against the ship in connection with various other bulk commodities moving over their facilities and with respect to lumber shipped in other trades. In addition the petition brings into issue the practical use of the Freas formula in the Northwest and the competitive relationship between Northwest and California terminals. Petitioners state that they have built their rate structure upon the approved Freas formula and that the Board failed to apply it in the *Intercoastal* case. They seek Board approval of the same allocation of terminal charges between vessel and cargo as that approved in the *California* case.

In response to the petition the Board, on May 14, 1954, ordered:

That a proceeding of inquiry be instituted upon the Board's own motion, in the exercise of its powers and duties under section 15 and 17 of the Shipping Act, 1916, concerning the operations of the Association and its members hereinabove named, for the purpose of obtaining information as to the proper bases (1) for the segregation of the services, and the costs thereof, rendered for the account of the vessel from those rendered for the account of the cargo, (2) for allocating costs assignable to the vessel as between dockage, service charge, and other services rendered to the vessel, (3) for allocating costs assignable to the cargo as between wharfage, wharf demurrage and storage, and other services rendered to the cargo, (4) for determining carrying charges on waterways, land, structures, and other terminal property devoted to furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water, and of apportioning such charges to the various wharfinger services, and (5) any other services and costs necessary to a determination of the above-mentioned bases.

In addition to the Association and its members, Eureka Terminals, Inc., formerly doing business at Tacoma; Waterside Milling Co., located at Tacoma; General Hardwood Co., located at Tacoma; Matson Terminals, Inc., doing business at Seattle, Tacoma and Portland; "Luckenbach Terminals", doing business at Portland as Lukenbach

Steamship Company; Irving Dock, located at Portland; Southern Pacific Company, formerly operating an export lumber dock at Portland; American Mail Line, Ltd., operating a pier at Seattle; and Puget Sound Terminal Co., a subsidiary of Puget Sound Freight Lines, operating at Seattle, Bellingham, Olympia and possibly other Puget Sound ports, were named respondents.

By order of September 16, 1954, the Board granted a motion to dismiss the proceedings as to Southern Pacific Company on the ground that it does not now operate any marine terminal facilities in connection with a common carrier by water at Northwest ports, and upon consideration that Southern Pacific file promptly a supplement to its Terminal Tariff No. 230–K to reflect such fact. Said supplement was filed.

Respondent Eureka Terminals, Inc., is not now in operation. It should be ordered to file a supplement to Tacoma Terminal Tariff No. 1 showing that fact, after which this proceeding as to it should be dismissed.

Respondents Tait Tidewater Terminals, Williams, Dimond & Co. and Ames Terminal Co. are no longer in the wharfinger business in the Northwest, are not parties to any terminal tariff on file with the Board, and this proceeding, as to them, should be dismissed.

The Commission of Public Docks of Portland now operates Ocean Terminals.

Respondent American Mail Line Ltd. filed a motion to be dismissed as a party on the ground that the Board's power to require the filing of any particular type of terminal rates in foreign commerce is derived from its power under agreements filed pursuant to section 15 of the Act; that said respondent is not a party to any such agreement; and that therefore the Board has no power to require it to become a party to or adhere to any particular type of terminal tariff. Public Counsel replied to the motion, pointing to the fact that the words "tariff" and "terminal tariff" do not appear in the order instituting this proceeding. They cite *Contract Rates—Port of Redwood City*, 2 U. S. M. C. 727; *Free Time and Demurrage Charges—New York*, 3 U. S. M. C. 89; and *Interchange of Freight at Boston Terminals*, 2 U. S. M. C. 671, as typical cases where jurisdiction over individual terminals not parties to section 15 agreements has been exercised under the provisions of section 17 of the Act. By order of November 17, 1954, the motion was dismissed.

Respondent Matson Terminals, Inc., moved that it be dismissed as a party on the main grounds that it exists solely for the purpose of serving the vessels of its parent company, Matson Navigation Com-

pany and another subsidiary of that company, The Oceanic Steamship Company, and that it does not operate a public terminal in the real sense of the word as do members of the Association. No party opposed the motion, and it was granted. Therefore Matson Terminals, Inc., should be required to cancel its participation in Seattle Terminals Tariff No. 2–C, The Commission of Public Docks of the City of Portland, Oregon, Terminal Tariff No. 3–A and any other general public wharfinger tariff it may participate or concur in. Its terminals Tariff No. 6 is on file with the Board.

Numerous steamship freight conferences[2] and Pacific American Steamship Association were permitted to intervene on behalf of their members.

A motion to dismiss the proceeding was filed on behalf of the first 13 intervening conferences shown in footnote No. 2. The motion was filed upon the jurisdictional ground that the Board's power of investigation under the Act is provided in section 22 where such power is limited to investigating "any violation of this Act." It was urged in support of the motion that this proceeding of inquiry is not an investigation of any violation, or alleged violation, of the Act and that therefore the Board has no power to conduct it. The Association and Public Counsel replied to the motion citing various authorities, including *California* v. *United States*, 320 U. S. 577, recognizing jurisdiction of the Board to conduct proceedings of inquiry under the powers conferred by sections 15 and 17 of the Act. The motion was dismissed by order of the Board.

With respect to the substance of this proceeding, interveners have no objection to uniform application of the Freas Formula, but object to using it as a means of reviewing the *Intercoastal* case or as an attempt to increase terminal charges against the ship.

There is no controversy between the parties and no problem presented concerning application of the Freas formula to wharfinger services accorded general cargo which is checked or tallied by respondents for the ship, described in the *Intercoastal* case as the "principal item going into the service charge". It is only necessary, therefore, to consider "nonchecked" cargo which generally consists of bulk commodities, including lumber, received, held, and delivered by respondents at their general wharfinger facilities. As here used "nonchecked"

[2] Pacific Indonesia Conference; Camexco Freight Conference; Canal, Central America Northbound Conference; Capca Freight Conference; Colpac Freight Conference; Pacific Coast/Caribbean Sea Ports Conference; Pacific Coast/Mexico Freight Conference; Pacific Coast/Panama Canal Freight Conference; Pacific/West Coast of South America Conference; West Coast South America/North Pacific Coast Conference; Pacific Straits Conference; Pacific Coast European Conference; Pacific Coast River Plate Brazil Conference; Pacific Westbound Conference; and Intercoastal Steamship Freight Association.

means that no check or tally of cargo is made by respondents for the vessel.

Illustrative of such nonchecked cargo passing over Northwest terminals, inbound and outbound, are lumber, fabricated steel products; heavy equipment such as cranes, railroad cars or motor vehicles; sand, rolled steel products, plate and window glass, ores, aluminum pig, concentrates, sulphur, phosphate rock, coal, scrap, logs and machinery. They are loaded or discharged by ship's tackle from or to open-top railroad cars or barges alongside, although the bulk of outbound lumber arrives at the terminal by motor vehicle. While the terminals do not check or tally this cargo for the ship unless requested, they do issue receipts therefor. During the calendar year 1952 respondents Port of Seattle, Ames Terminal, Olympic Steamship Company and Alaska Terminal & Stevedoring Company handled in excess of 203,000 tons of nonchecked cargo, exclusive of lumber. The percentage of nonchecked cargo to total cargo ranged from 35 to 50 percent. During the same period the Port of Seattle alone handled and collected service charges on 173,780 tons of cargo, other than lumber, of which 87,131 tons was nonchecked. About 60 percent of total cargo handled by the Port of Tacoma is nonchecked. At Portland about 25 percent of the total cargo handled by the Commission of Public Docks is nonchecked, exclusive of lumber and bulk cargo separately handled at its specialized bulk facility.

The record shows that there is no clear line of demarcation between terminal functions with respect to nonchecked cargo on the one hand and general cargo on the other, insofar as the ship's use of facilities and the services rendered to it are concerned. The duties performed by the terminal for the ship are precisely the same irrespective of the nature of cargo in the following particulars:

1. The vessel must be directed to and furnished an available berth.
2. Agreement between the terminal and the ship is made with respect to whether it will tie up on the port or starboard side.
3. The number of hatches to be worked must be known and arrangements made accordingly.
4. Procurement of labor and cargo-handling equipment such as cranes or lift trucks is done by the terminal in advance of arrival of the ship.
5. Cargo is assembled on the terminal advantageous to the ship's berth.
6. Ordering, checking, spotting and moving railroad cars on the terminal is similar with respect to either open top or box cars, and

understanding with the railroad companies are necessary for expeditious loading and discharging of the vessel.

7. Dock receipts are prepared from the line-up furnished by the water carrier, and cargo is delivered to the ship against receipt by the ship's supercargo.

8. As to cargo loaded from barge, raft, lighter or other water carrier, the terminal furnishes adequate berthing and other facilities necessary to the expeditious turn-around of the ship.

9. Interchange of freight between the ship, consignees, consignors and land carriers involves a great amount of clerical work performed by the terminal which does not vary with the nature of the cargo.

The record also shows that with respect to both checked and nonchecked cargo the services performed and wharfinger facilities furnished by Northwest terminals for ship and cargo are in general similar to those performed by California terminals except that in the Northwest the term "stevedoring" is limited to mean stevedoring performed on the ship, whereas in California the term is used to include the dock gang which handles cargo between place of rest and ship's tackle.

The Association asserts that the definitions of the terminal charges contained in their tariffs[3] are "substantially identical" with those contained in Marine Terminal Association of Central California Terminal Tariff No. 1–A, F. M. B. No. 1, "which definitions have been approved by the Commission" in the *California* case. It should be observed here that the Commission did not approve any tariff definitions in that case. However, the importance of uniformity of definitions was recognized by the Commission in *Terminal Rate Increases—Puget Sound Ports*, 3 U. S. M. C. 21, 23 (hereinafter called the *Puget Sound* case) in the following language:

> We are of the opinion that there should be uniform and clear definitions of various terminal services, and a clear and inclusive list of the specific activities contained in each definition in order to enable terminal operators, the shipping public, carriers, and us to determine whether each service is bearing its fair share of the cost load. Such uniformity should be a goal sought by all owners and operators of terminals in all ports of the United States and its Territories and possessions. This does not mean, however, that there necessarily should be a uniformity of charges. Uniformity of definitions will result in a much healthier condition of the industry and much fewer competitive situations resulting in noncompensatory charges for certain services. While it may be difficult to cover all ports in an attempt to secure immediate and universal uniformity,

[3] Seattle Terminals Tariff No. 2–C; The Commission of Public Docks of the City of Portland, Oreg.—Terminal Tariff No. 3–A; Tacoma Terminals Tariff No. 1; Port of Astoria Tariff No. 6; Port of Longview Terminal Tariff No. 2; Port of Vancouver, Wash., U. S. A., Tariff No. 1; Port of Everett Tariff No. 1; Port of Olympia Terminals Tariff No. 5; Port of Bellingham Tariff No. 3; and Baker Dock Company Terminal Tariff No. 1.

we should take every opportunity to require terminal operators to publish their charges under headings which are clear, concise, and which in no way overlap.

It is axiomatic that uniformity of definitions is a prerequisite to uniform application of the Freas formula to terminal operations along the entire Pacific coast range. It is therefore necessary to critically examine certain basic definitions and descriptions of service appearing in Association tariffs.

The Association cites the Seattle tariff as representative of definitions used by them and as a convenient means of comparison with those provided by California tariffs.

WHARFAGE

The term "wharfage" is defined in the Seattle tariff as follows:

Wharfage is the charge that is assessed on all freight passing or conveyed over, onto, or under wharves or between vessels or overside vessels when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is the charge for use of wharf and does not include charges for any other service.

The same definition of wharfage is found in the other Asssociation tariffs and there is no conflict with that published in the Central California tariff. Mr. Freas says "Tolls (wharfage) covers the charge against the cargo for passing freight over the wharves." In the *Puget Sound* case at page 24 the Commission said with respect to the same definition:

The imposition of a wharfage charge against the cargo can be justified only on the principle that the carrier, or the terminal operator on the carrier's behalf, does not actually take possession or deliver up possession of the cargo other than at place of rest on the pier as distinguished from the end of ship's tackle. Between that place and the entrance to or exit from the pier the cargo is using the pier to get into position to utilize the carrier's facilities or has finished the use thereof. The establishment of the charge against the cargo for this use has been widespread throughout the country under various names, viz: "wharfage," "top wharfage," "tollage,' "wharf tollage." We cannot ignore that fact. The definition appears to be adequate.

CARLOADING AND CAR UNLOADING

The terminal service is described in the Seattle tariff as follows:

Carloading and car unloading charges are the respective charges for services performed in loading freight from wharf premises on or into railroad cars or unloading freight from railroad cars onto wharf premises. The services include ordinary breaking down, sorting and stacking on wharf. Carloading and car unloading charges are assessed against cargo when not absorbed by carriers.

While the same definition is found in other Association tariffs, Bellingham includes, in addition, the loading and unloading of trucks or

any type of carrier; Longview and Vancouver specifically include motor trucks and barges; while Baker Dock provides charges for loading and unloading motor trucks when requested. The Central California tariff provides for loading and unloading cars or trucks which are not inconsistent with Northwest descriptions of service. As a general rule the motor carriers do their own loading and unloading so that the terminal charges therefor do not apply. In California much of the railroad carloading and unloading on the terminals is performed by independent carloading companies. See *Status of Carloaders*, 2 U. S. M. C. 761; 2 U. S. M. C. 791; 3 U. S. M. C. 116; and 3 F. M. B. 268; and *Carloading at Southern California Ports*, 2 U. S. M. C. 788; and 3 F. M. B. 261.

California terminals charge the cargo for direct transfer by ship's tackle from or to open top cars spotted alongside vessel, whereas Association members make no such charge except for rental or use of mechanical equipment and labor, and that is against the *ship*.

Mr. Freas describes loading and unloading as follows:

> Car and truck loading operations should be charged with the expenses of the areas, facilities and services employed by them and make use of between point of rest and rail car or truck. In the case of rail shipments handled through a transit shed, this embraces a proportionate share of shed aisle space, such portions of docks, if any, as are utilized by carloaders and unloaders, and general overhead. If the services are performed by the terminal it includes also labor and supervision. The resulting costs are assignable to carloading and unloading. The fact that certain terminals do not load or unload cars is of no consequence. The service is nevertheless performed on their facilities and under the use principle here followed is chargeable with a proportionate share of the cost of making the facilities available. Other activities should not be burdened with costs incurred in carloading and unloading. The cost of providing facilities on which others may load and unload cars may be passed on to those conducting business on the wharfinger's property in the form of a rental or license.

Under the Freas Formula all forms of loading and unloading are charged to cargo.

WHARF DEMURRAGE AND ACCESSORIAL SERVICES

It is unnecessary to review in detail the definitions and descriptions of services regarding wharf demurrage and such accessorial services as weighing, repacking, recoopering and stencilling because, while there are variations in tariff provisions, they mean the same thing and the services are alike in the Northwest as well as in California. For example, wharf demurrage is charged cargo for holding it beyond the free designated by the tariff although it is called "wharf demurrage," "wharf storage" or "monthly storage." Irrespective of the terminology used, wharf demurrage is a penalty charge whether collected

in California or the Northwest. The accessorial services are charged to cargo in both areas.

HANDLING CHARGE

The term "handling charge" is defined in the Seattle tariff as follows:

Handling charge is the charge made against vessels, their owners, agents or operators (see exception) for moving freight from end of ship's tackle on the wharf to first place of rest on the wharf, or from first place of rest on the wharf to within reach of ship's tackle on the wharf. It includes ordinary sorting, breaking down and stacking on wharf.

Exception: Handling charges applying on fish and seafood, canned, except foreign imports, moving under rates named in item 136 series, when not absorbed by ocean carriers, are assessed against the cargo and are due from the owner, shipper or consignee of the cargo.

The terminal companies, when equipped to perform the service of handling freight and to care for the same on their terminals, reserve the right in all instances to perform such services.

The other Northwest tariffs publish the same definition and some (Portland and Tacoma) add notes and exceptions of no particular consequence to the issues.

Handling charges are not provided for in the Central California tariff. As pointed out above, the handling of cargo between ship's tackle and place of rest in California is done by the ship's contracting stevedores and not by the terminals.

The offshore carriers serving California, Oregon and Washington ports have been required by the Commission to publish their own handling charges. See, for example, Pacific Westbound Conference Local Tariff No. 1–W, Rule No. 19, original page No. 59, where the following appears:

The carrier, its agent, or stevedore, shall perform at the expense of the consignor or consignee, the handling service at all Pacific coast ports, at rates hereinafter provided:

1. on terminal direct from place where unloaded from railroad car or other vehicles to ship's tackle,

2. from place of rest on terminal, barge or lighter to ship's tackle, including ordinary breaking down and trucking.

As to handling the Board said in the Puget Sound case at pages 23 and 24:

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. On the other hand, if such receipt and delivery is impracticable or impossible, the carrier must assume as part of its carrier obligation the cost of moving the cargo to where it can be delivered to the consignee

or from where it can be received from the shipper—referred to generally as the place of rest. The carrier cannot divest itself of this obligation by offering a service which it is not prepared to perform. It can, however, separate its rates into two factors, one covering the actual transportation and the other covering the handling between tackle and place where cargo is received or delivered. *J. G. Boswell Co.* v. *American-Hawaiian S. S. Co.*, 2 U. S. M. C. 95; *Los Angeles By-Products Co.* v. *Barber S. S. Lines, Inc.*, 2 U. S. M. C. 106.

The Freas Formula does not take into account the handling of cargo between ship's tackle and place of rest as a terminal *service* but it is included as a use apportioned to the vessel.

The fact that Northwest terminals perform the handling service for the ship while the California terminals do not is no bar to use of the Freas Formula in both areas. Nor are shippers and consignors concerned as to whom such charges are paid. As stated by Mr. Freas on page 9 of his study, "Eventually, the cost of the terminal service as well as that of the water transportation is borne by the consumer."

DOCKAGE CHARGE

The Seattle tariff definition is:

Dockage is the charge assessed against ocean vessels for docking at a wharf, pier or seawall structure, or for mooring to a vessel so docked, or for coming within a slip.

The term is similarly defined in all other Association tariffs as well as in the Central California tariff.

On page 140 of the Freas Study the following appears:

Under dockage are accumulated the costs of furnishing berthing space, facilities for tying up the vessel, and working areas for gear and stevedores.

SERVICE CHARGE

The Seattle tariff defines the service charge as follows:

Except as otherwise provided in individual items, service charge is the charge assessed against ocean vessels, their owners, agents, or operators which load or discharge cargo at the terminals for performing one or more of the following services (subject to Notes 1, 2, 3, and 4):

1. Providing terminal facilities.
2. Arranging berth for vessel.
3. Arranging terminal space for cargo.
4. Check cargo.
5. Receive cargo from shippers or connecting lines and give receipts therefor.
6. Deliver cargo to consignees or connecting lines and take receipts therefor.
7. Prepare dock manifests, loading lists, or tags covering cargo loaded aboard vessels.
8. Prepare over, short, and damage reports.
9. Order cars, barges, or lighters as requested or required by vessels.

10. Give information to shippers and consignees regarding cargo, sailing and arrival dates of vessels, etc.

11. Lighting the terminal.

NOTE 1.—Service charge will not apply on cargo moving under rates named in section 4 of this tariff.

NOTE 2.—Service charge does not include any freight handling, loading, nor unloading operations, nor any labor other than that which is essential to performing the service.

NOTE 3.—When it is required and permitted that the services of checking, receiving and/or delivering cargo as defined in paragraph (A), be performed by the U. S. Government, with its own personnel or with personnel in its employ and under its direction, service charge rates as named in item 49–3 will apply.

NOTE 4.—When owners, agents, or operators of vessels are permitted to perform the services of checking, receiving, and/or delivering of cargo, as defined in paragraph (A), with their own personnel or with personnel directly in their employ and under their direction, service charge rates named in item 49–3 series will apply.

Section 4 of the tariff referred to by Note 1 provides rules, regulations, rates and charges applicable to bulk liquids only.

The Portland, Astoria, Everett, Longview, and Olympia tariffs provide the same definition of service charge as the Seattle Tariff. The Baker Dock Company and Tacoma Terminals tariffs carry the same definition, but provide that as to softwood lumber moving in eastbound intercoastal service the *service charge applies the shipper or owner of the cargo and not against the vessel.* The Vancouver definition differs sharply from those provided in the other Northwest tariffs. It reads:

Service charge is the charge assessed, on the basis of cargo tons handled against vessels, their owners, agents or operators which load or discharge cargo at the terminals, for use of terminal facilities, *for berthage while loading or discharging cargo, for administrative expense in serving the carrier,* and for performing one or more of the following services [emphasis supplied]:

(The list of services is the same as shown above from the Seattle tariff.)

Rules and Regulations Applicable to Lumber and Lumber Products Moving in Intercoastal Trade

Service charge is the charge assessed for performing any one or more of the following services:

1. Arranging terminal space for lumber.
2. Keeping record of lots and parcels of lumber received and handled on dock.
3. Receiving lumber from shippers or connecting lines and giving receipts therefor.
4. Delivering lumber from consignees or connecting lines.
5. Preparing loading lists, manifests, or tags, covering lumber to be loaded aboard vessel.
6. Ordering cars, barges, or lighters, as requested or required.
7. Give information to shippers and consignees regarding lumber shipments, sorting and arrival dates of vessels.

8. Furnish lights for receiving, sorting, and handling of lumber on terminal.
NOTE.—Service charge does not include handling, loading, or unloading operations, or any other than that which is essential to performing the services.

The Port of Bellingham does not publish a service charge for the probable reason that it is in competition with Bellingham Warehouse Company, a wholly-owned subsidiary of Pacific American Fisheries, Inc., which, in connection with its industrial dock at South Bellingham, operates a public wharfinger business, and which does not maintain a service charge against vessels docking there. Bellingham Warehouse Company, while not a respondent, has filed its tariffs with the Board since the date of hearing.

The Port of Bellingham handles less cargo than any other member of the Association, its total volume for the calendar year 1952 amounting to only 2,762 revenue tons, which was about one-tenth of one percent of the total handled by Association members. Sixty percent of the Bellingham tonnage consists of lumber, the rest being general cargo. Ninety percent of its traffic is Alaskan and ten percent Hawaiian. Members of Pacific Westbound Conference will not call at Bellingham for less than 300 revenue tons of cargo or 300,000 board feet of lumber or lumber products. Bellingham is not shown as a terminal port in the Pacific Coast European tariff, but arrangements for calling may be made between shipper and ship.

It is evident that the failure of Bellingham to apply a service charge is no threat to uniformity on the Pacific coast, and the parties do not appear concerned with the operations of Bellingham Warehouse Company.

The Central California tariff definition of the service charge is similar to that provided in the Seattle tariff.

In the Puget Sound case the Board made the following observations as to definitions of service charges, especially pertinent to the one found in the Vancouver tariff:

To include "berthage" with other services "incidental to receiving and delivering of freight" will add still more to the general confusion in the use of terminal definitions. Berthage should be established as a separate item since it is purely a use charge for space occupied by the vessel and has no direct relation to a "service" as such.

The phrase "for use of terminal facilities" is broad enough to comprehend the use of terminal facilities for which compensation is included in other charges, such as wharfage, and should be eliminated. For a like reason, "administrative expense in serving the carrier" should be deleted. Each service presumably bears its proper share of the administrative expense in the charge established for the service, and, to exact payment for such expense in the service charge would be a duplication of charges.

Another expression of the Board on the same subject is found in the *Intercoastal* case at page 394:

In the interest of uniform and clear definitions, we think services included in respondents' service charge should be limited to those concerned with or incidental to the receiving and checking of cargo (the principal item going into the service charge). If respondents desire to make a charge against the vessel for ordering railroad cars alongside, it should be set up as a special charge and not included in the service charge.

In the *California* case the definition of "Service and Other Charges" against the ship used in the Freas Formula is set forth on page 60, n. 6 as follows:

The charge assessed for arranging berth for vessel, arranging terminal space for cargo, checking cargo to or from vessel, receiving outbound cargo from shippers, and giving receipts therefor, delivery of cargo to consignees and taking receipts therefor, preparing manifests, loading lists or tags covering cargo loaded aboard vessel, preparing over, short and damage reports, ordering cars, supplying shippers with vessel information, and lighting terminal. Some definitions also include "use of terminal facilities."

This understandable general confusion as to what the generic term "service charge" means, insofar as application of the Freas Formula is concerned, is readily resolved by referring to the Freas study and the formula itself. How it fits into the whole pattern of terminal operations is described on page 22 of the study as follows:

Regardless of the terminal company's chosen method of doing business, wharfinger revenue is obtained from several or all of the following operations:

(1) Use of space and facilities for docking vessels (charge for which is commonly known as dockage).

(2) Passing cargo over wharf (charge for which is commonly known as wharfage (toll)).

(3) Holding cargo (the charge for holding cargo within a specified "free time" is included in the toll; that made for holding beyond the free time is commonly known as wharf demurrage or storage).

(4) Rental of facilities (this may entail the use of an entire pier or piers for the conduct of a terminal service or of portions of piers for office purposes, storage of gear, etc.).

(5) Miscellaneous vessel services (usually covered by a "service" charge). They do not include any cargo handling operations or labor.

(6) Accessorial services (charged for in various ways). Accessorial services include car or truck loading and unloading, fumigating, sampling, stencilling, labeling, strapping, repacking, etc.

In addition to the services rendered and use of facilities furnished by the wharfinger to the ship as generally described in the *California* case under the caption "Service and other charges," the Freas study and formula specifically list and explain on pages 36, 88, 119, 120 and 140:

(1) Assembling cargo for the account of the vessel.
(2) Handling lines.
(3) Any other labor expense incurred for the benefit of the vessel.
(4) Costs incurred in rendering clerical services for the vessel and areas used therefor.

So far as service charges are concerned it is obvious that it will be necessary to reconcile the tariff definitions with the Board's decisions and the Freas Formula before the "substantial doubt" can be removed and the goal of uniformity can be attained. However, there can be no doubt that the service charge, properly defined, is a legitimate charge against the vessel as to lumber or bulk commodities as well as to general cargo. It would, of course, be an unreasonable practice to make a specific charge for checking when that service is not performed. A cease and desist order should be entered prohibiting any of the respondents from collecting service charges from shippers or receivers of freight, including lumber moving in the eastbound intercoastal trade.

THE FREAS FORMULA

The Association employed Philip E. Linnekin, a certified public accountant, to analyze the operations of the members and determine the applicability of the Freas Formula to their wharfinger functions. His experience in Pacific coast terminal cost accounting dates from 1946 when he was assistant to Mr. Freas in the *California* case. Since that time Mr. Linnekin has been continually engaged in making current applications of the formula to both California and Northwest terminal operations, has trained port staff personnel in its use, and has established systems improvements to facilitate accumulation of accounting data for application of the formula. He testified on behalf of the Association, and his qualifications as an expert witness were readily accepted by all parties.

Witness Linnekin's testimony is that both from an organizational and operational point of view the principles of cost accumulation and segregation in the Freas Formula apply to the Northwest marine terminal industry to the same extent as in California. He states that the applied formula recognizes in both areas the division of responsibility between the vessel and the cargo and the underlying principle of allocating costs according to use.

Eight members of the Asssociation,[4] which account for about 80 percent of the entire volume of the total business done by all members, were selected as representative for the purpose of analysis.

[4] Port of Seattle; Port of Tacoma; Commission of Public Docks, Portland; Port of Longview; Alaska Terminal & Stevedoring Co.; Ames Terminal; Olympic Steamship Co.; and Port of Vancouver, Wash.

Witness Linnekin's approach to the studies in the Northwest was that used by Mr. Freas in the *California* case. Physical inspections were made of the facilities; volume and character of cargo handled were ascertained; the condition of the records and accounting systems were examined; and most of the detail work was done by terminal personnel under his direct supervision.

As explained in the *California* case, cost allocations are grouped under three main headings (1) Carrying Charges, (2) Dock Operating Costs, and (3) General and Administrative expenses. The formula itself consists of six schedules. Schedule I provides respectively for the development and separation of carrying charges; Schedule II for the further separation of the carrying charges developed in Schedule I and for the development and separation of the dock operating and general and administrative expenses; and Schedules III, IV, and V for the further breakdown respectively of the costs assignable to service charges, tolls, and wharf demurrage. Schedule VI summarizes the results of the other five.

The application of the Freas Formula to California ports is shown in the appendix to the Commission's decision in the *California* case, Howard Terminal having been selected for illustrative purposes. Application of the formula to the Northwest terminals is shown in Schedules I and II of the appendix hereto, East Waterway and Lander Terminals of the Port of Seattle being used as an example. The basic cost allocations are contained in these two schedules. All of the cost items appear in the Northwest studies as they did in the *California* case except for maintenance which represents a 5-year average in the Northwest whereas the same item represented only 1 year in the California study.

Schedule I covers the accumulation and allocation of plant carrying charges (facility costs) between waterways, aprons, cargo areas, rail and truck areas, and other wharfinger and nonwharfinger areas. The cost items include provision for return on land and structures, taxes on land and structures, insurance on structures, depreciation and maintenance of structures.

Schedule II provides for the accumulation of all costs and their allocation between services performed for the vessel and services performed for the cargo. The first part of the schedule deals with the allocation of the carrying charges developed in Schedule I. The carrying charges are allocated to the various services on the same bases as in the *California* case.

In general, witness Linnekin proposes no change in the incidence of costs against vessel or cargo, although, as in the *California* case,

his study reveals need for increased terminal revenue, deficiencies existing in both carrier and cargo revenue. No party of record challenges the structure of the formula or use of it in the Northwest.

But, as indicated above, a refinement in the formula is necessary to reflect handling of cargo between place of rest and ship's tackle by the Northwest terminals, a labor activity which is regarded as stevedoring in California and consequently a nonwharfinger service under the Freas Formula. The existence of this service in the Northwest is recognized and provided for by witness Linnekin by adding column (f) to Schedule II. The direct costs of handling are segregated on the records of the terminal operators, and the indirect operating and administrative costs are allocated to this service in the same manner as they are allocated to other services in accordance with the principle embodied in the Freas Formula of allocating costs to use. In the interest of uniformity all carrying charges against the vessel for the working areas in the handling service are allocated to dockage by witness Linnekin, although he agrees with Mr. Guy M. Carlon, consultant to the Board who participated in this proceeding, that under the Freas theory of use the carrying charges for aprons and shed and open cargo areas which are allocated in his studies to dockage, should be allocated to the handling charge. The Board should find that under the Freas Formula in the Northwest these charges are properly assignable to handling instead of dockage.

No problem is presented in applying the Freas Formula to the terminal facility activity, the costs of which are designed to be recovered in both California and the Northwest through the service charge against the vessel. The cost factors used by witness Linnekin are the same as those appearing in the Freas Formula (Schedule II) with the exception of two items, i. e. (1) assembling cargo for the account of vessel and (2) handling lines. So far as the Association is concerned, assembling cargo for account of vessel appears to be included in the handling charge, while handling lines is regarded as part of the stevedoring, a nonwharfinger function, and consequently unrelated to the service charge. The following table shows the composition of costs that are included by witness in the service charge, based upon the application of the Freas Formula to the eight Association terminals studied:

Cost element (a)	Amount (b)	Percent, total (c)
Direct cost of checking	$441,764	39.40
Indirect costs of service charges:		
Superintendence	10,399	.93
Clerical other than checking	75,895	6.77
Cleaning sheds and docks	11,008	.98
Watchmen	17,584	1.57
Utilities	6,341	.56
Industrial insurance	7,728	.69
Claims	2,824	.25
Miscellaneous dock expense	12,094	1.08
Miscellaneous dock equipment	4,365	.39
Carrying charges—miscellaneous	20,337	1.81
Administrative expense	52,284	4.66
Total indirect costs	220,859	19.69
Dockage deficiency	[1] 458,757	40.91
Total costs recoverable by service charges	[1] 1,121,380	100.00

[1] Includes $386,787 for carrying charges on aprons and cargo areas (sheds and open) allocated by witness Linnekin to dockage, but recommended herein as properly allocable on the basis of use to the handling charge. If so allocated, the total costs recoverable by the service charge would be reduced to $734,593.

Recognizing that the general confusion resulting from the service charge is caused by its tariff definition or description, witness Linnekin suggests that the California and Association tariffs be clarified to indicate clearly that the service charge includes provision for the recovery of the cost of terminal structures and/or facilities provided for the benefit of the vessel to the extent that such costs are not recovered through dockage or handling charges. He recommends that the descriptive heading of the tariff item which now reads "Service Charge" be amended to read "Service and Facilities Charge" and that the clause in the item reading "Providing Terminal Facilities" be eliminated and in lieu thereof the following description be inserted:

Providing for the vessel terminal structures and/or facilities necessary to the performance of the services enumerated below and to enable the vessel to accomplish the transfer of cargo

(a) from vessel to consignees, their agents or connecting carriers, or

(b) from shippers, their agents or connecting carriers to vessel.

AMERICAN MAIL LINE, LTD.

Respondent American Mail Line, Ltd., leases Pier 88 in Seattle from the Great Northern Railroad and operates it as part of its steamship operations. It also furnishes terminal facilities there for Moore-McCormack Lines, Inc., and Blue Star Line.

American Mail Line's terminal rates, charges, rules and regulations are published in three individual tariffs which are on file with the Board: Terminal Tariff No. 1-B, F. M. B.—T—No. 1, applicable to transpacific cargo; Terminal Tariff No. 3-B, F. M. B.—T—No. 5, applicable to cargo in the South American and Caribbean Sea trades; and Terminal Tariff No. 2, F. M. B—T—No. 2, applicable to vessels using the facility. This means that American Mail Line departs from the practices of California and Association terminal operators by naming in one tariff all charges against cargo and in another, all charges against the vessel. There is also a marked difference in the construction of its tariffs with a view towards simplicity. In Terminal Tariff No. 1-B, applicable to transpacific cargo, a single rate is named to apply on cargo "delivered to and received from trucks" and another single rate for cargo "loaded to or unloaded from railroad cars." This avoids naming separate rates for wharfage, handling, loading and unloading. In Terminal Tariff No. 3-B, applicable to cargo in the South American and Caribbean Sea trades, specific charges are made for wharfage and loading or unloading and reference is made to steamship conference tariffs for the handling charges. Terminal Tariff No. 2, naming charges against the vessel, carries only two items of general application, (1) dockage and (2) terminal rates. As to the scope of dockage there is no difference between American Mail, Association and California tariffs. The terminal rates are on a specific commodity basis, divided between railroad and motor carrier traffic. While American Mail Line does not publish a service charge against the vessel, its dockage charge is higher than that made by Association terminals.

No party challenges either the lawfulness of American Mail Line's terminal practices or the system of cost accounting used. Obviously the Freas Formula could not be easily adjusted to its operations because of the difference in breakdown of the factors of wharfage, dockage, handling, carloading and unloading, and the complete absence of the service charge. There is no suggestion of record that American Mail Line adopt the formula.

THE INTERCOASTAL CASE

The *Intercoastal* case was a complaint and answer proceeding and the conclusions reached were based upon a limited record. No consideration was given to the necessity of the imposition of the service charge to obtain a fair return on investment in the terminal facilities used by the vessel or to the division of responsibility to the terminal between the vessel and the cargo. In addition to condemning the

service charge as an unlawful practice the Commission referred the case to the examiner for further proceedings on complainants' claim for reparation. In view of the fact that the figures of record herein prove a general deficiency in revenue, including that sought to be recovered through the service charge, it seems clear that there is no basis upon which reparation could be paid. Appendix II hereof shows the revenue, expenses, and gain or deficiency of the eight operators included in the study.

For these reasons, and based upon the more complete record in this case, the Board should reverse the decision in the *Intercoastal* case, set aside the cease and desist order entered therein, and close the record without further proceedings on the question of reparation.

Ultimate Conclusions

The Board should:

(1) Approve the Freas Formula as a proper method of segregating terminal costs and carrying charges, and apportioning such costs and charges to the various wharfinger services at Pacific northwest ports;

(2) Require those California and Pacific northwest terminal operators which make a service charge to adopt a uniform definition and/or description of such charge consistent with that recommended by witness Linnekin herein;

(3) Find that respondents operating publicly owned terminals are entitled to a fair return on investment;

(4) Reverse the findings and conclusions in the *Intercoastal* case;

(5) Complete the record and dispose of the issues remaining to be decided in the *California* case;

(6) And give consideration to instituting a nationwide rulemaking proceeding under section 4 of the Administrative Procedure Act and the Shipping Act, 1916, to make as uniform as possible the allocation of terminal charges between ship and cargo, and as uniform as possible the definitions of tariff services offered by all persons carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with common carriers by water throughout the United States, its Territories and possessions.

An appropriate order should be entered.

APPENDIX I

Port of Seattle, Freas Formula Applied to East Waterway & Lander Terminals, Schedule I—Plant carrying charges, calendar year 1952

Line No.	Item	Total cost	Bases	Waterway	Cargo areas		Open	Rail and truck areas	Wharfinger	Non-wharfinger
					Aprons	Sheds				
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
1	Return—land	$42,824	1	$6,519	$1,271	$8,120	$15,785	$4,749	$698	$5,682
2	Return—structures and facilities	60,268	1		10,159	23,518	716	13,691	9,636	2,548
3	Insurance—structures only	1,940	2		343	709	17	549	279	43
4	Depreciation—substructure	4,561	2		1,607	1,316	113	1,071	393	61
5	Depreciation—superstructure	2,931	2			2,350			185	396
6	Depreciation—rail and truck facilities	1,094	3					1,094		
7	Depreciation—service system	946	3						946	
8	Maintenance—substructure	29,955	2		9,559	9,136	456	6,373	3,826	605
9	Maintenance—superstructure	19,776	2			16,020			2,242	1,514
10	Maintenance—rail and truck	8,276	3					8,276		
11	Maintenance—service system	7,084	3						7,084	
12	Total carrying charges	179,655		6,519	22,939	61,169	17,087	35,803	25,289	10,849

Key to bases numbers (col. c)
1. Apportion according to value.
2. Direct allocation, or value if separate data not available.
3. Direct allocation.

Port of Seattle, Freas Formula applied to East Waterway & Lander Terminals, Schedule II—Allocation of costs to services, calendar year 1952

Line No.	Item	Total costs	Bases	Dockage	Service charges	Handling charges	Cargo				
							Wharfage	Wharf demurrage	Car loading, unloading	Accessorial services	Nonwharfinger
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)
	Carrying charges (schedule 1)										
1	Waterway	$6,519	1	$6,519							
2	Aprons	22,939	1	22,939							
3	Cargo areas—sheds	61,169	2	5,811			$46,489	$3,058	$5,811		
4	Cargo areas—open	17,087	2	1,623			12,987	854	1,623		
5	Rail and truck areas	35,803	1				35,803				
6	Other wharfinger	25,289	3	1,661	$3,781	$7,908	5,212	215	1,515	$4,997	
7	Nonwharfinger	10,849	1								$10,849
8	Total carrying charges	179,655		38,553	3,781	7,908	100,491	4,127	8,949	4,997	10,849
	Dock operating charges										
9	Superintendence	9,815	3	645	1,467	3,069	2,023	83	588	1,940	
10	Checking	69,110	1		69,110						
11	Car loading and unloading	20,250	1						20,250		
12	Handling	144,592	1			144,592					
13	Accessorial services	91,335	1							91,335	
14	Clerical other than checking	30,967	2	1,356	13,409	6,456	4,255	175	1,237	4,079	
15	Cleaning sheds and docks	34,228	3	2,249	5,117	10,703	7,054	291	2,050	6,764	
16	Watchmen	14,988	3	985	2,241	4,687	3,089	127	898	2,961	
17	Utilities	6,266	3	412	937	1,959	1,291	53	375	1,239	
18	Industrial insurance and medical	11,802	4	118	2,393	5,007	374	15	732	3,163	
19	Claims	1,238	1		309	620			309		
20	Cartage	3,438	1			3,438					
21	Miscellaneous dock expense	25,749	3	1,692	3,849	8,052	5,307	219	1,542	5,088	
22	Cargo handling equipment	74,980	5			65,758			9,222		
23	Other equipment	4,863	3	319	727	1,521	1,002	41	291	962	
24	Total dock operating charges	543,621		7,776	99,559	255,862	24,395	1,004	37,494	117,531	
25	General administrative expense	138,146	6	8,979	20,045	51,142	24,217	995	9,007	23,761	
26	Total costs	861,422		55,308	123,385	314,912	149,103	6,126	55,450	146,289	10,849

Key to bases numbers (col. c).
1. Direct allocation.
2. Allocate according to use.
3. Direct allocation according to nature where determinable, remainder to all services based on the sum of carrying charges exclusive of waterway and nonwharfinger and direct labor items.
4. Direct labor.
5. Cargo handling labor.
6. The sum of carrying charges and dock operations charges (exclusive of nonwharfinger if that portion was excluded from total cost, but including nonwharfinger if that portion was not excluded from total cost).

APPENDIX II

Northwest Marine Terminals Association, summary of revenue and expenses, all 8 operators included in study

Line No.		Revenue (1)	Expense (2)	Gain or deficiency (3)
	(A) GENERAL CARGO			
	Charges to vessel			
1	Dockage	$110,639	$489,301	[2] ($378,662)
2	Service charge	512,417	633,878	(121,461)
3	Handling charge	1,508,681	1,701,602	[2] (192,921)
4	Total charges to vessel	2,131,737	2,824,781	(693,044)
	Charges to cargo			
5	Wharfage	730,056	1,609,886	(879,830)
6	Wharf demurrage	103,161	141,224	(38,063)
7	Car loading and unloading	319,529	515,678	(196,149)
8	Truck loading and unloading	1,002	6,725	(5,723)
9	Accessorial services	517,515	493,695	(23,820)
10	Total charges to cargo	1,671,263	2,767,208	(1,095,945)
11	All charges	3,803,000	5,591,989	(1,788,989)
	(B) LUMBER			
	Charges to vessel			
12	Dockage	13,802	93,897	[2] (80,095)
13	Service charge	57,746	28,745	29,001
14	Handling charge	144,500	144,735	[2] (235)
15	Total charges to vessel	216,048	267,377	(51,329)
	Charges to cargo			
16	Wharfage	90,978	363,162	(272,184)
17	Wharf demurrage	5,897	10,800	(4,903)
18	Carloading and unloading	71,348	[1] 124,569	(53,221)
19	Truck loading and unloading	29,547	18,427	(11,120)
20	Accessorial services	75,018	77,581	(2,563)
21	Total charges to cargo	272,788	594,539	(321,751)
22	All charges	488,836	861,916	(373,080)

[1] Includes $33,214 truckloading and unloading.

[2] If the carrying charges on aprons and cargo areas (shed and open), amounting to $324,533 on general cargo terminals and $62,254 on lumber terminals, which have been allocated to dockage by witness Linnekin in these results, be allocated to the handling charge on the basis of use as recommended herein, the expense and deficiency here shown for dockage would be reduced by those amounts and the expense and deficiency for the handling charge would be correspondingly increased.

FEDERAL MARITIME BOARD

No. S-57

STATES MARINE CORPORATION AND STATES MARINE CORPORATION OF DELAWARE—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON THEIR TRI-CONTINENT, PACIFIC COAST/FAR EAST, AND GULF/MEDITERRANEAN SERVICES

No. S-60

ISBRANDTSEN COMPANY, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY AGREEMENT—EASTBOUND ROUND-THE-WORLD SERVICE

Submitted May 24, 1956. Decided June 8, 1956

REPORT OF THE BOARD ON INTERLOCUTORY APPEAL

BY THE BOARD:

This matter has been presented on interlocutory appeal, under Rule 10 (m) of our Rules of Practice and Procedure, from rulings of the hearing examiners in these proceedings. In each proceeding the examiner has determined, inter alia, (1) that trade route essentiality determinations of the Maritime Administrator ("Administrator") under section 211 of the Merchant Marine Act, 1936 ("the 1936 Act"), constitute relevant and material evidence for production in proceedings before the Board under section 605 (c) of the 1936 Act, and are entitled to some weight in such proceedings; (2) that the Administrator should produce the official documents containing formal determinations made under section 211 of the 1936 Act, together with the reasons for the determination if contained in the documents; and (3) that the Administrator may produce his reasons for the 211 determination, if not contained in the official documents, in a manner convenient to him, whether by submission of minutes, staff memoranda, or other study, or by summary statement.

While the examiners ruled on other issues, also appealed to the Board, this report will be confined to the rulings on the section-211 issues.

Oral argument was heard, and Public Counsel (for the Administrator), States Marine Corporation and States Marine Corporation of Delaware ("States Marine"), American President Lines, Ltd. ("APL"), American Mail Line Ltd. ("AML"), and Isbrandtsen Company, Inc., appeared in partial or full opposition to the examiners' rulings; United States Lines Company ("U. S. Lines"), Moore-McCormack Lines Inc. ("Moore-Mac"), Lykes Bros. Steamship Co., Inc. ("Lykes"), Pacific Far East Line, Inc. ("PFEL"), and Weyerhaeuser Steamship Company ("Weyerhaeuser") appeared in support of the rulings.

The issue here presented, simply stated, is whether, under the 1936 Act and Reorganization Plan No. 21 of 1950 ("Plan 21"), section-211 determinations are relevant as *prima facie* correct, or otherwise relevant in sections 605 (c) proceedings, or whether the determinations made by the Board under section 605 (c) are made independently of the Administrator's action under section 211.[1]

Insofar as is here pertinent, section 211 of the 1936 Act, Plan 21, and section 605 (c) of the 1936 Act provide:

SEC. 211. The Commission is authorized and directed to investigate, determine, and keep current records of—

(a) the ocean services, routes, and lines from ports in the United States, or in a Territory, district, or possession thereof, to foreign markets, which are, or may be, determined by the Commission to be essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States, and in reaching its determination the Commission shall consider and give due weight to the cost of maintaining each of such steamship lines, the probability that any such line cannot be maintained except at a heavy loss disproportionate to the benefit accruing to foreign trade, the number of sailings and types of vessels that should be employed in such lines, and any other facts and conditions that a prudent business man would consider when dealing with his own business, with the added consideration, however, of the intangible benefit the maintenance of any such line may afford to the foreign commerce of the United States and to the national defense;

(b) The type, size, speed, and other requirements of the vessels, including express-liner or super-liner vessels, which should be employed in such services or on such routes or lines, and the frequency and regularity of the sailings of such vessels, with a view to furnishing adequate, regular, certain, and permanent service;

* * * * * * *

SEC. 105 OF PLAN 21. *Transfer of subsidy award and other functions to the Board.*—The following functions of the United States Maritime Commission are hereby transferred to the Board:

[1] Other statutory provisions relevant to this report are set out in the Appendix.

(1) The functions with respect to making, amending, and terminating subsidy contracts, and with respect to conducting hearings and making determinations antecedent to making, amending, and terminating subsidy contracts, under the provisions of Titles V, VI, and VIII * * *: *Provided further*, That, except as otherwise hereinbefore provided * * * the functions transferred by the provisions of this section 105 (1) shall exclude the making of all determinations and the taking of all actions (other than amending or terminating any subsidy contract), subsequent to entering into any subsidy contract, which are involved in administering such contract: *Provided further*, That actions of the Board in respect of the functions transferred by the provisions of this section 105 (1) shall be final.

* * * * * * *

SEC. 605 (c). No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; and no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Commission shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Commission, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, and ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper.

DISCUSSION

By Plan 21, the functions under sections 211 (a) and 211 (b) were assigned exclusively to the Secretary of Commerce rather than to the Board. Message from the President of the United States, H. Doc. 526, 81st Cong., 2d sess.; hearings before Committee on Expenditures in the Executive Departments on S. Res. 265, 81st Cong., 2d sess. ("the congressional hearings"), pp. 35–36, 53, 65, 151. Those functions were vested in the Secretary of Commerce [2] in keeping with his position as adviser to the President on matters of national transportation policy,[3] to be exercised in consonance with the general maritime policy laid down by Congress in section 101 of the 1936 Act. Appeal from the Administrator's section-211 findings lies only to the Secretary and not to the Board.

[2] Delegated to the Administrator by Commerce Department Order 117.
[3] Congressional hearings, pp. 40, 41.

While the Board has been allocated the functions of making, amending, and terminating subsidy contracts, wherein the Board alone determines the recipients and amounts of awards, it is clear from examination of the congressional hearings that the Board determinations are limited and circumscribed, in effect, by the route patterns and requirements as established by the Administrator.[4] The Secretary has no power to alter, limit, modify, or review Board determinations made under sections 605 (c) or 601 (a).

The distinction is this: while the Board, after advisory hearings under section 605 (c), determines whether or not that section is a bar to award of subsidy to the applicant, other determinations to be made by the Board under 601 (a) *may* operate as a bar to the award whether or not section 605 (c) is a bar, and the Administrator's findings under section 211 may similarly bar or limit award of subsidy on a particular route. Neither the Board's findings under section 601 (a) nor the Administrator's section-211 determinations affect the Board's section 605 (c) findings; all three findings are necessary independent steps to be taken prior to final award of subsidy by the Board.

Put otherwise, while "the Board alone will determine to whom subsidies shall be granted and will make and amend the subsidy contract," [5] such determinations are ineffective unless the Administrator has determined or until the Administrator subsequently determines, under section 211,[6] that the trade route with which the Board has been concerned in its 605 (c) findings and 601 (a) determinations is essential. While recommendations concerning essential routes may be made to the Administrator by the Board, and section 605 (c) hearings may be held by the Board prior to a section-211 finding, the determination of essentiality must, nevertheless, be made by the Administrator before subsidy may be awarded. *U. S. Lines Co.—Subsidy, Route 8*, 3 F. M. B. 713, 715 (1952); *Grace Line Inc.—Subsidy, Route 4*, 3 F. M. B. 731, 732 (1952).

Conversely, if the Board is unable to make the requisite findings under either sections 601 (a) or 605 (c), it is obliged, by the 1936 Act, to deny an application for subsidy regardless of the Administrator's section-211 findings. Further, in dischaging its duties under section 605 (c), where the precise route, the sailing frequencies thereon, or types of vessels to be operated thereon, is in issue in relation to the purposes and policies of the 1936 Act, the Board is obliged to deter-

[4] Congressional hearings, p. 40.

[5] Message from the President, *supra*.

[6] The function under sec. 211 was described by Senator Brewster, at p. 36 of the congressional hearings, as "* * * a veto power on the route awards * * *."

mine the issues without regard to the Administrator's section-211 determinations, and the Board's findings are final.[7] Where the determinations are in conflict, however, no effect may be given to the Board's determinations to the extent they are in excess of the Administrator's section-211 findings unless and until the Administrator, acting on the advice of the Board or on the record compiled in the section-605 (c) proceedings, alters his prior section-211 determination.

While the Maritime Commission, in whom both the policy making and subsidy awarding functions were vested, has affirmed [8] and revised [9] prior section-211 determinations in reports issued after section-605 (c) hearings, the Commission on those occasions merely used the record adduced in the 605 (c) proceeding as the basis for reexamining earlier determinations of essentiality, in the same manner as it might have relied on staff memoranda. The same result can presently occur where the Administrator desires to utilize a similar record as the basis for a 211 determination or modification.

The determinations to be made by the Administrator and by the Board under sections 211 and 605 (c), respectively, are essentially different from each other, although the determinations may, as stated, be based on the same information. The section-605 (c) determinations are quasi-judicial in nature and subject to the Administrative Procedure Act. The section-211 determination is purely an *ex parte* [10] exercise of delegated legislative power whereby the Administrator defines, as a matter of national policy, the limits within which the Board may, under the standards of titles I and VI of the 1936 Act, award subsidy to a particular applicant. The section-211 determinations, like the 1936 Act itself, or like congressional limitations in appropriation acts on subsidized sailings, are not relevant in a section-605 (c) proceeding; they are, rather, a legislative limitation on the Board's power to award subsidy. Within that limitation, however, Board determinations relative to making, amending, or terminating subsidy contracts are independently arrived at and are final.

In consonance with the foregoing, we determine that neither the Administrator's determination nor the data upon which it is based will be received in evidence in a section-605 (c) proceeding.

An appropriate order will be entered after resolution of the other issues before us on appeal from the examiners' rulings in these proceedings.

[7] *American President Lines* v. *Federal Maritime Board,* 112 F. Supp. 346 (D. C. D. 1953).

[8] *Am. Sou. African Line, Inc.—Subsidy, S. and E. Africa,* 3 U. S. M. C. 277, 287 (1938).

[9] *Am. Sou. African Line, Inc.—Subsidy, Route 14,* 3 U. S. M. C. 314, 320 (1947).

[10] See description of Senator Magnuson at 96 Congressional Record 7316.

SECTION 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

SECTION 601 (a). The Commission is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States * * *

FEDERAL MARITIME BOARD

No. 767

AGREEMENT AND PRACTICES PERTAINING TO BROKERAGE—PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT NO. 5200)

IN THE MATTER OF AMENDMENT TO BROKERAGE RULE 21 PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT NO. 5200)

Submitted January 13, 1956. Decided June 8, 1956

REPORT OF THE BOARD ON PETITION FOR RECONSIDERATION IN PART BY THE BOARD:

Petitioners, members of the Pacific Coast European Conference ("the conference"), seek reconsideration of our report herein on motions for interim order and related petitions, 4 F. M. B. 696, wherein we found an amendment to a conference tariff rule relating to brokerage to have been effectuated prior to our approval, in violation of section 15 of the Shipping Act, 1916 ("the Act"). Subsequent to issuance of the report we issued an order declaring effectuation of the amendment to the brokerage rule (Amended Rule 21), while unapproved, to be a violation of section 15. The report and order are considered by petitioners to be erroneous since, it is urged, (1) the Board has no statutory right to issue a declaration of unlawfulness, and (2) the decision is based on critical errors of fact and law.

In its first argument the conference states that under section 15 of the Act we are given the right to disapprove agreements on findings specified in section 15, and to approve all other agreements. We have, it is stated, no other powers. The power to issue a declaration of unlawfulness, the conference states, is not included in the statutory language of section 15, and therefore, "since the Board has sought to issue an order and decision in excess of its statutory powers, *both the order and decision are nullities.*" [Emphasis supplied.]

Replies have been filed by Public Counsel, Customs Brokers and Forwarders Association of America, Inc., Pacific Coast Customs and Freight Brokers Association and Los Angeles Customs and Freight Brokers Association, American Union Transport, Inc., and New York Freight Forwarders and Brokers Association, Inc. ("New York Brokers"), the latter party also having filed a cross-petition for reconsideration. All of the replies point to section 5 (d) of the Administrative Procedure Act [1] ("APA") as a complete answer to the first conference contention. The replies further consider that we have properly construed the law in this case. When section 5 (d) was in this manner brought to its attention, the conference, in disregard of our Rules of Practice and Procedure,[2] filed a reply to the briefs in opposition to its petition. In that reply the conference asserted, in contrast to the position taken in its petition, that it "does not challenge the Board's power to hold, *in a proper proceeding*, that an agreement among common carriers is such as to require approval under Section 15 of the Shipping Act before it may lawfully be carried out." [Emphasis in text.] After conceding that such a decision may be made under our Rule 5 (g) or 5 (i), which deal with show cause and declaratory orders, respectively, the conference states:

> We challenge the power of the Board to declare, in a decision in response to an application for an interim order, that any action of respondents is *unlawful* under the Shipping Act. Such a finding may be made only after full hearing in accordance with the requirements of the Administrative Procedure Act and the rules of the Federal Maritime Board. A recommended decision of the trial examiner following a full hearing is essential and that has not been had in this proceeding on the request for an interim order. [Emphasis in original.]

While we do not countenance disregard for our Rules, the gravity of either of the conference's contentions in this instance merits a waiver of the Rules and full consideration of the Board's authority.

The arguments, taken singly or together, constitute an attempt to strip this Board of regulatory authority.

THE PETITION

The petition considers that we exceeded our powers in stating, at page 703 of our report on motions, *supra*, that—

> * * * where we become aware of an agreement * * * which may be * * * unapproved * * * within the meaning of section 15, assuming no issues of fact

[1] Section 5 (d) of the APA provides that—

"The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

[2] Rule 5 (p) provides in part: "A reply to a reply is not permitted." While the New York Brokers filed a cross-petition with its reply, the conference reply did not deal with the matters contained in the cross-petition.

or administrative discretion, we are authorized under section 22* to order the carriers to show cause * * * why the agreement should not be declared to be unlawful as an unapproved agreement within the meaning of the Act. The sanctions which we may then impose are, first, a declaration of unlawfulness of the agreement under section 15 * * *.

In support of its argument, the conference selects the Maritime Commission's decision in *Reliance Motor Car Co.* v. *Great Lakes Transit Corp.*, 1 U. S. M. C. 794 (1938).[3] In that proceeding the Commission rejected complaints verified more than 2 years after the date of alleged injury although filed, in unverified form, in less than 2 years after the proper date, holding that the explicit requirements, in section 22 of the Act, that complaints be both sworn and filed within two years after accrual of the cause of action, are jurisdictional.

The citation of this decision in the petition in support of an argument that we have power, in section-15 matters, only to approve or disapprove agreements between carriers,[4] is at odds with the conference admission, in its reply, that we may, in a proper case, declare agreements to be unlawful as unapproved under section 15. It is necessarily an assertion, moreover, that the authority granted in section 22, which authorizes us, in proceedings commenced by complaint or upon our own motion, to make such order as we deem proper, is limited by the express authority granted elsewhere in the Act.

If we should accept the above conclusion we would likewise be required to say, in the absence of express terms in the Act, that we have no power to order carriers and other persons subject to the Act to cease and desist from violating sections other than 17,[5] or to seek an injunction to restrain a practice of a single carrier pending our decision on the merits of the practice.[6] If our powers are so restricted

*U. S. Nav. Co. v. Cunard S. S. Co., 284 U. S. 474, 486 (1932): "If there be a failure to file an agreement as required by § 15, the board, as in the case of other violations of the act, is fully authorized by § 22, *supra*, to afford relief upon complaint or upon its own motion."

[3] Cited by petitioner as a Shipping Board report.

[4] The conference overlooks another power included in the statutory language of section 15, i. e., the power to modify agreements. An order to modify an agreement necessarily includes a disapproval of that agreement in part, a declaration that effectuation of the part disapproved will be thenceforth unlawful, and a requirement that the parties to the agreement thereafter cease and desist from effectuation of that which has been disapproved. Our authority to require modification of agreements has been upheld by the courts in *Atlantic & Gulf/West Coast, Etc.* v. *United States*, 94 F. Supp. 138 (S. D. N. Y. 1950); *Pacific Westbound Conference* v. *United States*, 94 F. Supp. 649 (N. D. Calif. 1950).

[5] Section 17 specifically authorizes issuance of "an order that the carrier shall discontinue demanding * * * any * * * unjustly discriminatory or prejudicial rate, fare, or charge."

[6] In *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775 (2d Cir. 1948), petition for certiorari dismissed, 336 U. S. 908, the Court of Appeals upheld the power of a District Court to issue an injunction in a matter wherein the Maritime Commission intervened as a party plaintiff. The Act does not expressly authorize this agency

there is no logical basis for asserting that we have exclusive primary jurisdiction over violations of the Act.[7]

The argument is unsound, however. The powers granted to us by the Act are broad.[8] It is inconceivable that Congress would have granted antitrust law immunity to agreements between carriers which might, in the absence of such immunity, offend those laws, and yet have denied the agency charged with supervision over those agreements the power to protect the public by declaring a given agreement to be unlawful, as unapproved, and/or by requiring the carriers to cease and desist from effectuating the agreement prior to approval or after disapproval.[9] None of these powers is specified in the Act, yet each has been vested implicitly in us as necessary to the "effective government supervision" [10] contemplated by the Act. Section 22 of the Act, in permitting us to make such order as we deem proper, gives us that authority. In our report on motions, *supra*, at page 704, we stated:

> The question of our authority to suspend amended Rule 21 during the pendency of proceedings in Docket 767 requires little discussion. Briefly, we considered this Board to be without authority, express or implied, to suspend or stay approved *or unapproved* agreements between carriers. * * * In the present case we are not authorized to order the conference to cease and desist from applying amended Rule 21 either prior or subsequent to a determination of the status of the rule under section 15 of the Act. [Emphasis supplied.]

Since that report, a realization of the full import of *U. S. Nav. Co.* v. *Cunard S. S. Co.*, *supra*, compels us to reverse the foregoing lan-

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to petition for an injunction or intervene as plaintiff in a carrier's petition for an injunction prior to issuance of an order capable of being enforced by the courts. It is noted that in our brief opposing a petition for writ of certiorari in that proceeding, we urged the Supreme Court that the necessity and propriety of such an agency action "was foreshadowed in *State of California et al.* v. *United States et al.*, 320 U. S. 577, in which case this Court said:

'Finding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, [1] within the general framework of the Shipping Act, fashion the tools for so doing.'

"[1] Not only 'may' but 'must.' As stated elsewhere in the opinion the Commission is 'charged by law with the duty to do so.'"

[7] See *United States Nav. Co.* v. *Cunard S. S. Co.*, 50 F. 2d 83, 91 (2d Cir. 1931): "[The Shipping Board] has exclusive jurisdiction here, because of the nature of the questions involved and the *broad powers* given to it under the act." [Emphasis supplied.]

[8] See footnote 7.

[9] Cf. *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 487:

"* * * it reasonably cannot be thought that Congress intended to strip the board of its primary original jurisdiction to consider such an agreement and 'disapprove, cancel, or modify' it, because of a failure of the contracting parties to file it as § 15 requires. A contention to that effect is clearly out of harmony with the fundamental purposes of the act and specifically with the provision of § 22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper."

[10] 4 Alexander Report (H. Doc. 805, 63d Cong., 2d sess., 1914).

guage of our report insofar as it disclaims the power to issue cease and desist orders, or the equivalent, the power to stay an unapproved agreement.[11] In that case a petition for an injunction was filed under the Clayton Act to restrain the respondents from engaging in concerted acts both within the scope of condemnation of the Sherman and Clayton Acts and also within the apparent prohibition of the Act. The acts complained of resulted from an agreement between common carriers unfiled with and unapproved by the Shipping Board. The bill was dismissed by the District Court as stating matters within the exclusive primary jurisdiction of the Shipping Board. On review, the Court of Appeals considered the most important question presented to be whether the antitrust law immunity granted to agreements between carriers in section 15 of the Act is limited to those agreements which have been approved under that section. The court then stated, at page 89:

> It is said that the foregoing clause leaves a private suitor free to seek *an injunctive remedy* under the Clayton Act so long as the agreement has not been filed and approved. * * * *The Shipping Act complete provides remedies* for all the alleged wrongs * * *. [Emphasis supplied.]

At page 90 the court stated:

> The Shipping Board may determine whether any agreement such as is described in the bill has actually been made, and, if it has, may order it filed and require the parties to cease from acting under it unless and until it is approved.

In holding that actions concerning unapproved as well as approved agreements are within the exclusive primary jurisdiction of the Shipping Board, the court appeared to have been influenced greatly by the injunctive power over unapproved agreements it considered to be vested in the Shipping Board. In the court's view, the Act provides remedies as complete[12] as those available to private suitors under the antitrust laws. On review the Supreme Court stated:[13]

> * * * If there be a failure to file an agreement as required by § 15, *the board, as in the case of other violations of the act, is fully authorized* by § 22, *supra*, to afford relief upon complaint or upon its own motion. [Emphasis supplied.]

The Supreme Court's equation of section 15 with other sections of the Act, in relation to the Board's powers under section 22, is particularly significant since the courts have uniformly upheld our power, under other sections, to issue cease and desist orders. *State of Cali-*

[11] In view of the explicit prerequisites to disapproval under section 15 of the Act, and since a stay of an approved agreement is tantamount to a disapproval for the duration of the stay, it is clear, as stated in our report on motions, *supra*, that we have no power to suspend or stay an *approved* agreement.

[12] Described in *River Plate & Brazil Conf.* v. *Pressed Steel Car Co.*, 227 F. 2d 60 (2d Cir. 1955), as "virtually coextensive with those under the anti-trust laws" (p. 63).

[13] P. 486.

fornia v. *United States*, 46 F. Supp. 474 (N. D. Calif. 1942), affd. 320 U. S. 577 (1944); *Booth S. S. Co.* v. *United States*, 29 F. Supp. 221 (S. D. N. Y. 1939); *Isthmian S. S. Co.* v. *United States*, 53 F. 2d 251 (S. D. N. Y. 1931).

It is clear, then, that we have (1) power to issue cease and desist orders in the event of violation of section 15 of the Act, and (2) power to issue declarations of unlawfulness of agreements under section 15.[14] The latter power is necessarily implicit in the authority to issue a cease and desist order under section 15, and is explicitly contained in section 5 (d) of the APA. We accordingly will modify our report on motions, *supra*, by elimination of the words "or unapproved" in the above-quoted language and the words "or an unapproved" appearing in the ultimate paragraph of the report. We will further eliminate that language of the foregoing quotation commencing at "In the present case" and continuing to the end of the foregoing quotation from page 704 of the report.

As a second ground for reconsideration, the petition asserts that our report on motions, *supra*, is based on critical errors of law and fact, arising principally from our interpretation of *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D. C. Cir. 1954), cert. denied sub nom. *Japan-Atlantic & Gulf Conference et al.* v. *United States et al.*, 347 U. S. 990 (1954). Our view, that the *Isbrandtsen* case provided a standard for distinguishing between routine and nonroutine agreements between carriers, is not only incorrect, it is urged, but an "unwarranted abandonment by the Board of its primary jurisdiction to interpret section 15 of the Shipping Act." It is the conference view that the Court of Appeals held that we cannot approve an agreement among common carriers without a hearing, such approval being based on the specific findings enumerated in section 15. It was not the Court of Appeals but the Board itself, it is stated, which determined that an agreement to use dual rates requires specific section-15 approval.

We recommend to the conference a rereading and analysis of the cited decision. Briefly, the court, under the Hobbs Act,[15] reviewed a Board order which found, *inter alia*, that a proposed dual-rate system was not in violation of the Act. The court reversed the primary agency decision on its legal merits, finding the dual-rate system to be unapproved under section 15. The court rejected, *for that case*, the scope of authority argument, finding that a prior Board approval of a basic conference agreement to set joint rates did not operate as approval of a later agreement to institute dual rates. The court held,

[14] See Attorney General's Manual on the APA, at p. 59, where the relationship between the power to issue declaratory orders and cease and desist authority is discussed.
[15] 5 U. S. C. A. 1032.

in spite of a contrary finding in the Board order under appeal, that the latter agreement violated section 15 since it introduced an entirely new scheme of rate combination and discrimination not embodied in the basic conference agreement, and requiring separate approval.

In our report on motions *supra*, we accurately applied the *Isbrandtsen* yardstick in holding that an agreement to boycott a broker who solicits for a competitor is not encompassed within the approval of an agreement to make uniform rules and regulations concerning brokerage. The lack of Board approval of the new agreement being admitted, and the secondary effect of the new agreement on competitors as well as brokers being apparent on the face of the agreement, we decided the matter, as did the court in *Isbrandtsen*, as a matter of law or its equivalent, a matter free from genuine issues of material fact. Our decision, it is stated, is inconsistent with our proposal to set a rule-making proceeding for the guidance of conferences. We see no inconsistency. The rule-making proceeding has been proposed as a guide, as complete as may be possible, to the type of agreements which requires specific approval, in order to eliminate any confusion, genuine or spurious, as to filing requirements and in order to avoid recurrence of proceedings of this kind. The proceeding is designed to assist carriers to meet the burden of filing copies or memoranda of agreements,[16] which has been imposed on them by section 15 of the Act.

A third point raised in the petition is specious. It is contended that a discrepancy between the report and the order issued thereunder makes compliance an impossibility. The discrepancy, it is stated, is the reference in the report to "amended Rule 21" and the reference in the order to the "amendment to Rule 21." It is clear from the report, however, that that which is called, in the report, "amended Rule 21," by way of short definition, is the amendment to the Rule. Further, while the petition indicates that compliance is impossible prior to clarification of the discrepancy, we note that the conference has been careful to suspend the amendment to the Rule.

THE REPLY

In its "reply," the conference asserts that we have violated our Rules and the APA (and, we assume, section 23 of the Act as well) by denying it a hearing on the question of whether the amendment to Rule 21 is unlawful as an unapproved agreement within the meaning of section 15. Such a hearing has been held. The conference was given notice that that issue would be decided after oral argument thereon; oral argument was held, at which counsel for the confer-

[16] *Section 15 Inquiry*, 1 U. S. S. B. 121, 125 (1927).

ence appeared. As stated at page 703 in our report on motions, *supra*, "oral argument on such questions affords a full opportunity to be heard, within the meaning of section 23 of the Act."

CROSS-PETITION

The New York Brokers (1) seek reconsideration of a statement in the report on motions, *supra*, which, it is argued, construes the amendment to Rule 21 as a routine agreement; and (2) requests action aimed at collection of the penalties provided in section 15. Both requests are denied; (1) it is obvious that we have considered the amendment to Rule 21 to be an unapproved section-15 agreement as a matter of law, and (2) an action aimed at collection of section-15 civil penalties is one between the Government and the offending carriers. The remedy of persons other than the Government, in the event of injury resulting from violation of section 15, is an action for reparation commenced under sections 15 and 22.

CONCLUSION

The conference petition and the cross petition of the New York Brokers for reconsideration of our report on motions, *supra*, are denied. Of our own motion, however, under the authority of section 25 of the Act, we modify our report on motions, *supra*, by the elimination of the words "or unapproved" appearing on page 704, the words "or an unapproved" appearing in the ultimate paragraph, and the sentence "In the present case we are not authorized to order the conference to cease and desist from applying amended Rule 21 either prior or subsequent to a determination of the status of the rule under section 15 of the Act," appearing at page 704 of the report.

Since the conference in its petition is of the view that our report on motions, *supra*, and the order issued thereunder are nullities, we will, in addition to the modification hereinabove set out, require the conference to cease and desist from carrying out the amendment to Rule 21, from which the conference has a statutory right to judicial review. In the event of violation of our order, we will (1) apply to a court of competent jurisdiction to enforce obedience thereto, (2) commence a civil action to collect the penalties provided in section 15 of the Act, and (3) commence action to cancel the basic conference agreement.

An appropriate order will be entered.

Chairman MORSE concurring in result:

I agree with the majority that this petition for reconsideration should be dismissed. I disagree, however, with the reasoning ex-

pressed by the majority in arriving at that result. In considering the arguments of the conference that a declaration of unlawfulness under section 15 is beyond the express authority of the Board, the majority equated such a power with cease and desist authority under section 22, considering both powers to be necessarily implicit in the authority under section 22 to "make such order as [the Board] deems proper."

The analogy is inept. We do not have cease and desist authority under section 15. Our power to issue a declaration of unlawfulness as a matter of law is expressed in the Act as tantamount to and implicit in our power to disapprove agreements which are in violation of the Act. Whether we call a given order a "declaratory order" or whether we say it constitutes an order disapproving an agreement is a play on words. Here there was an actual and existing controversy. We were not functioning within a vacuum. The effect of our decision was to order, as a matter of law, that the agreement was disapproved. In my opinion, we clearly have that jurisdiction under section 15, and our authority was properly exercised.

The power to issue a cease and desist order is clearly distinguishable and one which requires specific congressional delegation. Such delegation is contained in section 17 of the Act. It is not contained in sections 14, 15, or 16 of the Act. In view of the specific inclusion of such power in one section, I necessarily conclude that comparable power has been denied the Board under sections wherein the power is not similarly expressly granted. See my concurring opinion in *Mitsui S. S. Co. Ltd.* v. *Anglo Canadian Shipping Co., Ltd.*, 5 F. M. B. 74.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 8th day of June A. D. 1956

No. 767

AGREEMENT AND PRACTICES PERTAINING TO BROKERAGE PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT No. 5200)

IN THE MATTER OF AMENDMENT TO BROKERAGE RULE 21 PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT No. 5200)

These matters being at issue on petitions for reconsideration in part of an order of the Board issued herein on the 20th day of December 1955, and full consideration of the matters and things involved having been given, and the Board on the date hereof having made and entered of record a report stating its conclusions and decision on said petitions, which report is hereby referred to and made a part hereof;

It is ordered, That the petitions for reconsideration be, and they are hereby, denied; and

It is further ordered, That the report of the Board issued on the 30th day of November 1955 and made a part of the aforesaid order of the 20th day of December 1955 be, and it is hereby, modified in accordance with the report of the Board on the date hereof; and

It is further ordered, That petitioner Pacific Coast European Conference and its members as named in the Appendix cease and desist from effectuating any or all of the provisions of the October 5, 1954, amendment to Rule 21 of the Pacific Coast European Conference Tariff No. 12.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

Anglo Canadian Shipping Co., Ltd.
Blue Star Line, Ltd.
Canadian Transport Co., Ltd.
Compagnie Generale Transatlantique (French Line).
The East Asiatic Co., Ltd (A/S Det Østasiatiske Kompagni).
Fruit Express Line A/S.
Furness, Withy & Co., Ltd. (Furness Line).
Hamburg-Amerika Linie (Hamburg American Line).
"Italia" Societa Per Azioni di Navigazione (Italian Line).
Dampskibsaktieselskapet Jeanette Skinner
Skibsaktieselskapet Pacific
Skibsaktieselskapet Marie Bakke
Dampskibsaktieselskapet Golden Gate
Dampskibsaktieselskapet Lisbeth
(Knutsen Line—Joint Service)
Nippon Yusen Kaisha.
Norddeutscher Lloyd (North German Lloyd).
N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij (Holland-American Line).
Osaka Shosen Kaisha, Ltd.
Fred. Olsen & Co. (Fred Olsen Line).
Rederiaktiebolaget Nordstjernan (Johnson Line).
Rederiet Ocean A/S (J. Lauritzen, managing owners) (Lauritzen Line).
Royal Mail Line, Ltd.
Seaboard Shipping Co., Ltd.
States Marine Corp.
States Marine Corporation of Delaware (States Marine Lines—Joint Service).
Westfal-Larsen & Co. A/S (Interocean Line).
Western Canada Steamship Co., Ltd.
Regular members of the Pacific Coast European Conference and American President Lines, Ltd., an associate member of said conference.

FEDERAL MARITIME BOARD

No. 764

MITSUI STEAMSHIP COMPANY, LTD.

v.

ANGLO CANADIAN SHIPPING CO., LTD., ET AL.

No. 773

AMERICAN POTASH & CHEMICAL CORPORATION ET AL.

v.

AMERICAN PRESIDENT LINES, LTD., ET AL.

Submitted May 15, 1956. Decided June 8, 1956

Interpretation of Pacific Coast European Conference Shippers' Rate Agreement as including all goods of contract signatories sold for shipment in the conference trade, whether sold f. o. b., f. a. s., c. i. f., or c. and f. basis, found to be a new agreement between carriers, effectuated in violation of section 15 of the Shipping Act, 1916. Conference and its members ordered to cease and desist from the violation.

The foregoing interpretation not found to have resulted in violation of sections 14, 16, 17, or 18 of the Act.

Alan F. Wohlstetter and *Ernest H. Land* for complainant Mitsui Steamship Co., Ltd.

Martin A. Meyer, Jr., for complainants American Potash & Chemical Corp. and Three Elephant Borax Corp.

Leonard G. James and *Robert D. Mackenzie* for respondents.

Leroy F. Fuller and *Edward Aptaker* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

This is a consolidated proceeding involving complaints filed by Mitsui Steamship Co., Ltd., ("Mitsui"), and by American Potash & Chemical Corp. and its subsidiary Three Elephant Borax Corp. (col-

lectively "American Potash") against the member lines of Pacific Coast European Conference (the "conference"), alleging violations of the Shipping Act, 1916 ("the Act").

In its complaint, as amended, Mitsui alleges that it is a citizen of Japan and a common carrier by water between Pacific coast ports of the United States and ports of the United Kingdom and Continental Europe; that each of the respondents is engaged as a common carrier by water in the same trade; that the conference, pursuant to Agreement F. M. B. No. 5200, has established an exclusive-patronage contract/noncontract dual-rate system; that foreign buyers and consignees of goods purchased in the United States on an f. o. b. or f. a. s. basis desired to exercise their customary rights to designate the carrier in such purchases, and desired to ship via Mitsui; that the conference, by the use of unfair, coercive, discriminatory, and illegal practices, deprived those foreign consignees of their rights to ship via Mitsui, and in coercing the consignees, who were not signatories to exclusive-patronage contracts, to ship exclusively on conference lines, violated their natural and legal rights to designate the carrier when they are obligated to pay the freight; and that these actions of the conference are in violation of sections 14, Third, 15, 16, and 17 of the Act. Reparation is requested to the extent damages are proven.

The American Potash complaint, as amended, alleges that complainants are engaged in the manufacture and sale of various chemicals, including boron products, which are exported from Pacific coast ports to the United Kingdom and continental Europe; that each of the conference member lines is a common carrier by water from Pacific coast ports to the United Kingdom and continental Europe; that the conference, pursuant to Agreement F. M. B. No. 5200, has established an exclusive-patronage contract/noncontract dual-rate system; that complainants are each signatories to Shippers' Rate Agreements and are entitled to be charged the lower contract rate for their shipments; that the conference unlawfully terminated complainants' right to contract rates effective October 15, 1954, and on April 1, 1955, gave notice of termination of complainants' Shippers' Rate Agreements, to be effective as of the close of business on May 31, 1955; that since October 15, 1954, the conference members have wrongfully and unlawfully charged complainants the higher noncontract rate while charging their competitors the lower contract rate; and that these actions of the conference have violated sections 15, 16, 17, and 18 of the Act. Reparation is requested to the extent that damages may be proven.

After hearings held between May 9 and May 14, 1955, a recommended decision was issued in which the examiner found, in Docket No. 764, that Mitsui had failed to show that the conference lines have coerced buyers and consignees to ship goods exclusively on conference vessels in violation of sections 14, Third, 15, 16, and 17 of the Act. The examiner further recommended that an oral motion to dismiss made jointly by complainant and respondents in Docket No. 773, based on satisfaction of the complaint, be granted. Exceptions to the recommended decision have been filed and oral argument has been heard.

ISSUES

The focal point of this proceeding is the conference interpretation of its form of exclusive-patronage contract, or shippers' agreement, as requiring signatories thereto to ship via conference vessels all goods supplied by them for shipment in this trade whether the goods are sold on an f. o. b., f. a. s., c. i. f., or c. and f. basis,[1] whether or not the receiver of the goods is a signatory to the Shippers' Rate Agreement. The issues which result are as follows:

(a) Is the conference interpretation such a new agreement or modification of an agreement between carriers within the meaning of section 15 of the Act as to require Board approval under that section?

(b) Is the interpretation, as a matter of law, correct? Put otherwise, is an American exporter in any or every instance the "shipper" of goods which have been sold on an f. o. b. or f. a. s. basis?

(c) Has the conference interpretation resulted in violation of sections 14, Third, 15, 16, or 17 of the Act?

The facts are the following:

The conference is a voluntary association of 24 common carrier steamship lines operating under the authority of Agreement F. M. B. No. 5200 (basic agreement), initially approved, under section 15 of the Act, on May 26, 1937. Conference vessels operate in the trade from United States and Canadian Pacific coast ports to Great Britain, Northern Ireland, Ireland, continental Europe, Baltic Scandinavian, and Mediterranean Sea ports.

The conference has established and employs an exclusive-patronage contract/noncontract freight-rate system (dual-rate system). Under that system, two levels of freight rates are established, the lower to be applicable to cargoes of those shippers who agree to patronize con-

[1] F. O. B.—free on board; f. a. s.—free alongside; ci i. f.—cost, insurance, freight; c. and f.—cost and freight.

ference lines exclusively, the higher to be applicable to the cargoes of all other shippers. The form of agreement between the conference carriers and the signatory shippers is called a Shippers' Rate Agreement. Insofar as is pertinent to the present disputes, the conference's current Shippers' Rate Agreement provides:

1. In consideration of the mutual covenants herein contained and the contract rates as shown in the applicable tariff of the

PACIFIC COAST EUROPEAN CONFERENCE

hereinafter called the Conference, the Shipper agrees to offer or cause to be offered for transportation on vessels of the Carrier from Pacific Coast ports of the United States and Canada to ports of call in Great Britain, Northern Ireland, Ireland, Continental Europe, Scandinavia, and French Morocco and on the Mediterranean Sea and other seas bordering thereon (except the Black Sea) *all of its shipments* by water on which said contract rates are applicable. The contract rates, and the rules, regulations and conditions applicable thereto, as shown in the applicable Conference tariff, shall govern to the ports of destination as set forth in said tariff.

This agreement covers *all export shipments of the Shipper* (excluding shipments via Intercoastal vessels) to aforesaid countries moving via any Pacific Coast port of the United States or Canada. All such shipments shall be tendered to the Carriers for their vessels which may load at any Pacific Coast port of the United States or Canada and are scheduled to sail to any ports of call in the aforesaid countries. Failure to so tender any such shipments to the Carriers or shipment of them by vessels other than those of the Carriers shall constitute a violation of this agreement. In agreeing to so confine the carriage of *its (their) shipments* to the vessels of the Carriers the Shipper hereby promises and declares it is the intent and purpose to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or subsidiaries.

2. If, at any time, the Shipper shall make any shipment or shipments in violation of any provision of this Agreement, the Shipper shall pay liquidated damages to the Conference in lieu of actual damages which would be difficult or impracticable to determine. Such liquidated damages shall be paid in the amount of freight *which the Shipper would have paid* had such shipment or shipments moved via a Conference Carrier computed at the contract rate or rates currently in effect. Failure of the Shipper to pay liquidated damages within thirty (30) days after the receipt of notice from the Conference that such liquidated damages are due and payable shall be cause for the Conference to terminate the Shipper's right to the contract rates until the Shipper pays to the Conference the amount due. In the event the Shipper violates this contract more than once in any period of twelve (12) months, the Conference may cancel this contract by serving written notice of such cancellation upon the Shipper and notifying the Federal Maritime Board of such action. If the contract is cancelled for violation thereof as provided herein, the Conference may refuse to enter into a new contract with the Shipper until any unpaid liquidated damages due to the Conference have been paid in full.

In order that the Conference may determine the existence or non-existence of a violation hereof, the Shipper shall, upon request, furnish to the Conference

full and complete information with respect to any shipment or shipments made by such Shipper in the trade covered by this Agreement. [Emphasis supplied.]

Mitsui is a common carrier by water engaged in the transportation of merchandise between Pacific coast ports of the United States and ports of the United Kingdom and continental Europe. While Mitsui is a member of many American and foreign steamship conferences, it was not, at the close of hearings in these proceedings,[2] a member of this conference. Its vessels do no call regularly at all of the loading and discharging ports served collectively by the conference, do not provide refrigerated service, and are longer in transit, because of calls at New York, than the bulk of the conference lines. Two sailings per month are provided by it in this trade.

Mitsui's European agents regularly solicit consignees in the Pacific coast-European trade, none of whom are signatory to the conference Shippers' Rate Agreement.

Prior to Mitsui's entry into this trade in September 1953, the conference had no independent liner competition. During this period European consignees did not customarily control the routing of cargo movements. Since Mitsui's entry, however, European receivers have asserted the right to select the ocean carrier of goods bought on f. o. b. or f. a. s. basis.

Prior to World War II, most of the goods shipped in this trade had been sold under c. i. f. terms. In the postwar period, however, f. o. b. sales increased because of the buyer's ability, under such a sale, to pay freight in his own currency rather than in American dollars. Presently, the majority of transactions are on an f. o. b. or f. a. s. basis.

During 1954 the conference notified 10 signatories to its Shippers' Rate Agreement[3] that the conference had information indicating shipment of cargoes via Mitsui in violation of the agreement. In the letters or telegrams of notification the conference requested information concerning the shipments involved, and warned the signatories that liquidated damages would be demanded in the event of failure to furnish the requested information. The conference chairman could not recall the specific information, the type of information, or the source of the information on which he acted in sending the notices to shippers. Further, he used no standards or guides in determining

[2] On February 1, 1956, Mitsui was admitted to this conference, conditioned upon its withdrawal from this and other proceedings against the conference. Determination of the legality of the condition is presently pending in Docket No. 792.

[3] American Potash & Chemical Corp.; Associated Metals & Minerals Corp.; Brandeis Goldschmidt & Co., Inc.; California By-Products Corp.; H. Muehlstein & Co., Inc.; Kaufman Trading Corp.; Miles Metals Corp.; Pacific Coast Borax Co.; Sinason-Teicher Inter American Grain Corp.; South American Minerals & Merchandise Corp.

whether action should be taken against a signatory, nor has the conference prescribed the type of evidence which is required in such circumstances.

All of the notified exporters in reply to the conference either denied shipping via Mitsui or advised the conference that the shipments had moved via Mitsui at the request and under the control of the European buyer. No further action was taken against five of the notified exporters, although some action may or may not be taken in the future. Five other shippers, however, admitted supplying cargoes which moved via Mitsui but denied having control of the movement. Those exporters received closer attention from the conference. A fuller discussion of these exporters and their relationships with the conference follows:

(a) *American Potash*, a manufacturer of borate and other chemical products, was advised by the conference that a shipment f. o. b. Los Angeles via Mitsui to an A. G. Schering had constituted an evasion or subterfuge in violation of the Shippers' Rate Agreement in view of the fact that Schering was, in the view of the conference, an "intermediary or subsidiary" of American Potash within the meaning of Article 2 of the agreement. The accusation was vigorously denied by American Potash, which maintained that its only alternative would have been to refuse to make the sale. Thereafter, as a result of this shipment, rights to contract rates were denied to American Potash as of October 15, 1954, and to Three Elephant Borax Corp., its subsidiary, as of October 28, 1954. The companies were assessed noncontract rates from the specified dates until approximately March 1, 1955.

The market for borate is highly competitive. The competition for European sales is principally among producers in this country, with only 5–10 percent of borate sold in Europe originating in countries other than the United States. During the period when American Potash was assessed noncontract rates on its shipments in this trade, it absorbed the difference between contract and noncontract rates in order to meet the competition of other producers. Because of these absorptions no sales were lost.

(b) *Pacific Coast Borax Co.* ("Pacific"), another manufacturer of borate products, in reply to the conference, produced evidence that its shipment questioned by the conference was in fact delivered to and shipped by the buyer's agent in this country, the sale having been made on "f. a. s. Los Angeles Harbor" terms. Pacific stated that, in shipping under such terms, it had been guided by a letter of advice addressed to it by the conference on May 13, 1949, wherein it was stated:

Counsel for the Conference has advised us that you wish to have for the records of Pacific Coast Borax Company, a written confirmation of the oral opinion given to you by Conference counsel with respect to the validity of the shipments by non-Conference lines when the cargoes in question are purchased on f. a. s. terms.

It is the opinion of our attorneys that the shippers rate agreement employed by this Conference is not violated by a shipper who has sold goods to a foreign importer on f. a. s. terms whereby title to the goods is taken by the importer at ship's side or prior thereto and the goods are shipped by a non-Conference line in the name of the importer with the contract shipper's name not appearing on any shipping documents in connection with the shipments. It is the opinion of the Conference attorneys that *under such circumstances the contract shipper is not in fact the shipper of the cargo, but that the shipper is the foreign importer* who, if not bound by a shippers rate agreement with this Conference, is not required to ship via Conference lines. The fact that the shipper would, as agent for the foreign importer, obtain the export license for the foreign importer, would not, in the opinion of the Conference attorneys, affect the status of the shipment as being made by the foreign importer and not by the contract shipper. [Emphasis supplied.]

The conference replied by demanding liquidated damages for violation of the Shippers' Rate Agreement.

The 1949 letter was explained by the conference as applying only to shipments to the Joint Export Import Agency, a Government agency, and not to commercial shipments. By letter of March 16, 1955, however, the conference offered to waive the liquidated damages assessed if Pacific would concur in the conference interpretation of the Shippers' Rate Agreement as requiring exporters to ship via conference vessels all goods sold for export, regardless of the terms of sale. The conference affirmed by wire of March 18, 1955, that this interpretation would apply to sales made f. o. b. seller's inland plant. Although the conference had threatened to terminate Pacific's right to contract rates unless liquidated damages were paid on or before January 31, 1955, no such action was taken against Pacific.

(c) *Kaufman Trading Corp.* ("Kaufman") advised the conference that a shipment which had moved via Mitsui had been under the control of the foreign buyer. When threatened with assessment of liquidated damages, however, Kaufman agreed to apply to future shipments the conference interpretation of the Shipper's Rate Agreement. Damages have not been assessed against Kaufman, and contract rates have not been denied it.

(d) *Sinason-Teicher Inter American Grain Corp.* ("Sinason") advised the conference in October 1953 that it was obligated by European buyers to ship via nonconference vessels. Nearly a year later, the conference demanded of Sinason payment of liquidated damages

for a shipment which moved via a nonconference vessel. Sinason's right to contract rates was thereafter cancelled.

The conference chairman stated that rights to contract rates have not been terminated nor have liquidated damages been assessed against any shipper because of *f. o. b. shipments via nonconference carrier.* He stated that he had no knowledge of whether Sinason's shipment in question moved f. o. b., f. a. s., c. and f., or c. i. f. In view of Sinason's representation that the buyer obligated it to book a shipment via Mitsui, however, the chairman admitted that the shipment probably was not c. and f. or c. i. f.

(e) *South American Minerals & Merchandise Corp.* ("Samincorp") advised the conference that it had sent shipments forward via Mitsui in accordance with specific instructions of the buyers. The conference assessed liquidated damages on the shipments, however, and terminated Samincorp's right to contract rates on November 29, 1954. While the record does not conclusively establish the fact, it is most probable that the Samincorp goods which moved via Mitsui had been sold on f. a. s. or f. o. b. terms in view of Samincorp's vigorous arguments, in correspondence with the conference, that an exporter cannot select the carrying vessel on an f. a. s. sale.

In early March 1955, the conference, by letter, advised 15 borate shippers of its interpretation of the Shippers' Rate Agreement as applying to all export shipments of contract signatories, regardless of terms of sale. The shippers were requested to indicate concurrence in the conference interpretation by signing and returning the letter before April 1, 1955, or to expect cancellation of the Shippers' Rate Agreement. Stauffer Chemical Co. ("Stauffer") and seven others concurred in the interpretation.

As a result of conference action taken at a meeting on April 1, 1955 (Ex. No. 11), the conference sent notice of termination of the Shippers' Rate Agreement to Pacific and to American Potash, effective in 60 days; established a moratorium on claims for liquidated damages from those shippers, effective until June 1, 1955; restored the right of American Potash to contract rates retroactive to February 1, 1955; established a moratorium regarding conditions in the March 16 letters addressed to other borate shippers who had not yet concurred; and offered Stauffer an opportunity to withdraw their acceptance of the conference's March 16 letter. Stauffer subsequently withdrew its concurrence with the conference letter of March 16, and no notice of termination of the Shippers' Rate Agreement has been sent to any of the other 13 borate shippers.

During the course of the hearings, American Potash and the conference submitted a Dismissal with Prejudice with an attached letter

dated May 10, 1955, confirming an agreement whereunder the conference restored the right of American Potash and its subsidiary, Three Elephant Borax, to contract rates retroactive to October 15 and October 28, 1954. The conference further agreed to a moratorium on claims for liquidated damages for a 90-day period after May 31, 1955, and agreed to restore to American Potash the difference between contract rates and noncontract rates which had been charged subsequent to October 1954. For its part, American Potash agreed to attempt to persuade foreign buyers to surrender the power to make bookings.

By letter of May 11, 1955, a similar moratorium was established on claims against Pacific. Likewise, a similar moratorium was extended to Stauffer and to other borate shippers for the same period. No moratorium was extended to shippers of products other than borate.

Despite American Potash's agreement with the conference, that company has not changed its interpretation of the Shippers' Rate Agreement and does not know what it would do to attempt to persuade foreign buyers to ship via conference vessels. The company would not refuse to sell to a foreign buyer who insisted on routing shipments via a nonconference vessel. In any event, an American Potash witness anticipated that at the termination of the period of the moratorium the conference would again be "at loggerheads" over the proper legal construction of the Shippers' Rate Agreement.

American Potash's interpretation of the Shippers' Rate Agreement, more fully stated, is as follows: American Potash considers that title to goods sold on an f. o. b. or f. a. s. basis passes to the buyer on delivery to the vessel or alongside the vessel, that the buyer has the right to designate the method by which he wants to have the goods shipped, and that, accordingly, such shipments are not included in the coverage of the Shippers' Rate Agreement. On such shipments American Potash appears on the ocean bill of lading as agent for the buyer, who is the shipper on such transactions, and the existence or nonexistence of a letter of credit as the method of payment for the goods does not affect the buyer's status as shipper. American Potash asserts, however, that the terms f. o. b. and f. a. s. do not determine who *will* select the carrier but merely who *has the right to select.* For this reason, American Potash considers that the buyer's failure to select the carrier gives the exporter the right to select. Under such circumstances, American Potash maintains, the exporter is entitled to receive contract rates on f. o. b. and f. a. s. shipments, as indeed American Potash has in the past, prior to Mitsui's entry into this trade. On f. o. b. or f. a. s. shipments in which the buyer did not exercise a right to select the carrier, and to which contract rates were applied, American Potash

appeared as shipper on the ocean bill of lading, but the buyer paid the ocean freight to the carrier.

Stauffer interprets the Shippers' Rate Agreement in much the same manner. Briefly, Stauffer believes that an f. o. b. or f. a. s. buyer has the right to make the booking on a vessel of his solicitation. If the buyer does not exercise his right—or put otherwise—in the absence of a specific agreement as to the routing of cargo, the seller may designate the carrier. Most of Stauffer's sales are made on an f. o. b. vessel or f. a. s. basis. While payment is usually made after arrival of the goods in Europe, Stauffer does not believe that it has a lien on the goods in the event of nonpayment since it considers that title to the goods has passed to the buyer on delivery to the dock or to the vessel. While goods sold on an f. o. b. basis have moved via Mitsui vessels on the instructions of buyers, Stauffer has never been denied the contract rate on its shipments via conference vessels. In February 1955, Stauffer was given a notice of cancellation of its Shippers' Rate Agreement, but the notice was subsequently withdrawn.

The testimony of other shipper witnesses presented by Mitsui was in general agreement with the American Potash and Stauffer position. Five shipper witnesses presented by the conference testified generally that they considered f. o. b. and f. a. s. shipments to be included within the terms of the Shippers' Rate Agreement. Of these, one stated that he had made no f. o. b. or f. a. s. shipments in the Pacific coast European trade. Three others have not been requested to ship via Mitsui and, in fact, could not since Mitsui does not provide reefer service in this trade, does not regularly serve all of the ports of shipment, and does not serve all of the ports of discharge. Libby-McNeill & Libby, a shipper of canned goods, does make some shipments on an f. o. b. basis and has been requested by buyers to ship via nonconference lines. Buyers have always acquiesced, however, in the insistence of Libby-McNeill & Libby that the goods move via conference vessels.

The conference takes the position that its Shippers' Rate Agreement applies to all shipments, regardless of the terms of sale, and that if a signatory shipper enters into any arrangement with the foreign buyer which permits the foreign buyer to direct cargo to move on a nonconference vessel, the signatory shipper violates the agreement. The conference chairman stated that if a foreign buyer insisted that he had the right, under the terms of an f. o. b. or f. a. s. sale, to direct the routing via nonconference vessel, the signatory shipper, in order to comply with the terms of the Shippers' Rate Agreement, could not deliver to the nonconference vessel, and that if the buyer insisted on his right, compliance with the agreement would require the seller to

refuse to make the sale. It is the conference's position that a sale f. o. b. inland plant in the United States, where the foreign buyer or his forwarder handles the inland transportation and ships via nonconference line, would amount to a violation of the agreement by a signatory seller, if the seller knew that the goods would be shipped abroad. The mere fact that an f. o. b. or f. a. s. shipment moved via a nonconference line would amount to an evasion or a subterfuge within the meaning of the agreement. The record is silent on the question whether, prior to the entry of Mitsui in this trade in 1953, the conference had ever advised shippers of this interpretation.

In f. o. b. and f. a. s. transactions in this trade, the freight is normally paid collect by the foreign consignee, and the payment for the goods is made in varying ways—by letter of credit, sight draft and invoice, open account, or prepayment. Payment for the goods may actually be received by the seller before, during, or after carriage of the cargo.

In the Revised American Foreign Trade Definitions, it is considered the duty of the buyer in f. o. b., f. a. s. transactions, and of the seller in c. i. f. transactions, to provide and pay for ocean transportation. In comments on all f. o. b. terms the definitions provide:

> 6. Under f. o. b. terms, excepting "f. o. b. (named inland point in country of importation)," the obligation to obtain ocean freight space, and marine and war risk insurance, rests with the buyer. Despite this obligation on the part of the buyer, in many trades the seller obtains the ocean freight space, and marine and war risk insurance, and provides for shipment on behalf of the buyer. Hence, seller and buyer must have an understanding as to whether the buyer will obtain the ocean freight space, and marine and war risk insurance, as is his obligation, or whether the seller agrees to do this for the buyer.

While a similar comment is made on f. a. s. terms, no variation of duty on c. i. f. terms is suggested in the definitions. No witness to these proceedings disagreed with the matter set out in the definitions and comments thereto. All of the witnesses agreed on the desirability of uniform rates in the trade, and no witness opposed a dual-rate system in the trade. A number of witnesses testified that in this trade, on f. o. b. shipments, the seller is requested to obtain and does obtain shipping space on behalf of the buyer.

DISCUSSION

In *Contract Rates—Japan/Atlantic-Gulf Freight. Conf.*, 4 F. M. B. 706, the Board was required to determine the lawfulness of a provision in an agreement between carriers which would require signatories of exclusive-patronage contracts to ship via vessels of conference lines all of the shipments made directly or indirectly by the

signatory, whether made on c. i. f., c. and f., f. o. b., ex-godown or other terms. On the evidence there presented, we disapproved of the provision, stating at page 740:

* * * as drafted, the receiver under the f. o. b., f. a. s. shipments may obtain contract rates as long as he patronizes exclusively conference vessels, but once he ships nonconference he may not thereafter receive contract rates. This provision is objectionable because such a receiver obtains the benefits of contract rates without signing a shipper contract whereas all other nonsigners are charged the full noncontract tariff rates; unlike treatment therefore is being accorded nonsigners. Such f. o. b. receiver should receive contract rates only if he is a contract signatory.

We approve the contract form insofar as it purports to cover c. i. f. and c. and f. sales. Except as stated below, we disapprove the contract form insofar as it purports to cover f. o. b. or f. a. s. sales. Irrespective of the terms of the sales agreement, in any instance where the contract signer appears as shipper in the bill of lading, such fact alone automatically requires that the shipment move on conference vessels. In the situation where the contract signer appears as shipper in the bill of lading, it is no mere matter of form to say he is the shipper in fact. In c. and f. or c. i. f. sales the problem does not arise because there the contract signer is in fact the shipper, but in f. o. b. or f. a. s. sales we deem it undesirable to have the answer to this problem turn on the complicated questions of law as to risk of loss or when title passes in determining when a given shipment is or is not covered by the shipper's agreement. We deem it highly desirable that simple tests and standards be applicable. To this end we consider that the contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper. We do not intend, however, to preclude shipment by an exporter as agent for the buyer, where the exporter only renders assistance at the buyer's request and expense in obtaining the documents required for purposes of exportation.

Consistent with that language, we ordered (January 10, 1956) "that said contract system shall not apply to shipments which are made on an f. o. b., f. a. s., or ex-godown basis unless the person, whether seller or buyer, named as shipper in the ocean bill of lading, is a contract signatory * * *."

Following the foregoing determination we ordered, in another dual-rate proceeding, *Secretary of Agriculture* v. *N. Atlantic Cont'l Frt. Conf.*, 5 F. B. M. 20, that the particular dual-rate system therein considered "shall not apply to shipments which are made on an f. o. b. or f. a. s. basis unless the person, whether seller or buyer, named in good faith as shipper in the ocean bill of lading, is a contract signatory * * *."

In these proceedings, among other issues, we are called upon to determine whether the conference Shippers' Rate Agreement contemplates exclusive shipment via conference vessels of goods sold by contract signatories on an f. o. b. or f. a. s.[4] basis as well as exclusive

[4] Throughout the hearing the terms f. o. b. and f. a. s. were not distinguished other than by the fact that in the former type of sale the price includes delivery on board a vessel, while in the latter the price includes only delivery alongside. It was the testimony of the

shipment of goods sold on a c. i. f. or c. and f. basis. To this end we consider a discussion of the incidents of the terms to be in order.

At the outset, it should be noted that, in the absence of evidence of an intention to the contrary, the beneficial interest in goods and the risk of loss thereof passes to the buyer on delivery of the goods to the carrier in c. i. f.[5] shipments as well as in f. o. b. port-of-loading shipments.[6] From the viewpoint of beneficial interest and risk of loss, then, it is not accurate to state that c. i. f. shipments are shipments of the seller and f. o. b. shipments are shipments of the buyer. Recognition of the contrasting nature of these types of sale in other respects, however, enables us ultimately to distinguish between them on that basis.

In a true c. i. f. contract, the full property in goods does not pass to the buyer nor is there the complete delivery contemplated by the contract until tender of the requisite documents.[7] For this reason, c. i. f. sales have been considered sales of documents relating to goods rather than sales of goods.[8] The c. i. f. contract is fulfilled by delivery of the documents, and in the event of failure to deliver an essential document, the seller will be in default.[9] A tender of proper

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conference chairman that an f. a. s. sale was not otherwise "essentially different from the f. o. b." The terms, unless otherwise appearing from the context, will hereinafter be treated as synonymous for the purpose of this report.

[5] *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19, 26 (1915); *Warner Bros. & Co.* v. *Israel,* 101 F. 2d 59 (2d Cir. 1939); *Mee et al.* v. *McNider,* 109 N. Y. 500 (1888); *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.,* 147 F. 2d 399, 402 (2d Cir. 1945).

[6] *Nelson Bros. Coal Co.* v. *Perryman-Burns Coal Co.,* 48 F. 2d 99 (2d Cir. 1931); *Higgins* v. *California Prune & Apricot Growers,* 16 F. 2d 190 (2d Cir. 1926); *Inglis* v. *Stock,* 5 Asp. 422, 424 (1885).

[7] *Warner Bros. & Co.* v. *Israel, supra; Rand* v. *Morse,* 289 F. 339, 342 (8th Cir. 1923); *Harper* v. *Hochstein,* 278 F. 102 (2d Cir. 1921); *Smyth* v. *Bailey,* 45 Com. Cas. 292 (1940). *Karberg* v. *Blythe,* (1915) 2 K. B. 379; *Ireland* v. *Livingston,* 5 H. L. (A. C.) 395 (1871); *Horst* v. *Biddell,* (1912) A. C. 18, 22: "The answer is that delivery of the bill of lading when the goods are at sea may be treated as delivery of the goods themselves;" *Macondray & Co.* v. *W. R. Grace & Co.,* 30 F. 2d 647 (9th Cir. 1929); *Groom* v. *Barber,* (1915) 1 K. B. 316: "It * * * becomes immaterial whether before the date of the tender of the documents the property in the goods was the seller's or buyer's or some third person's. The seller must be in a position to pass the property in the goods by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender, nor need he have obtained any right to deal with the bill of lading until the moment of tender." See also *Cohen* v. *Wood & Selick,* 212 N. Y. S. 31, 35 (1925); *Dwane* v. *Weil,* 192 N. Y. S. 393 (1922).

But see the following cases to the effect that title in a c. i. f. sale passes on delivery to the carrier for shipment: *American Sugar Refining Co.* v. *Page & Shaw,* 16 F. 2d 662 (1st Cir. 1927); *Commissioner of Internal Revenue* v. *East Coast Oil Co.,* 85 F. 2d 322, 323 (5th Cir. 1936); *Cerro De Pasco Copper Corp.* v. *Knut Knutsen O. A. S.,* 94 F. Supp. 60 (S. D. N. Y. 1950); *Ruttonjee* v. *Frame,* 199 N. Y. S. 523 (1923). See also 30 Yale L. J. 91; *Orient Co., Ltd.* v. *Brekke and Howlid,* 18 Com. Cas. 101 (1913).

[8] *Karberg* v. *Blythe, supra; Finlay* v. *N. V. Kwik, etc.,* 32 Ll. L. Rep. 245, 248 (1928).

[9] *Hansson* v. *Homel,* (1922) 2 A. C. 36; *Manbre Saccharin Co.* v. *Corn Products Co.,* (1919) 1 K. B. 198. Also *Schmoll Fils & Co.* v. *Scriven,* 19 Ll. L. Rep. 118, 119 (1924); *Shipton, Anderson & Co.* v. *John Weston & Co.,* 10 Ll. L. Rep. 762, 763 (1922).

documents must be accepted even though the parties are aware that the goods have been lost or destroyed.[10] On the other hand, in the usual f. o. b. port-of-loading sale, and in the absence of a contrary intention, the delivery contemplated by the contract is a delivery of goods at ship's rail at the named point of shipment.[11] Title to the goods as well as risk loss and right to possession will, in these circumstances, be presumed to pass to the buyer on delivery of the goods to the carrier [12] rather than on delivery of the bill of lading.

The presumptions arising from the use of the terms under consideration are subordinate, of course, to an expression of a contrary intent by the parties. Whether a reservation of title in the seller is an expression of a contrary intent has frequently been litigated. Under English law the presumption that beneficial ownership passes to the buyer on f. o. b. delivery remains unaffected by retention of a security title in the seller.[13] While some doubt exists as to whether the same rule obtains in this country,[14] we consider the better view to be that expresed by the English cases and those American cases which are in accord. In c. i. f. sales, however, the beneficial interest and risk of loss clearly pass to the buyer on shipment, regardless of retention of a security title in the seller,[15] unless an intent to the contrary is unmistakably shown.[16]

In c. i. f. sales, as hereinabove indicated, the use of the term necessarily indicates that the seller must, *inter alia*, and as a contractual commitment, arrange the contract of affreightment to destination and ship the goods.[17] In f. o. b. sales, it has been said, on the one hand,

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[10] *Law and Bonar (Limited)* v. *British American Tobacco Co.*, 21 Com. Cas. 350 (1916); *Dwane* v. *Weil, supra.*

[11] *J. & J. Cunningham Limited* v. *Robert A. Munro & Co., Limited,* 28 Com. Cas. 42, 45 (1922).

[12] *United States* v. *Andrews,* 207 U. S. 229 (1907); *Higgins* v. *California Prune & Apricot Growers, supra; Nelson Bros. Coal Co.* v. *Ferryman-Burns Coal Co., supra.*

[13] *Inglis* v. *Stock, supra.*

[14] The property and risk of loss remain in the seller. *L. Lazarus Liquor Co.* v. *Julius Kessler & Co.,* 269 F. 520 (6th Cir. 1920). Regardless of the form of the bill of lading, the property passes to the buyer on delivery to the carrier. *Rosenberg Bros. & Co.* v. *F. S. Buffum Co.,* 234 N. Y. 338 (1922); *Pennsylvania R. Co.* v. *Bank of the U. S.,* 212 N. Y. S. 437 (1925); *Standard Casing Co.* v. *California Casing Co.,* 233 N. Y. 413 (1922).

This represents the better view: 2 Williston Sales (1948), section 280b, pp. 100, 101.

[15] *Harper* v. *Hochstein, supra; Ruttonjee* v. *Frame, supra.*

[16] *Northern Grain Warehouse Co.* v. *Northwest Trading Co.,* 201 P. 903, 904 (Wash. 1921); *Donbigh, Cowan & Co.* v. *Atcherly & Co.,* 125 L. T. 388 (1921).

"In some trades there is in use a form which is in terms expressed to be a c. i. f. contract, but also provides (i) for payment on loaded weights; (ii) for payment as to any goods arriving damaged with an allowance; and (iii) for the contract to be void as to any portion shipped but not arriving. Except in name this is not a c. i. f. contract." Scrutton on Charterparties, 16th Ed., footnote (n) at p. 201. See also *Cundill* v. *A. W. Millhouser Corporation,* 257 N. Y. 416 (1931).

[17] *A. Klipstein & Co.* v. *Dilsizian,* 273 F. 473 (2d Cir. 1921); *Warner* v. *Israel, supra; Seaver* v. *Lindsay Light Co.,* 182 N. Y. S. 30, 33 (1920); *American Sugar Refining Co.* v. *Page & Shaw, supra; Karberg* v. *Blythe, supra;* Carver's Carriage of Goods by Sea, Ninth Ed., p. 746 and cases cited.

that the *prima facie* effect of the phrase f. o. b. is that the buyer must select the carrier;[18] on the other hand, it has been held that each case must rely upon its own facts in determining which party to a sale has the duty to secure transportation.[19] Still other decisions find the buyer to be under a duty to furnish or designate a carrier in f. o. b. sales.[20] The apparent conflict is readily reconciled. On this point, Williston states (Williston, *supra*, p. 96) :

> Where goods are to be transported by private conveyance, as on a chartered ship, it is an obvious duty of the buyer to provide the ship, if by the terms of the contract the seller is merely to deliver goods on board a vessel at the point of shipment (footnote omitted). When, however, the goods are to be shipped by a common carrier, the assumption seems unwarranted that either party undertakes that the carrier shall be either able or willing to perform its normal functions. The contract is made on the mutual assumption that the carrier will perform these functions. It is indulging in fiction to say, as some cases do, that the carrier is the agent of the buyer. There is no such agency until the carrier accepts the shipment. *It is assumed by both parties that the carrier will be willing to become the agent or bailee for the buyer* (footnote omitted). [Emphasis supplied.]

Obviously, where common rather than private carriage is contemplated, the parties to a sale may agree, consistent with the presumption of delivery arising from the use of the term f. o. b., that either buyer or seller may select the carrying vessel. But since the goods are presumptively delivered to the buyer at ship's rail, it presumptively is the buyer who has the right to designate the bailee. Accordingly, although the right to select may be delegated to the seller, if the seller does not maintain a security title to the goods the selection of a carrier in an f. o. b. shipment[21] is made on behalf of the buyer and the shipment is therefore the shipment of the buyer. Consistently, the buyer should appear as shipper on the ocean bill of lading.

From the foregoing analysis, as well as from the testimony of all witnesses in these proceedings, and from the generally accepted definition of the term as set forth in the Revised American Foreign Trade Definitions, we find that c. i. f. shipments are the shipments of the seller since (1) final delivery under the contract does not occur until

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[18] *Davis* v. *Alpha Portland Cement Co.*, 134 Fed. 274 (E. D. Pa. 1905) and cases cited. See also *United States Smelting Co.* v. *American Galvanizing Co.*, 236 F. 596, 598 (E. D. Pa. 1916) ; *Evanston Elevator & Coal Co.* v. *Castner*, 133 Fed. 409, 410, 411 (Cir. Ill.) ; *Baltimore & L. Ry. Co.* v. *Steel Rail Supply Co.*, 123 Fed. 655, 658 (3d Cir. 1903).

[19] *Hecht* v. *Alfaro*, 4 F. 2d 255 (N. D. Calif. 1925) ; *Mathieu* v. *George A. Moore & Co.*, 4 F. 2d 251 (N. D. Calif. 1925). See also *H. Hackfeld & Co.* v. *Castle*, 198 P. 1041 (Calif. 1921).

[20] *Carvel* v. *John Kellys*, 53 N. Y. S. 2d 640 (1945) ; *Brandt* v. *Morris*, (1947) 2 K. B. 784 ; *Douglas Fir Exploitation & Export Co.* v. *Comyn*, 279 F. 203 (9th Cir. 1922).

[21] Assuming that the delivery of goods contemplated by the sales contract is delivery to the carrier.

tender of the requisite documents made *after* the goods are received for shipment by the ocean carrier; (2) the seller must arrange and procure the contract of affreightment as a condition to the contract of sales; and (3) the parties contract with reference to general commercial custom, which, as stated, contemplates a duty in the seller to ship in c. i. f. contracts of sale. This is true, of course, whether or not the seller ships to his own order or to the order of a third party.

Unlike c. i. f. sales, where the arrangement of the contract of affreightment by the seller is an integral part of the agreement, without which the contractual delivery is incomplete, in f. o. b. sales the selection of the carrier is, as hereinabove indicated, a matter of variable intention between buyer and seller. The difference between the types of sale has been acknowledged by the witnesses in these proceedings and is recognized in the Revised American Foreign Trade Definitions.

From our examination of the law, we consider that the right to designate a carrier on f. o. b. shipments is vested in that person having the right to possession of the goods at the time of shipment, since it is he who has the power to designate a bailee of the goods. Where a contrary intention is not specified, the right to possession of goods passes to the buyer on delivery to the carrier.[22] Reservation of a security title in the seller, however, is an expression of a contrary intention which entitles the seller to appear as shipper in the ocean bill of lading. In circumstances where the seller ships to his own order or to the order of a third party as security against payment by the buyer, it is the seller who has the right to possession and, consequently, the right to designate a carrier. While there is, as hereinabove stated, some doubt as to the effect of a security title on risk of loss and right to the goods, there is nevertheless no doubt that a reservation of security title in a seller retains the seller's right to possession of the goods prior to tender of payment.

We consider that the commercial custom of considering f. o. b. and c. i. f. shipments to be those of the buyer and seller, respectively, recognized in the Revised American Foreign Trade Definitions, is derived from an analysis of the rights of the parties similar to our own. It is significant to renote that in the "Comments on All F. O. B. Terms," where the seller obtains the ocean space and marine insurance, he is considered to have acted "for the buyer" and "on behalf of the buyer." Whether the actual selection is made by the buyer or by the

[22] 2 Williston, *supra*, p. 98: "As it is a necessary implication in f. o. b. contracts that the buyer is to be at all expense in regard to the goods after the time when they are delivered free on board, the presumption follows that the property passes to the buyer at that time * * *."

seller in such case, it is nevertheless made for the *buyer*, who is the shipper in such sales, except as herein noted where security title is reserved, and should appear on the ocean bill of lading as such.

Our view of f. o. b. and c. i. f. transactions disposes of the issue as to whether f. o. b. shipments are included in the phrases "all of its shipments" and "all export shipments of the shipper," appearing in Article 1 of the Shippers' Rate Agreement. We find, in consonance with the foregoing, that goods sold by a signatory exporter on an f. o. b. basis are not included within the meaning of the phrase unless the exporter retains a security title to the goods sold.

If further indication were needed, we need only point to the 1949 letter in which the conference stated: "* * * the shippers rate agreement employed by this conference is not violated by a shipper who has sold goods to a foreign importer on f. a. s. terms whereby title to the goods is taken by the importer at ship's side or prior thereto and the goods are shipped by a nonconference line in the name of the importer with the contract shipper's name not appearing on any shipping documents in connection with the shipments. It is the opinion of the conference attorneys that under such circumstances, the contract shipper is not in fact the shipper of the cargo but that the shipper is the foreign importer who, *if not bound by a shippers rate agreement* with this conference, is not required to ship via conference lines." [Emphasis supplied.]

The conference expansion of the letter is not convincing. It is urged that the statement stands as a specific exception to the coverage of the Shippers' Rate Agreement granted only because the "foreign importer" in point was a Government agency. We note, however, that (1) no such qualification appears in the letter, (2) no reason is given for preferential treatment of Government importers vis-a-vis private importers, and (3) no explanation was given for limitation of the preference to those Government agencies not signatory to a Shippers' Rate Agreement. While the letter referred only to f. a. s. shipments, it is, in our opinion, of equal applicability to f. o. b. shipments for reasons previously herein set forth, equating in principle the two types of shipments.

It must be noted that prior to the entry of Mitsui as an independent in this trade, the conference members assessed contract rates on shipments made pursuant to f. o. b. or f. a. s. port-of-shipment sales of contract signatories when control of the routing was left to the seller. This course of conduct is consistent with the conference view that its Shippers' Rate Agreement requires signatories thereto to ship exclusively via conference lines all goods sold for export in the conference

trade. It is also consistent, however, with a conference view that f. o. b., f. a. s. sales of a contract signatory are within the scope of the Shippers' Rate Agreement *only where the buyer delegates to the seller his duty of selecting the carrier*, or only where the seller retains a security title to the goods sold. As found by the examiner, the conference recognizes "possible limited exceptions" to its view "such as (1) Government-controlled shipments, (2) forwarder acting for buyer in certain circumstances, (3) if title passes at ship's side or prior thereto and goods are shipped in name of buyer who is shipper, and (4) where there is complete delivery and transfer of title and the seller didn't know the goods were for export." These "exceptions" implicitly recognize, among other considerations, that the right to select the carrier is dependent upon the right to possession of the goods. Whether or not the buyer delegates his right to select the carrier, the shipment is not entitled to contract rates unless the buyer is a contract signatory. Where a seller retains a security interest in goods sold, of course, the seller has the right to select the carrier and to appear as shipper on the ocean bill of lading. But even if we were to assume *arguendo* that f. o. b. shipments are not those of the buyer, as indicated in our findings, shippers disagree on whether f. o. b., f. a. s. sales are included within the scope of the Shippers' Rate Agreement, and the agreement itself makes no reference to such sales. There has been, therefore, no clear intent expressed by the parties to each Shippers' Rate Agreement as to the coverage of the agreement, and the agreement itself is of no help in the problem. Since it is an elementary principle of construction that a contract must be construed strictly against the drafting party,[23] the Shippers' Rate Agreement here must for this reason also be construed against the conference's contention.

Since the Shippers' Rate Agreement does not specify that f. o. b. and f. a. s. shipments of a signatory must move via conference vessels, since shippers disagree as to whether agreement imposes that obligation, since the custom of the industry, as evidenced by the Revised American Foreign Trade Definitions, contemplates that ordinary f. o. b. and f. a. s. shipments are those of the buyer, since the conference, in a 1949 letter expressed, from all that appears in the letter, a broad opinion to the effect that f. a. s. shipments are not included within the coverage of the Shippers' Rate Agreement, and since the new agreement has a secondary effect on nonsignatory buyers, not the natural and logical result of the agreement as written, we find that the new conference interpretation is an agreement or a modification of an approved agreement between carriers which requires specific

[23] *Grace* v. *American Central Ins. Co.*, 109 U. S. 278 (1883); *Fairbanks, Morse & Co.* v. *Consolidated Fisheries Co.*, 190 F. 2d 817 (3d Cir. 1951).

approval under section 15 of the Act, and which has been effectuated prior to such approval in violation of section 15.[24]

It is unnecessary for us here to consider whether the new conference interpretation is detrimental to the commerce of the United States. Detriment to the commerce of the United States is a ground for disapproval of a section-15 agreement; we are not called upon to approve or disapprove this agreement in the present proceedings, nor is such action necessary in view of our finding that the conference interpretation is a new agreement or a modification of an agreement between carriers and has been effectuated in violation of section 15 of the Act. Under the authority of sections 15 and 22 of the Act, we will require the conference and its members to cease and desist from effectuation of the new interpretation until such time as the agreement has been approved under section 15.

We do not here state that we may never approve of a Shippers' Rate Agreement which requires its signatories to ship exclusively via conference vessels all goods sold by such signatories for export in the trade served by the conference, whether sold on f. o. b., f. a. s., c. i. f., or c. and f. terms. Such an agreement, like the dual-rate system itself, would depend, for approval, on the competitive need shown to exist, in keeping, however, with the command of the court in *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 57 (D. C. Cir. 1954) that a concerted conduct approved by us and thus exempted from the antitrust laws must not offend the spirit of those laws any more than is necessary to serve the purposes of the Act.[25] Our view that approval of such an agreement depends upon the evidence adduced has recently received support from the District Court for the Northern District of California in *United States* v. *Borax Consolidated, Ltd., et al.*, 141 F. Supp. 397 (D. Cal. 1955). There a petition, brought to restrain borax producers and the conference from causing customers of the borax producers to ship borax products exclusively on conference vessels, was dismissed on the ground that the subject matter is within the exclusive primary jurisdiction of this Board.

Like the examiner, we cannot find on the evidence before us that the new conference interpretation has resulted in violation of sections

[24] While the Act places the burden of filing for our approval those agreements or modifications of agreements between carriers which fall within the standards of section 15, we have in Docket No. 767 proposed a rule-making proceeding to assist the carriers in meeting that burden by defining, *inter alia*, insofar as they may be capable of enumeration, those nonroutine agreements which require separate section 15 approval.

[25] While the court in *Isbrandtsen* continued to state that, until approval, the agreement is subject to the operation of the antitrust laws, that view is opposed to the weight of authority. See *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932); *Far East Conf.* v. *United States*, 342 U. S. 570 (1952); *American Union Transport* v. *River Plate & Brazil Conf.*, 126 F. Supp. 91 (S. D. N. Y. 1954), affirmed 222 F. 2d 369 (2d Cir. 1955).

14, 16, or 17 of the Act. No injury to any exporter has been shown to have resulted from conference termination of the exporter's right to contract rates in circumstances where a shipment of the exporter has moved via nonconference vessel under f. o. b. or f. a. s. terms. American Potash was, for a period, denied contract rates, but the right to such rates has been restored and a refund of excess charges over contract rates has been agreed to. While the Samincorp and Sinason Teicher Shippers' Rate Agreement have been terminated, complainants have not established that the movements which resulted in termination of those Shppers' Rate Agreement had been made on f. o. b. or f. a. s. terms in circumstances where those companies did not have the right to control the movements.

There is no evidence before us of any actual loss by specific discrimination against Mitsui, nor is there evidence that any foreign consignee has been coerced or prejudiced or has in fact suffered any loss or injury as a result of conference action. Finally, in view of the conference agreement to restore to American Potash the excess of charges over contract rates, we cannot find that unjustly discriminatory rates have been charged by the conference. In view of this satisfaction of the American Potash complaint, we will permit American Potash to withdraw. We will dismiss as unproven all of the charges in Mitsui's complaint except the allegation that the conference interpretation of its Shippers' Rate Agreement has been an effectuation of a new agreement between carriers without our approval, in violation of section 15 of the Act. Although complainants' burden of proof has not been sustained as to whether the conference actions in the Samincorp and Sinason Teicher matters have been in violation of the Act, we will consider the possibility of investigating those matters on our own motion.

An appropriate order will be entered.

Chairman MORSE concurring in result:

Although I arrive at the same result reached by the majority, I disagree with the majority's decision that this Board has power under sections 15 and 22 of the Act to issue cease and desist orders. This agency is one of limited jurisdiction created by statute. We have the authority and jurisdiction granted to us by the Congress. We have no authority or jurisdiction not specifically granted to us or necessarily implied from the general or specific authority. Within the framework of that statutory authority we should exercise our jurisdiction to its fullest extent to carry out the purposes and intent of the various statutes, but we cannot arorgate unto ourselves jurisdiction in excess of that granted to us by statute. The fact that the agency has purported to exercise cease and desist authority in the past does not, in

my mind, justify a continuance where clearly in excess of our statutory jurisdiction.

Other agencies that exercise cease and desist authority do so in reliance on clear and explicit statutory authority.[26]

Section 17 of the Act specifically grants the authority to require carriers to cease and desist from charging unjustly discriminatory rates. No similar authority is contained in sections 14, 15, or 16. Accordingly, I construe the specific inclusion of the power in section 17 to be a necessary exclusion of similar power under the aforementioned sections 14, 15, and 16.

If the Congress had wanted us to have cease and desist authority generally it would either have omitted any reference to cease and desist authority in section 17, or it would have included cease and desist authority in section 22. The authority in section 22 to "make such order as [the Board] deems proper" does not enable us to exercise unlimited and unrestrained jurisdiction and authority. In my opinion, adequate remedies lie in section 15 and in our right to obtain injunctive relief from the courts.[27]

[26] N. L. R. B., 29 U. S. C., sec. 160 (c); F. C. C., 47 U. S. C., sec. 312 (c); I. C. C., 49 U. S. C., sec. 15 (1); F. T. C., 15 U. S. C., sec. 45 (b); and C. A. B., 49 U. S. C., sec. 642 (c).

[27] *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775 (2d Cir. 1948).

Commission on Organization of Executive Branch of the Government, report to Congress on Legal Services and Procedures, March 1955, Recommendation No. 50 (p. 85).

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 8th day of June A. D. 1956

No. 764

MITSUI STEAMSHIP COMPANY, LTD.

v.

ANGLO CANADIAN SHIPPING CO., LTD., ET AL.

No. 773

AMERICAN POTASH & CHEMICAL CORPORATION ET AL.

v.

AMERICAN PRESIDENT LINES, LTD., ET AL.

These matters being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board on the 8th day of June 1956, having made and entered of record a report stating its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof:

It is ordered, That Pacific Coast European Conference and its members, as named in the Appendix, cease and desist from effectuating any interpretation of said conference's Shippers Rate Agreement inconsistent with the interpretation set forth in the report herein; and

It is further ordered, That the complaint in Docket No. 764 be, and it is hereby, dismissed, except as to the charge that the conference's interpretation of its Shippers Rate Agreement constitutes an unapproved agreement in violation of section 15, Shipping Act, 1916; and

It is further ordered, That the complainant in Docket No. 773 be, and it is hereby, permitted to withdraw its complaint.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

Anglo Canadian Shipping Co., Ltd.; Blue Star Line, Ltd.; Canadian Transport Co., Ltd.; Compagnie Generale Transatlantique (French Line); The East Asiatic Co., Ltd. (A/S Det Østasiatiske Kompagni); Fruit Express Line A/S; Furness, Withy & Co., Ltd. (Furness Line); Hamburg-Amerika Linie (Hamburg American Line); "Italia" Societa Per Azioni di Navigazione (Italian Line); Dampskibsaktieselskapet Jeanette Skinner, Skibsaktieselskapet Pacific, Skibsaktieselskapet Marie Bakke, Dampskibsaktieselskapet Golden Gate, Dampskibsaktieselskapet Lisbeth (Knutsen Line—Joint Service); Nippon Yusen Kaisha; Norddeutscher Lloyd (North German Lloyd); N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij (Holland-America Line); Osaka Shosen Kaisha, Ltd.; Fred. Olsen & Co. (Fred Olsen Line); Rederiaktiebolaget Nordstjernan (Johnson Line); Rederiet Ocean A/S (J. Lauritzen, managing owners) (Lauritzen Line); Royal Mail Line, Ltd.; Seaboard Shipping Co., Ltd.; States Marine Corp., States Marine Corporation of Delaware (States Marine Lines—Joint Service); Westfal-Larsen & Co. A/S (Interocean Line); Western Canada Steamship Co., Limited; regular members of the Pacific Coast European Conference and American President Lines, Ltd., an associate member of said conference.

FEDERAL MARITIME BOARD

No. M–67

ISBRANDTSEN COMPANY, INC.—APPLICATION TO CHARTER FIFTEEN LIBERTY-TYPE, WAR-BUILT, DRY-CARGO VESSELS

REPORT OF THE BOARD

BY THE BOARD:

This proceeding was instituted pursuant to Public Law 591, 81st Congress, upon the application of Isbrandtsen Company, Inc. ("Isbrandtsen"), for the bareboat charter for 1 year of 15 Liberty-type, war-built, dry-cargo vessels for employment in the coal trade from United States ports north of Cape Hatteras to Antwerp, Rotterdam, Terneuzan, or North France (Bordeaux/Dunkirk range).

Hearing was held before an examiner, at which American Tramp Shipowners Association, Inc. ("ATSA"), intervened in opposition to the application. Marine Transport Lines and Marine Navigation Co. intervened as their interests might appear. In his initial decision, the examiner recommended that the Board find and certify to the Secretary of Commerce that the service under consideration is required in the public interest, that such service is not adequately served, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service. Exceptions to the examiner's recommendations were filed by ATSA and by Marine Transport and Marine Navigation.[1] Public Counsel urges the adoption of the examiner's recommendations. Oral argument was not heard. The petition of ATSA to instruct the examiner to reopen the proceeding to receive additional

[1] Counsel for Marine Transport and Marine Navigation advised the examiner at the commencement of the hearing that those companies had filed a teletype application to charter 10 vessels for the same trade, and he requested that the present application and the application of his clients be heard together. The request was denied. The exceptions of these interveners complain that the examiner, in his decision, failed to decide whether the two applications were mutually exclusive. The procedural position of the examiner was correct, hence he was not called upon to reach a formal conclusion in his decision on the issue of mutual exclusivity.

evidence is hereby denied. Our conclusions agree with those of the examiner.

Isbrandtsen executed a charter with Association Technique de l'Importation Charbonnier ("ATIC") on April 27, 1956, to transport coal in the trade mentioned above at the rates of $11.60 a ton to Belgian and Dutch ports and $12.10 to French ports, subject to Isbrandtsen's ability to obtain the 15 vessels here sought. ATIC, which is an association of coal importers, supervises for the Government the importation of all coal into France. Isbrandtsen agrees, as to the 15 vessels, to bear the cost of breaking out, reconditioning, and making them ready for sea, with the privilege of refusing any vessel which, in its opinion, would require the expenditure of more than $150,000. Isbrandtsen also stipulates that the charter hire shall be based upon the floor price, or $6,806.32, for each vessel per month. Charter for 1 year is requested because of the high amortization entailed by the expenses of breakout, etc.

Public interest.—France is the largest importer of coal in the world, and because of the severe winter of 1955–56, the drop in rainfall, and the lack of snow, a greater quantity of coal is needed during the next year for its economy. The normal importations from Great Britain and Germany have fallen off because of conditions in those countries, and France finds herself dependent to a greater degree upon coal from the United States. For example, whereas France imported slightly over 1 million tons of coal from the United States in 1955, approximately 6 million tons will be needed in 1956.

Being a member of North Atlantic Treaty Organization and Organization for European Economic Cooperation, the welfare of France is extremely vital to that of the United States. The economic stability of France is contingent in great measure upon its ability to obtain coal from the United States. Incidental but nonetheless important is the fact that the mining of coal and its shipment from the United States is advantageous to those industries in various ways.

The vessels under consideration clearly are to be used in a service which is in the public interest.

Adequacy of service.—At the time of hearing the charter market for American-flag vessels was tight. Furthermore, the president of ATSA admitted that owners of such vessels have never been interested in carrying coal, which is a low-paying commodity. Without being too specific, the witness from International Cooperation Administration claimed that there was such a shortage of American-flag vessels that some of his programs had not been announced. The record shows that two of ATIC's regular brokers in New York canvassed the charter

market after the agreement had been made between ATIC and Isbrandtsen, but only four American-flag vessels had been fixed at the time of the hearing. Although owner witnesses alluded to as many as 20 American-flag vessels which were available for charter by ATIC, only 2 of these vessels were definitely offered to ATIC. ATSA's president stated that the owners of the others preferred to have them available to handle cargoes for the United States Government. The two vessels referred to, when originally offered, were subject to the withdrawal of the present application. This condition was removed subsequently. The volume of coal to be transported for ATIC would require more vessels than the 15 here sought and the 20 already mentioned.

The record substantiates the fact that at the time of the hearing the service under consideration was not adequately served by American-flag vessels.

Reasonable conditions and rates.—ATSA's president conceded that a rate of $11.60 for coal is a very good one, being the equivalent of approximately $65,000 per month for time charter. Isbrandtsen's cost of operation of chartered Libertys is about $40,000 per month, exclusive of overhead, leaving a margin of between $5,000 and $6,000. Isbrandtsen's witness stated that the operation of a Liberty vessel at a rate less than $11.60 would be unprofitable for the company.

Upon this record, the privately owned American-flag vessels available to Isbrandtsen for the carriage of ATIC's coal, other than those few which were fixed prior to the hearing or were offered during the hearing at the rate of $11.60, were not available on reasonable conditions and at reasonable rates.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced at the hearing, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is in the public interest;
2. That such service is not adequately served; and
3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

Any charters which may be granted herein should be for the requested period of 12 months, subject to the right of cancellation by the charterer on 15 days' notice, and the right of cancellation by the Government on 15 days' notice after 6 months; basic charter hire should be at a rate not less than 15 percent of the statutory sales price of the vessels chartered; and all breakout, readying, and layup costs

should be for account of applicant. Before any affirmative action is taken on such charters, however, the Maritime Administrator should satisfy himself that conditions which form the basis for these findings continue to exist and warrant the chartering of the vessels here sought.

JUNE 28, 1956.

FEDERAL MARITIME BOARD

No. M–65

POPE & TALBOT, INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY CARGO VESSELS FOR OPERATION IN THE INTERCOASTAL TRADE

No. S–62

PACIFIC ARGENTINE BRAZIL LINE, INC.—APPLICATION UNDER SECTION 805 (A), MERCHANT MARINE ACT, 1936, AS AMENDED, FOR PERMISSION FOR ITS PARENT CORPORATION, POPE & TALBOT, INC., TO OPERATE SUCH CHARTERED VESSELS IN THE INTERCOASTAL TRADE

REPORT OF THE BOARD

BY THE BOARD:

Docket No. M–65 is a proceeding under Public Law 591, 81st Congress, upon the application of Pope & Talbot, Inc., for the bareboat charter of three Government-owned, war-built, dry cargo, Victory-type vessels for operation in the domestic trade between ports on the Pacific and Atlantic coasts of the United States via the Panama Canal, for a period of 12 months. Docket No. S–62 is a proceeding upon the application of Pacific Argentine Brazil Line, Inc., under section 805 (a) of the Merchant Marine Act, 1936, as amended, for permission for its parent corporation, Pope & Talbot, Inc., to operate such chartered vessels in the intercoastal trade.

The Virginia State Ports Authority, The Port of San Diego, the Norfolk Port Authority, Pan Atlantic Steamship Corporation, American Tramp Shipowners Association, Inc., and Luckenbach Steamship Company, Inc., intervened, the two last named in opposition to the application to charter.

Hearing on these applications was held before an examiner on a consolidated record on May 7, 8, 9, and 10, 1956, pursuant to notice in the Federal Register of April 27, 1956. The examiner's decision was

served on May 29, 1956, in which he recommended that the Board should make the statutory findings necessary for the charter and grant the section-805 (a) permission. Exceptions were filed by Pope & Talbot, Inc., Public Counsel, Luckenbach Steamship Company, Inc., and American Tramp Shipowners Association, Inc., and we heard the parties in oral argument on June 20, 1956.

The evidence establishes that for shipments of steel products, printing paper, pneumatic rubber tires and tubes, alcoholic liquor, lumber, canned fruits and vegetables, and dried fruits there is a continuing and growing shortage of cargo space in the intercoastal trade. The factors contributing to this condition are the increasing volume of shipments, reduction of service by Pan Atlantic Steamship Company and by Quaker Line, and discontinuance of all service by American Hawaiian Steamship Company and by Isthmian Steamship Company. The intercoastal service is an integral part of the domestic commerce of the United States and is in the public interest. Its importance has been recognized by the Congress, the Interstate Commerce Commission, the Maritime Administration, and the Board.

Pope & Talbot, Inc., which has been engaged in the intercoastal trade for many years, owns four Victory-type and two C–3-type vessels. One of the C–3 vessels, under charter to States Marine Lines since December 21, 1955, was due for redelivery on the Pacific coast about May 20, 1956, at which time it was to reenter the intercoastal trade. During 1955 several of applicant's ships were chartered on termination of the eastbound intercoastal voyage for operation in foreign trade and redelivered to it at a Pacific coast point. Operating in this manner, applicant completed 30 eastbound sailings and 20 westbound sailings in 1955; in the first quarter of 1956, seven eastbound and four westbound sailings. Steel and steel products are the principal westbound cargoes, loaded at Philadelphia, Baltimore, and Norfolk for discharge at Los Angeles Harbor, San Francisco Bay area, Portland, and Seattle. Service is on a fortnightly frequency and turnaround of 70 days. Space on the westbound sailings is allocated by applicant's New York office to prevent overbooking. The ships are fully loaded and complete discharge alternately at Portland and Seattle, at which points they are placed on the eastbound loading berth. Lumber, constituting about 75 percent of the eastbound carryings in 1955, is loaded at the lumber berths in the Columbia River and Puget Sound areas for discharge at Baltimore, Philadelphia, New York Harbor, Albany, and occasionally north of New York. General cargo, consisting principally of canned goods and dried fruit, is loaded at San Francisco; pig lead at Selby, Calif., for discharge at Deep-

water, N. J., and occasionally bulk magnesite for discharge in the Philadelphia area.

Applicant is constantly receiving requests from the shippers of general cargo for additional eastbound service; all lumber space has been booked through June 1956, and 57 million feet of lumber offered for shipment in May, June, and July have been turned down because of lack of space. The three vessels sought to be chartered are to augment the present service to 45 round voyages annually. Service, on a 9-day frequency, will be from Seattle, and alternately, Portland, and San Francisco Bay area to Baltimore, Albany, and, if sufficient traffic offers, to Norfolk, in the general cargo berth, and to Baltimore, Philadelphia, Brooklyn, Newark, Irvington, and Albany in the lumber route. There will be one so-called combination vessel each month which will lift lumber and general cargo; the remaining 33 voyages will be with full loads of lumber.

Applicant has sought through its New York chartering agent to charter privately owned Victory-type vessels but has been advised that none is available. Two Liberty-type ships were offered for time charter at rates of $65,000 and $67,000 per month but were rejected, as operation of these slower ships in applicant's berth service would result in an out-of-pocket loss before any allocation of overhead. One Liberty ship was offered on the Pacific coast at a rate of $70,000 per month but applicant was not agreeable to negotiating on the basis of that rate. Although members of the American Tramp Shipowners Association, Inc., had been informed by Association circular dated April 26, 1956, that applicant was seeking to charter Victory vessels, applicant had not received through May 8 any offers of any tonnage from any broker or operator.

Of the eight other carriers operating in the intercoastal service only Luckenbach Steamship Company, Inc., opposes granting of the application to charter. Its position is that the trade is now being served by privately owned vessels, and that the interjection of Government-owned vessels on a fundamental basis lower than the cost to the privately owned vessels is unfair competition. Luckenbach does not carry lumber eastbound and does not serve the ports of Norfolk, Baltimore, or Albany. As Philadelphia is the only port served by both applicant and Luckenbach, there is no basis for a finding of unfair competition.

At the hearing applicant stated that if its application to charter be granted it would be agreeable to having the charters contain a requirement that for the duration of the charters those vessels and the four owned vessels be operated solely in the intercoastal trade. American

Tramp Shipowners Association, Inc., insists upon such a condition and numerous others being attached to the charters should the application be granted. These would require a commitment by applicant to purchase vessels to replace the chartered vessels; that it serve all the places to which shipper witnesses desire service; that San Francisco be served on all voyages; that it pay the break-out and lay-up express involved; that the charter rate be the standard 15 percent, with the standard recapture provision; that the charters be subject to cancellation on 15 days' notice by the Government; that the charters should be cancelled when privately owned Liberty ships are offered to applicant at $59,000 per month, which amount it admits it can afford to pay; and that the Board take such further action as may be necessary to insure that lumber will not be given preference.

Luckenbach asks that if the application be granted that the charters be conditioned upon applicant eliminating Philadelphia from its eastbound and westbound services; that the same privilege of chartering vessels be opened to all carriers in the trade, including Luckenbach; that the charter hire be the full 15 percent of the statutory sales price of the vessels without advantage in respect of break-out items or otherwise; and that the charters be subject to cancellation on 15 days' notice, with opportunity to any interested party at any time to reopen and present new facts deemed important.

Public Counsel's position is that none of applicant's vessels should be permitted to operate in trades other than the intercoastal; that the vessels of Pacific Argentine Brazil Line, Inc., a subsidiary of applicant, should be required to fulfill their commitment on Trade Route 24 or to operate in the intercoastal trade before they are sent offshore in other trades; and that the rate of charter hire should be not less than 15 percent of the unadjusted statutory sales price, or the floor price of the vessels, whichever is higher.

Under date of June 22, 1956, American Tramp Shipowners Association, Inc., informed the Board that applicant had chartered on June 21st one of its vessels, the *Pathfinder*, to the Military Sea Transportation Service for the carriage of coal to Korea, loading expected to begin August 12, 1956. It was urged that this action disqualifies Pope & Talbot as an applicant in this proceeding. Applicant immediately denied this charge for the reason that undisputed testimony of record established that the *Pathfinder* is owned by applicant's subsidiary, Pacific Argentine Brazil Line, Inc., and that for some time that vessel has been chartered in the offshore trade (as in the present MSTS charter), subject to Maritime Administration approval, the profits of which charters are includable in the earnings of Pacific Argentine

Brazil Line, Inc., for purposes of subsidy recapture. Rule 13 (g) of the Rules of Practice and Procedure permits our taking official notice of material facts outside the record, under certain circumstances, and the decision herein will be influenced in part by this new development.

On the basis of the facts presented, we find and hereby certify to the Secretary of Commerce that:

1. The intercoastal service under consideration is in the public interest;

2. Such service is not adequately served; and

3. Privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

RECOMMENDATIONS

The circumstance of Pope & Talbot, Inc., acquiescing in the action of its subsidiary Pacific Argentine Brazil Line, Inc., in chartering one of its vessels for presumably more lucrative operation in foreign trade impels us to recommend that any charters which may be granted pursuant to the findings herein be limited to not more than two Victory-type dry-cargo vessels, except as hereinafter provided; that the vessel *Pathfinder* be required to be placed in the intercoastal service upon termination of the current charter to Military Sea Transportation Service and to remain in the intercoastal service until the charters of both vessels authorized hereunder are completed, unless prior thereto the *Pathfinder* is again required in the subsidized service of Pacific Argentine Brazil Line, Inc., on Trade Route No. 24, in which event the third vessel applied for may be chartered on the terms and conditions stated herein for the other two vessels, except that the term of the charter period shall be coterminous with the term of the charter for the other two vessels; that the charters of the two Victory-type vessels be for the requested period of 12 months; that the charter hire for such vessels be at a basic rate of 15 percent of the unadjusted statutory sales price of the vessels, or of the floor price, whichever is higher, of which 8½ percent is payable unconditionally and the remaining 6½ percent payable if earned on a cumulative basis; that all break-out, readying, and lay-up expenses incurred be borne by the charterer; that the charters be subject to cancellation by the charterer at any time upon 15 days' notice, and, after a period of six months, upon 15 days' notice by the Maritime Administrator, except that in the event of a national emergency the charters may be cancelled by either party on less than such 15 days' notice. We further recommend that such charters be conditioned upon the chartered vessels and the four

vessels owned by Pope & Talbot, Inc., remaining in the intercoastal trade for the duration of the charter period.

With respect to the application of Pacific Argentine Brazil Line, Inc., for permission for its parent corporation to operate the chartered vessels in the intercoastal trade, we find that such operation will not result in any unfair competition to any person, firm, or corporation operating exclusively in the intercoastal service, or that it would be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended. The Board recommends to the Administrator that written permission to so operate, pursuant to section 805 (a) of the 1936 Act, be granted, and that the Administrator also give written permission, pursuant to section 805 (a) of the Act, to Pacific Argentine Brazil Line, Inc., so that its vessel *Pathfinder* may be operated in the intercoastal service, as recommended herein.

June 28, 1956

FEDERAL MARITIME BOARD

No. M–66

LYKES BROS. STEAMSHIP CO., INC.—APPLICATION TO BAREBOAT CHARTER FIVE VICTORY VESSELS FOR OPERATION ON TRADE ROUTE NO. 21, SERVICE 2, AND TRADE ROUTE NO. 13

REPORT OF THE BOARD

BY THE BOARD:

This proceeding was instituted pursuant to Public Law No. 591, 81st Congress, upon the application of Lykes Bros. Steamship Co., Inc., for the bareboat charter of five Government-owned, Victory-type, dry-cargo vessels for operation for a minimum period of six months on Trade Route No. 21, Service 2, and on Trade Route No. 13, at standard bareboat-charter terms. Pursuant to notice in the Federal Register of May 9, 1956, a hearing was held and oral argument heard, in lieu of briefs, before an examiner on May 28, 1956.

In his initial decision, the examiner recommended that the Board find and certify to the Secretary of Commerce that the service under consideration is required in the public interest, that such service is not adequately served, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

Exceptions were filed by intervener American Tramp Shipowners Association, Inc. ("ATSA"). Waterman Steamship Corporation and Bloomfield Steamship Company intervened but took no position. The Director for Transportation for International Cooperation Administration appeared in favor of the granting of the application to ensure adequacy of service to accommodate and accelerate that agency's foreign-aid program.

The application indicates that the company proposes to charter these vessels to augment the regular service provided by owned vessels on the two trade routes referred to above. It is pointed out in the application, and substantiated at the hearing, that applicant, during the month of March 1956, has been unable to move and declined a substantial volume

of cargo on these two trade routes, and that its 16 vessels on Trade Route No. 21, Service 2, and 12 vessels on Trade Route No. 13 have been sailing outbound substantially full for a period of 6 months prior to the filing of the application.

Public interest. Trade Route No. 21, Service 2, and Trade Route No. 13 have been determined to be essential, and we adopt as our own the findings of the examiner in this respect.[1]

Predicated upon these findings, the vessels herein sought to be chartered clearly are to be used in a service which is in the public interest.

Adequacy of service. While testimony offered by applicant's witness indicates that the number of United States-flag sailings from the Gulf to the Mediterranean (Trade Route No. 13) from November 1955 through May 1956 was thirteen fewer than the same period in 1954–1955, and that there was a reduction in applicant's sailings as well as in foreign-flag sailings, this decrease was explained as being caused by adverse weather conditions and several mishaps. This same explanation was offered also with respect to sailings to continental ports on Trade Route No. 21, Service 2. Since May 18, 1956, however, applicant has been forced to decline very substantial amounts of cargo to the Continent and to the Mediterranean, as well as inbound cargo on both trade routes. It was also shown that the new farm bill recently enacted will result in a substantial increase in the movement of cotton, which will probably materialize during August and September 1956. On this point a witness for the American Cotton Shippers Association testified in corroboration of these statements, pointing out that shippers had difficulty in obtaining May and June space and that some shippers are making August and September sales subject to availability of space. In addition to cotton, applicant also anticipates a heavy movement of grain, dairy products, and feeds under the surplus agriculture disposal program.

Applicant has indicated that the vessels here sought will operate at capacity on berth; that limited amounts of weight cargo, such as grain, phosphate, and sulfur will be used as nucleus or filler, and loading will be completed with general cargo. The record amply substantiates that at the time of the hearing the service under consideration was not adequately served by American-flag vessels.

Availability of ships—reasonable rates. According to applicant's witness, efforts were made to obtain fast liner-type vessels for three to

[1] Findings of the examiner: "The routes involved have been determined to be essential, and, with the services thereon, form important arteries for the movement of cotton, sulfur, petroleum, carbon black, phosphate rock, grain and other agricultural products from United States Gulf ports."

five months. This effort was made in February 1956, but the only vessel then available and offered was a Liberty vessel at $66,000 time charter per month. Applicant considered this to be high. Testimony of a chartering broker was to the effect that during the week of May 20, 1956, the charter rates had risen to $80,000-plus for C–2's, $73,000 to $75,000 for Victorys for one and two years, respectively, and $70,000 for Libertys for 10–12 months, and that a premium would be charged for delivery to the Gulf.

While witness Cocke indicated that applicant might lose a small amount of money on the operation of these vessels at a 15 percent basic charter hire rate, the company was willing to suffer a loss since it felt that it owed a duty to its shippers to furnish adequate service to meet the needs of the trade.

There was no evidence offered by ATSA to rebut the foregoing, and, upon this record, we sustain the view expressed by the examiner that privately owned vessels are not available at reasonable rates for use in the service under consideration at the time of the hearing.

Counsel for ATSA has argued that the requested charters are for the purpose of carrying tramp cargo; that applicant could have chartered privately owned vessels in February at break-even rates; that the charter of Government-owned vessels will have a detrimental effect upon the charter market; and that applicant has not proven the existence of an emergency such as is contemplated by Public Law 591.

We feel that such arguments are without merit. The requested vessels are to be operated in berth services carrying a substantial amount of general cargo, with weight cargo to be used as a nucleus or filler. The evidence shows that the private charter rates offered in February 1956 would result in a loss even if overhead were excluded from voyage expenses. Nor can we agree that the breaking out of Government vessels will have a detrimental effect upon the charter market.

As to the contention that an emergency within the meaning of Public Law 591 does not exist, in our opinion Public Law 591 does not require us to make a finding of emergency as a prerequisite to granting a charter.

On the basis of the facts adduced in the record, we find and certify to the Secretary of Commerce:

1. That the service under consideration is in the public interest;
2. That such service is not adequately served; and
3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

We recommend: (1) that bareboat charters of the five vessels be executed at a basic charter hire of 15 percent of the unadjusted statutory sales price of the vessels, or the floor price, whichever is the higher; (2) that applicant bear all break-out, readying, and lay-up costs incurred on the five chartered vessels; (3) that any charter which may be granted pursuant to the findings in this case be for a minimum period of six months, subject to the right of cancellation by applicant on 15 days' notice at any time, and the right of the Government to cancel on 15 days' notice at any time after the end of such six months' period, except that in the event of a national emergency the charters may be cancelled by either party on less than such 15 days' notice.

JUNE 28, 1956.

FEDERAL MARITIME BOARD

No. M–68

GULF & SOUTH AMERICAN STEAMSHIP CO., INC.—APPLICATION TO BAREBOAT CHARTER ONE VICTORY VESSEL FOR OPERATION ON TRADE ROUTE No. 31

REPORT OF THE BOARD

BY THE BOARD:

This proceeding was instituted pursuant to Public Law 591, 81st Congress, upon the application of Gulf & South American Steamship Co., Inc., for the bareboat charter of one Government-owned, Victory-type, dry-cargo vessel for operation for a minimum period of 6 months on Trade Route No. 31. Hearing was held before an examiner on June 7, 1956, pursuant to notice in the Federal Register of May 29, 1956, and was followed by oral argument in lieu of briefs. There was no opposition to the application.

The examiner recommends that the Board find and certify to the Secretary of Commerce that the service under consideration is required in the public interest; that such service is not adequately served; and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service. No exceptions were filed to the recommended decision.

The application sets forth that the applicant is a United States-flag operator serving Trade Route No. 31, and that the vessel, if chartered to applicant, will be used in its regular berth service on the route between United States Gulf ports and the West coast of South America; that the vessel is to augment applicant's fleet of four owned C–2 type vessels operated under an operating-differential subsidy agreement (Contract No. FMB–28) and a Liberty vessel now being time chartered for one round voyage of about 70 days; that no subsidy aid will be requested for the vessel sought to be chartered; that it was unable to charter a suitable privately owned United States-flag vessel at reasonable rates and on reasonable conditions for use in such service; and that an additional vessel is necessary to permit applicant

to maintain its position in Trade Route No. 31 and to carry 50 percent of Public Law 480 and Export Import Bank cargoes which are expected to be offered in the last half of 1956.

Public interest. Trade Route No. 31 has been determined to be an essential foreign trade route, and we adopt as our own the findings of the examiner in this respect. Predicated upon these findings, the vessel herein sought to be chartered clearly is to be used in a service which is in the public interest.

Adequacy of service. The vessel sought to be chartered will augment applicant's operation so as to provide a sailing approximately every 11 days. Although no other United States-flag vessels, either berth or tramp service, serve any portion of Trade Route No. 31, there is foreign-flag competition on the route. At the present time applicant's vessels provide a sailing approximately every 14 days on a 56-day turnaround, serving 6 Gulf ports and 14 ports of call in South America. With the vessel sought to be chartered, the service will be stepped up to approximately one sailing every 11th day.

Applicant has indicated that the use of an additional vessel is necessary to maintain an adequate service on this route due to increased industrial and commercial development on the West coast of South America. There is ample evidence to support this contention. Also, it is expected that within the next 60 days an unusual amount of cargo, consisting principally of heavy lifts, cranes, etc., will take place out of New Orleans, and additional cargoes are expected to result from the opening of a new mine in Chile by the Anaconda Copper interests and the development of nitrate and other commercial plants by interests in Chile. Increased shipments from the United States of certain agricultural products under the provisions of Public Law 480 are anticipated for Bolivia, Peru, and Chile.

Availability of ships—reasonable rates. Late in February 1956 applicant sought, through its charter broker, to secure a Victory or C–2 type vessel but, as none was available, a Liberty ship was chartered, making its first sailing from New Orleans on April 9, 1956. As late as June 4, 1956, the same broker informed applicant that no liner-type vessels would be available for charter for delivery in June, July, or August.

While figures were given by applicant as to the amount it would consider to be reasonable to pay for the charter of a vessel, there is no indication that vessels would be available at such figures. Under the circumstances, we have no difficulty in finding that privately owned American-flag vessels were not available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

Applicant has stated that the figures presented in this record are estimated break-even figures for a vessel being delivered in class and ready to go on berth, and it objects to paying for break-out, readying, and lay-up expenses of the vessel in any manner. Public Counsel is of the opinion that the statutory requirements for bareboat charter have been met by applicant but that, in the public interest, the Board should recommend to the Secretary of Commerce that such conditions be incorporated in the charter as will ensure reimbursement to the Government of all costs of breaking out the ship and putting it in class. We agree with Public Counsel as to applicant meeting the statutory requirements for bareboat charter and for a recommendation that applicant should reimburse the Government for the cost of breaking out, readying, and laying up the vessel.

On the basis of the facts adduced in the record, we find and certify to the Secretary of Commerce:

(1) That the service under consideration is required in the public interest;

(2) That such service is not adequately served; and

(3) That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

We recommend:

(1) That the bareboat charter of the one Victory vessel be executed at a basic charter hire rate of 15 percent of the unadjusted statutory sales price of the vessel, or of the floor price, whichever is the higher;

(2) That applicant bear all break-out, readying, and lay-up costs incurred on the chartered vessel; and

(3) That any charter which may be granted pursuant to the findings in this case be for a minimum period of 6 months, subject to the right of cancellation by applicant on 15 days' notice at any time, and the right of the Government to cancel on 15 days' notice at any time after the 6 months' period, except that in the event of a national emergency the charter may be cancelled by either party on less than such 15 days' notice.

JUNE 28, 1956.

FEDERAL MARITIME BOARD

No. M–69

MARINE TRANSPORT LINES, INC., ET AL.—APPLICATIONS TO BAREBOAT CHARTER GOVERNMENT-OWNED VESSELS

REPORT OF THE BOARD

BY THE BOARD:

This is a proceeding under Public Law 591 of the 81st Congress upon the application of Marine Transport Lines, Inc., and Marine Navigation Company, Inc., for the bareboat charter of 10 Government-owned, war-built, Liberty or Victory-type dry-cargo vessels for approximately one year for use in world-wide trading for the carriage of International Cooperation Administration ("ICA") and other Government-sponsored cargoes and such other cargoes as may be approved by the Maritime Administration. In view of the pending request of ICA for the break-out of 30 ships, preferably of the Victory type, for general agency operation, the notice of hearing was extended to permit any other interested operator to file an application to bareboat charter Government-owned, war-built, dry-cargo ships for the transportation of the type of cargoes mentioned, because it was felt that the ICA request for ships should be fulfilled through the medium of chartering. Notice of hearing was published in the Federal Register of June 7, 1956, subsequent to which 13 other companies filed applications for the charter of 77 vessels [1] for similar use.

Because of an emergency situation appearing to exist, the Board rather than a hearing examiner heard the evidence on June 14, 15, and 19, and heard oral argument in lieu of briefs. Exceptions will not be filed to this report.

The increasing volume of coal exports to Europe is regarded by ICA as the main factor in bringing about a scarcity of tonnage since last

[1] A. H. Bull Steamship Co., 10 Liberty or Victory ships; Grainfleet Steamship Company, Inc., 2 Libertys or Victorys; Olympic Steamship Co., Inc., 4 Victorys; Shepard Steamship Co., 5 Libertys or Victorys; West Coast Steamship Company, 5 Libertys; American Export Lines, Inc., 10 Libertys or Victorys; Luckenbach Steamship Company, Inc., 5 Libertys or Victorys; Coastwise Line, 5 Libertys or Victorys; Pacific Far East Line, Inc., 5 Victorys; Seas Shipping Company, Inc.; 5 Victorys; American President Lines, Ltd., 5 Libertys or Victorys; Pacific Atlantic Steamship Company, 5 Victorys; and American Defense Line, Inc., 1 Liberty.

fall. The Coal Committee of the Organization of European Economic Cooperation estimates that for the current calendar year the coal exports to Europe will amount to 40 million tons, compared with approximately 26 million tons for the previous year. Temporary factors creating this situation arose out of the severe winter of 1955–1956 and consequent high coal consumption for heating, requiring a rebuilding of resources. The long range factors are the consequence of the high rate of industrial activity developing in Europe with the consequent increase in power consumption and increased transportation requirements. Present estimates are that due to this increased industrial activity, European coal requirements for the immediate future will continue to increase. Accordingly, this trade has absorbed a considerable portion of the available tramp vessels of the world fleets because of attractive freight rates and quick turnarounds.

Due to accelerated activity in the sale of surplus agricultural commodities because of the severe cold and floods of the past winter in several areas throughout the world, current and potential programs for the movement of ICA and Public Law 480 cargoes, and cargoes financed by cooperating countries, exceed the capacity of available privately owned vessels, foreign or American flag, on reasonable conditions and at reasonable rates, for use in the services where they are required. Early in May 1956 the shortage of tonnage became so acute as to seriously retard the movement of commodities, particularly grain, in United States-sponsored programs, with the result that ICA requested the Maritime Administration to reactivate 30 Victory ships, in increments of 10, to meet Government requirements for space.

ICA does not buy or transport cargoes but finances the commercial procurement and ocean transportation of cargoes which are considered essential by ICA countries within the various programs which have been approved by the ICA. Other cargoes move under Public Law 480, and some are financed by the countries themselves. Most transactions are consummated through private channels of trade and are therefore not directly controlled by ICA.

Apart from the Department of Defense, ICA, General Services Administration ("GSA"), and the Department of Agriculture are the principal shipping agencies of the Government. Premised on their experience during fiscal year 1956, these agencies project the following as the complete summary of their estimated requirements for fiscal year 1957:

ICA estimates that vessel space will be required for a total of 3.6 million tons of export cargoes consisting of grain (including a backlog of 300,000 tons of 1956 grain), coal, fertilizer, sugar, lumber, and scrap, of which 1.2 million tons are expected to move on berth ships and 2.4

million tons on tramp ships to destinations in four general areas, Europe, the Near East, the Far East, and Latin America. Approximately one-half of the backlog of 300,000 tons of grain has been booked for shipment. Of the total, 1,035,000 tons are expected to move during the first quarter, 930,000 tons in the second, 935,000 tons in the third, and 700,000 tons in the fourth.

The Department of Agriculture estimates that during fiscal year 1957 its various programs such as Public Law 480, the International Wheat Agreement, and barter programs will require tramp ship space totaling 11,480,000 long tons and 8,028,000 tons in berth vessels. These export commodities include grain, rice, cotton, tobacco, dairy products, fats and oils, dry beans, processed dairy products, and other processed commodities. Exports under the International Wheat Agreement and the barter programs are not subject to the 50/50 cargo preference law.

Anticipated imports of strategic materials under the barter programs of the Department of Agriculture during fiscal 1957 are estimated at 1,430,000 tons, all of which are covered by outstanding contracts; the programs of GSA aggregate 1,292,000 tons of such materials. Some of these materials are in relatively minor quantities and will move in berth ships, but for the larger programs, such as one calling for 208,000 tons of bauxite, tramp tonnage will be used. Definite coverage for the bauxite program from the Caribbean area has been concluded, contractual obligations having been made with an operator of foreign-flag tramp vessels. The foregoing calculations are subject to revision, dependent upon congressional appropriations, delays in releasing monies by the Bureau of the Budget, or delays in country program determinations. They are not true portrayals of the future programs because enabling legislation has not yet been enacted, but they represent the anticipated movement of cargoes to the indicated areas.

Approximately 6 million tons of the Department of Agriculture exports on tramp vessels and 3.6 million tons of those estimated for berth services are subject to the statutory provisions that require at least 50 percent of the movement to be on American-flag vessels. To attain that objective in respect of these Government-sponsored cargoes, privately owned American-flag vessels of necessity would transport 4.8 million tons thereof.

The combined exports of coal and grain from the United States will approximate 4 million tons per month, of which ICA finances less than 10 percent, or about 3.5 to 4 million tons per year. That agency has estimated that the total exports of coal and grain in May of 1956 would amount to 4.3 million tons; in June, 4.7 million tons; in July, 4.7 million tons; in August, 4.7 million tons; in September, 4.5 million

tons; in October, 4.4 million tons; in November, 4.4 million tons; and in December, 4.5 million tons. None of these estimates have been made available to tramp owners as they are not public information. ICA estimates that a total of 20 vessels per month, American flag and foreign, will be used throughout 1956, and that the American-flag carriers will get about 10 to 15 cargoes per month.

The ICA representative stated that bids would be opened on June 25 for the transportation of 110,000 tons of grain for Pakistan in June and July, and that vessels could be offered to the Pakistan Embassy or to the grain houses for fixtures. Two other spot cargoes in the Gulf were mentioned as being available for the second half of June. The vessels sought to be broken out of lay-up were to be used for the movement of grain to Turkey and India as well as to Pakistan. ICA had programmed the Pakistan grain last year but the actual authorization was not issued until about ten days before this hearing. There was no notification to the shipping industry of such a contemplated movement as ICA could make no commitment until an agreement had been signed by the United States Government, ICA, and the Pakistan Government. The grain is in the possession of the grain companies and is not available for shipment by them until ICA has financed the transaction. Programs of the Department of Agriculture and GSA are handled in substantially the same way, with the result that there is always a sudden demand for vessel space. Neither the representatives of the shippers nor of the ocean carriers are represented at the meetings of the Interior Agency Committee, which is composed of representatives of the Defense Department, Department of Agriculture, ICA, GSA, Bureau of Public Roads, and Maritime Administration. Another factor affecting the situation is that until the agreement is actually signed information concerning the sale of the commodity is classified information so as not to jeopardize the negotiations. Accordingly, vessel owners, being uninformed of possible movements, do not always have ships at hand for immediate loading.

The Department of Agriculture experienced no difficulty in getting American-flag vessels to carry more than half of the financed cargoes that moved during fiscal year 1956, but for approximately 40 to 50 days prior to this hearing there had been some of minor consequence. All of the anticipated tramp movement in fiscal 1957 of 3,686,000 tons of grain under Public Law 480 will be to countries served by American-flag liner services, and to the knowledge of the Department's representatives there is not now offering any of the cargoes covered by the Department's programs which cannot obtain ocean transportation at reasonable rates. There was at the time of the hearing no cargo known to be available in July for any of the numerous vessels

named to the Inter-Agency Committee, but it is expected that there will be about 700,000 tons of bulk grain to move from the Pacific coast to Japan in the fiscal year 1957.

With respect to the availability of American-flag vessels, most of the 60 to 70 American-flag tramps are presently on short term charters, and in the opinion of the president of American Tramp Shipowners Association, Inc. ("ATSA"), practically all of those vessels would be available to any future projection for carriage of ICA-sponsored cargoes. Assuming that an average voyage would be of about 60 days duration, probably 30 tramp vessels would be available each month during the coming year.

In April and May 1956, ICA approved 40 American-flag vessels, 40 ICA-country-flag vessels, and 31 third-nation-flag vessels. Some American-flag vessels offered at rates in excess of those established by National Shipping Authority ("NSA") have been rejected. Those rates are fixed by NSA as reasonable in relation to vessel operating costs and are regarded by the Inter-Agency Committee as maxima, but as the ship operators have never been informed of the existence of such level they have been unable appropriately to limit their proffers. Not all offerings at higher rates are disapproved, however, 13 such having been accepted in April and 12 in May 1956. Early in June two American-flag vessels were approved and the Agency was informed by ATSA under date of June 12 that 26 other named vessels were seeking cargoes. These were indicated to be available at various times from spot position through August at Atlantic, Gulf, and Pacific coast points. Also, the Inter-Agency Committee had been informed by telegrams of June 7, 8, and 11 from Polarus Steamship Company of 19 additional American-flag vessels that were and would be available to the end of August. Replies from 22 American-flag berth operators to the Board's requests of June 15 for detailed information show that these operators expect to have an aggregate of approximately 2 million tons of additional cargo space available during fiscal year 1957 for Government-sponsored cargoes.

Discussion and Conclusions

This record establishes that actual and immediate need by Government agencies for cargo space on American-flag vessels in excess of the capacity of available privately owned vessels has not yet materialized; that all requirements are in terms of estimates and projections; that approximately half of ICA's backlog of 1956 grain has been booked for shipment; that there is not now offering any cargo under programs of the Department of Agriculture that cannot obtain

ocean transportation at reasonable rates; and that the Department of Agriculture knows of no cargo that will be available for movement in July beyond the capacity of available tonnage. The vessel operators have demonstrated that there is no dearth of tramp ships for early employment, and that berth operators will be able to accomodate substantially increased volumes of Government-sponsored cargoes in the ensuing fiscal year. Accordingly, we are unable to make the affirmative finding that privately owned American-flag vessels to the extent required are not available for charter by private operators on reasonable conditions and at reasonable rates for use in the world-wide services under consideration. Under the circumstances, it is unnecessary to comment on the other two statutory issues.

There appears to be a lack of coordination between the Government agencies which control or finance the shipment of cargo and the ship operators, in that the latter are not informed of tonnage to be moved until the cargoes are ready for loading. ICA and the other Government shipping agencies should be in position to give carriers several weeks' notice that ships are desired to be available for certain loading periods. The ship owners have also indicated a reluctance to reveal promptly their availability of ships, which is no doubt in the interest of offering them for the more desirable cargoes and trades. It is obvious that a more cooperative procedure should be established which would benefit all interested parties. We recommend that the agencies and carrier representatives inaugurate such a plan in order that the parties may reach accord respecting both availability of ships and proper rates.

If any Government agency, having given advance notice of definite requirements, advises the Board that it is unable to meet such requirements from privately owned American-flag vessels at reasonable rates and on reasonable conditions, the Board will then immediately reopen this hearing for the purpose of taking additional evidence with respect to such definite requirements and will, if the statutory requirements are shown to have been met, recommend bareboat charters of such Government-owned ships as are necessary to meet requirements to qualified applicants. To the end that this may be accomplished, the present record will be held open.

JULY 9, 1956.

FEDERAL MARITIME BOARD

No. 723

CITY OF PORTLAND, OREGON, ACTING THROUGH ITS THE COMMISSION OF PUBLIC DOCKS, AND THE PORT OF SEATTLE

v.

PACIFIC WESTBOUND CONFERENCE, AMERICAN-HAWAIIAN STEAMSHIP COMPANY ET AL.

Submitted May 16, 1956. Decided July 12, 1956

1. Equalization on explosives from du Pont, Washington, to the Philippines found justified on basis of inadequacy of scheduled direct service at time of prior hearing and since.
2. A monthly direct service would be adequate to serve normal needs of shippers of explosives from Puget Sound to the Philippines.
3. Equalization on explosives permitted to meet special needs of shippers when direct sailings unavailable.
4. Pacific Far East Line's past equalization on explosives may have resulted in overpayments; a separate proceeding to be initiated to determine if violations of the Shipping Act, 1916, have occurred.
5. Board's prior report and order modified to accord with above findings.

Additional appearances:

Odell Kominers for respondent Pacific Far East Line, Inc.

Leroy Fuller, *Edward Aptaker*, and *James L. Pimper* as Public Counsel, interveners.

REPORT OF THE BOARD ON FURTHER HEARING

BY THE BOARD:

In its original decision herein, 4 F. M. B. 664, the Board, after finding that respondent Pacific Far East Line, Inc. ("PFEL"), admitted there was adequate service from Pacific Northwest ports for the shipment of explosives to the Far East, found unlawful PFEL's practice of equalizing rates on such traffic originating in the Northwest and shipped through San Francisco. PFEL, after petition for

reconsideration and stay of the Board's order was denied, filed suit for judicial review in the Court of Appeals for the District of Columbia Circuit. The Court, on January 9, 1956, denied PFEL's motion for interlocutory injunction and for temporary stay or suspension, but granted its motion to adduce additional evidence, and directed the Board—

to take additional evidence in connection with the conclusion of the Board that Pacific Far East Line, Inc., admitted the adequacy of explosive service from the ports of Seattle and Portland * * *.

By order of January 24, 1956, the Board reopened and remanded the proceeding to the examiner to take such additional evidence, and to that end to take—

additional evidence as to the adequacy of service to meet the requirements of shippers of explosives to the Far East from the ports of Seattle and/or Portland, including evidence as to whether the practice of equalization on explosives from areas naturally and geographically tributary to (such) ports is justified.[1]

Further hearing was held on February 29 and March 1, 1956. Briefs were filed on March 23 and 27, 1956.

The folowing is a statement of evidentiary facts, basic facts, and the ultimate findings and conclusions of the chief examiner on further hearing:

"*Evidentiary facts.*—The record on further hearing establishes the following facts:

"1. The principal shipper of explosives from the Northwest to the Philippines is the du Pont Company. Its witness herein, called by PFEL, was U. J. Cook, manager of its San Francisco export office. du Pont manufactures and ships explosives from its plant located on tidewater at du Pont, Washington, near Tacoma. Ninety percent of the shipments are dynamites and accessories such as caps, fuses and detonating devices. The balance are nonexplosives such as wire and blasting agents, including 'nitramon' which is manufactured elsewhere. Normally, explosives and nonexplosives are shipped together. They are used chiefly in the operation of mines, which are vital to Philippine economy.

"2. du Pont ships to approximately 25 receivers at nine island destinations. The Philippine Constabulary limits the amount receivers can store, which is estimated to vary from 15 to 300 tons. The Constabulary requires mining companies to file monthly storage reports and is said to be unwilling to permit discharge of explosives until after

[1] The order also states that the Board may modify its findings of fact, or make new findings, by reason of the additional evidence taken, and may modify or set aside its order.

such reports are filed, approximately the 10th of each month.[3] Also, the cost of inventory maintenance limits storage. Therefore, receivers desire to receive small shipments on a relatively frequent basis.

"3. du Pont also ships explosives occasionally to other countries in the Far East, to Hawaii, Alaska, and Central and South America, where it encounters domestic and foreign competition. In the Philippines, which is its principal market, it faces potential competition from Japan and active competition from plants in the San Franicsco Bay region, which have a minimum of two PFEL sailings per month available from San Francisco to the Philippines. Witness Cook stressed the importance of satisfactory transportation service in meeting competition, with at least two regular sailings monthly. He testified that his customers specify approximately a 2-week period for delivery 'in early April, or mid-April, or late April,' for instance; that if only monthly service were available out of Puget Sound, consequent delays would force consumers either to buy from du Pont's competitors who have fortnightly service, or to suspend operations; that without equalization through San Francisco, du Pont would be forced to market its products at a substantial cost disadvantage; and that the du Pont works in Washington has been a marginal operation dependent on a substantial volume of export business, without which it might have to close down.

"4. Vessels carrying explosives are not permitted to call at general cargo docks here or at destinations. They load explosives at designated anchorages; and if general cargo also is to be loaded or discharged, it is necessary before entering port to off-load the explosives, proceed to the general cargo dock for loading or unloading, then return to the explosive anchorage for reloading explosives. This is a costly, impractical and unsatisfactory operation both from the carrier's and receiver's standpoint. The nonexplosive items shipped are not subject to these restrictions and may be shipped on any liner vessel.

"5. The present movement of explosives under equalization is from du Pont, Washington, via truck or rail to an explosives dock on San Francisco Bay (Giant, California). There it is placed in portable magazines or vans provided by PFEL and barged to PFEL vessels for shipment direct to the Philippines. PFEL absorbs the cost of barge service and of transfer from rail or truck to barge. Use of vans results in greater safety, improved handling and better condition of

[3] "This information was conveyed to Cook in letters from Macondray & Co. Inc., du Pont's Philippine agent, and a dealer in explosives. Cook was unable to state what the storage limits were and did not know the financial ability of any receivers to maintain an investment in stock. Macondray also stated that receivers require three to four sailings a month.

shipments upon arrival. Normally, shipments go direct to Manila and within one to 5 days are transshipped to outports. du Pont has no interest in whether PFEL delivers directly or by transshipment, so long as the receiver is satisfied. Absent equalization, the movement would be either direct from du Pont, Washington, by vessel to the Philippines, or from du Pont by barge or vessel to Blake Island anchorage (outside of Seattle), thence by vessel direct to the Philippines. du Pont is satisfied with PFEL's service, and wishes to continue using it under equalization.

"6. PFEL effects equalization by refunding to du Pont the costs incident to delivery of explosives from du Pont, Washington, to alongside vessel at San Francisco, less a flat amount of $10.96, regardless of the volume of the shipment. This is stated to be the cost to du Pont of diesel oil which would be used by du Pont's towing equipment in moving the cargo about 40 miles from plant to Blake Island. Witness Cook knew nothing about the kind of boat that would be used by du Pont to move the cargo to Blake Island, what crew would be used, the distance involved, or what the cost of such carriage would be. PFEL's Traffic Manager was similarly uninformed, but he testified he was satisfied that the $10.96 figure was proper after checking the expense with du Pont's main office.[4] Equalization payments based thereon have been made since 1953, and have been approved by the Pacific Westbound Conference, of which PFEL is a member. Actual shipments of explosives have moved from du Pont, Washington, to Blake Island by Puget Sound Freight Lines, a common carrier, for shipment to Alaska. Its tariff rate for such service, effective August 17, 1955, was $.94 per 100 pounds or $18.80 per ton. There are other barge lines or contract carriers which might be able to arrange for such carriage at differing rates.

"7. The following table shows du Pont's cargo, in revenue tons, carried by PFEL in 1955 to the Philippines:

[4] "He stated that du Pont owned the equipment, and paid the employees, which would be utilized, and that $10.96 would be the extra cost of delivery, irrespective of the number of tons moved or time of year shipped.

TABLE

Sailed San Francisco	Arrived	Manila	Philippine outports								Total (tons)
			(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	
Jan. 14	Jan 31		X								95
Jan. 22	Feb. 6	X	X					X			165
Feb. 1	Feb. 15		[1] X				X				92
Feb. 11	Feb. 28			X			X		X		410
Mar. 21	Apr. 6		[1] X							X	292
Apr. 29	May 15	X		X	X			X	X		295
June 11	June 26	X	X	X							320
June 30	July 18		([1])		X						48
July 22	Aug. 7		X								[2] 1
Sept. 2	Sept. 22	X	X	X			X	X	X		270
Sept. 18	Oct. 2	X									[2] 1
Sept. 30	Oct. 15	X	[1] X		X					X	237
Oct. 16	Oct. 30			X							[2] 46
Nov. 3	Nov. 19			X							104
Nov. 14	Dec. 2		X								379
Nov. 26	Dec. 12	X									[2] (7')
Dec. 28	Jan. 12	X	X	X	X	X		X	X		314
Total											3,069

[1] First port of call at San Fernando (Col. 1). Shipments to other outports transshipped from Manila, which was first port of call.
[2] Not equalized because shipments were either nitramon or did not qualify under Rule 2.

"8. This table reveals the following significant facts: The volume of shipments is slightly over 3,000 tons,[5] averaging approximately 180 tons per shipment. Shipments ranged from 1 to 50 tons up to 300 to 400 tons. With the exception of four direct shipments to San Fernando (Col. 1), all other shipments to outports were transshipped from Manila, which had 13 direct calls. Equalization was not accorded on four shipments. Of the 13 remaining shipments which were accorded equalization—three amounted to less than 100 revenue tons,[6] six went to Manila, nine to San Fernando, six to Jose Panganibon (Col. 2), and not over four went to any other outport. Witness Cook conceded that no one receiver would require two sailings a month, but he maintained that because of the number and scattered location of receivers, it was impossible to coordinate their requirements for shipment, and that the receivers, as a group, sometimes require more than one sailing a month. The Board, in its Report on page 18, found that a greater frequency than one was required. Of the 13 shipments equalized three arrived on or before the 6th of the month, and three arrived on the 26th, 28th and 31st. If one to five days are allowed for transshipment, the indication is that most of these six shipments would have arrived at final destination prior to the 10th of the month.

[5] "The volume for 1955 is about 20 percent greater than in 1953 and 1954, and is substantially the volume forecast for 1956. Included in the 3,069 tons is 352 tons of nitramon which normally does not move from du Pont.
[6] "There were also 13 shipments made in 1953, three of which amounted to less than 100 revenue tons.

"9. du Pont has billed PFEL for equalization on the shipments of November 3 and 14, and December 28, 1955, in amounts averaging slightly over $30 per revenue ton. These moved after the Board's Report and Order herein of October 12, 1955, which condemned the practice of equalizing on explosives.[7] PFEL has continued to offer equalization on explosives despite a ruling from counsel for the Conference that it was prohibited by the Board's order. PFEL has not reported to or secured approval of the Conference for such equalization despite the tariff rule so requiring.[8]

"10. No shipments of explosives have been made by du Pont to the Philippines between the last voyage shown in the Table, December 28, 1955, and date of further hearing, February 29, 1956. The next shipment was scheduled to be made via PFEL on March 16, 1956, approximating 250 tons. The only other shipment on order was for 27½ tons.

"11. The Board's finding that there was an admission by PFEL of adequate nonconference service for explosives from the Pacific Northwest to the Philippines was based upon the prior testimony of witness L. G. Dunn. Upon further hearing he testified that there was no nonconference service, including tramp service, at the time he originally testified, now, or since World War II;[9] that he did not intend in his prior testimony to admit or state that there was, and that now there is not adequate scheduled service by conference vessels from the Pacific Northwest. His testimony as to inadequacy of the service is not only unrebutted but is confirmed by other witnesses.

"12. During 1953–1955 all vessels, whatever their routing, which called at the Pacific Northwest and thereafter called at the Philippines averaged 2.2 to 2.6 sailings per week, the U. S.-flag sailings averaging approximately one a week.[10] However, none of these sailings was direct to the Philippines except those of Java Pacific, Hoegh Line ("Java Pacific"), a foreign-flag line which provides a direct monthly sailing from the Northwest to the Philippines. However, its

[7] "The Board's Report found the practice and so much of Article 4 of the basic agreement and Rule 2 which authorized the practice, to be unjustly discriminatory and unfair as between ports within the meaning of Section 15 of the Shipping Act, 1916. Its order disapproved the Article and Rule insofar as they authorized the practices found unjustly discriminatory and unfair.

[8] "PFEL's Traffic Manager testified that there was conflicting opinion as to the status of equalization, that the Board's order required the Conference to amend the tariff rules, that no such amendment had been approved by the Board and the rules as to equalization remained unchanged. He had doubt as to the effective date of the Board's disapproval of Rule 2 and Article 4 insofar as they authorized the condemned equalization.

[9] "He stated there was an attempt to establish a nonconference service 5 or 6 years ago which failed after one or two sailings.

[10] "The Board, on page 12 of its Report, took official notice that "Outbound sailings calling at Pacific Northwest ports enroute Philippines average about four per week, and these are divided about equally between United States flag and foreign flag ships."

last port of loading, after leaving Puget Sound, is Vancouver, British Columbia.[11]

"13. Java Pacific's service was instituted in 1950, and was scheduled to sail last from Seattle in anticipation of handling du Pont's dynamite shipments direct. This schedule was changed in 1953 to serve Vancouver last, because of failure to secure du Pont's dynamite and because of the heavier movement of flour from British Columbia. Java Pacific is experienced in, and its vessels are capable of, handling dynamite. It would use built-in powder rooms which, its witness E. L. Bargones conceded, would not be the most economical or safest way of handling dynamite. However, this method would comply with Coast Guard rules. Java Pacific has solicited this cargo and desires to handle it now. Bargones, who appeared under subpena, testified that if the dynamite traffic could be secured, Java Pacific, after loading at Vancouver, would proceed to Blake Island for loading, a matter of 65 miles deviation, and proceed direct to the Philippines without calling at Seattle.

"14. Following the Board's order of October 12, 1955, representatives of du Pont, including Cook, and of Java Pacific, including Bargones, met in November, 1955, at du Pont's request to consider the dynamite traffic. Bargones testified that after du Pont stated the conditions of shipment, Java Pacific offered to handle the business, and based on its monthly service, undertook to give service identical to that being furnished by PFEL; that it would carry small as well as large shipments; and would deliver either directly or by transshipment to the outports. Bargones testified that Cook told him that Java Pacific's monthly service was more than adequate, that sailings every two or three months might be all right, but that du Pont desired to have nothing less than quarterly sailings. Bargones further testified that there was no reference to the fact that receivers might require delivery after the 10th of the month. Cook testified that he did not recall discussing the time of month the Java Pacific vessels were scheduled to arrive.[12]

"15. Witness Cook testified the meeting was only exploratory, that he might have expressed the opinion that monthly service would be satisfactory, but that after discussing the matter with du Pont's people in the Philippines and going over the records, it was concluded that du Pont required at least two sailings a month to be competitive. He conceded that if Java Pacific's service should prove inadequate, it

[11] "Over two-thirds of its arrivals at Manila during 1953–1955, have been prior to the 10th of the month.

[12] "PFEL's Traffic Manager did not recall any specific instructions from du Pont requiring that arrivals of its cargoes be after the 10th of the month.

could be supplemented by use of PFEL's service. However, he was opposed to splitting up shipments among two or more carriers, stating that with the fluctuating volume of shipments a carrier must be given both the "bitter and sweet" to sustain an economical operation, and to insure to the shipper a continuous service.

"16. The only U. S.-flag lines sailing from the Northwest to the Philippines are American Mail Line ("AML"), every 10 days, and States Steamship Company ("States"), monthly. To the Philippines, AML goes via Japan; States via California ports. Their representatives, who appeared under subpena, testified they would not be interested in this traffic unless assured of substantial minimum shipments, AML 450 tons and States 400–500 tons. To participate, they would either have to reschedule their sailings or off-load and reload the dynamite at each intervening port.

"*Basic facts* derived from the foregoing recital are as follows:

"17. Whether witness Dunn, for PFEL, admitted adequacy of service is beside the point in view of this record which establishes the fact that the witness did not intend to make such admission; also the fact that there was not, at the time of the prior hearing, nor has there been since, any nonconference or tramp service, or any scheduled conference service adequate for the shipment of explosives from Seattle, Blake Island or Portland to the Philippines. This finding is based upon the undisputed testimony on further hearing that direct service is required, but that it was and is nonexistent.

"18. No requirement is shown for the necessity of more than one monthly sailing for the explosive traffic involved. The case for two or more sailings rests mainly upon the alleged limitations on storage imposed by Philippine authorities, the natural desire of receivers to limit their investment to minimum inventories, the fear that San Francisco competitors with more sailings available may capture the Philippine market, and the self-serving statements of du Pont's agent in the Philippines, Macondray, whose demand for three to four sailings seems exaggerated compared to the more modest claims of witness Cook. Giving all possible weight to these considerations, the fact remains that the testimony as to storage limitations is vague, unsubstantiated, and unconvincing. Moreover, the desire of receivers to keep down their capital outlay, and the fact that San Francisco competitors have a more advantageous location, are not controlling factors in determining adequacy of service from Northwest ports. The actual experience for 1955 shows 13 equalized shipments of widely fluctuating volume, a maximum of four, six and nine going to individual ports. Note also the time lapse of 2½ months between shipments during the

first quarter of 1956. While there is an indication by Cook in a statement to Bargones that a monthly service, or perhaps a quarterly service, would suffice, Cook later changed his mind after talking to his people in the Philippines and going over the records. But presumably the record he consulted was of past performance (see Table), which he projected for 1956 as to volume; and presumably he expressed the views of his people, including Macondray, in his testimony, all of which has been analyzed and considered above.

"19. The service of Java Pacific, with a monthly sailing from Blake Island direct to the Philippines, would be adequate for du Pont's explosives traffic without the need for any equalization. The record is convincing that Java Pacific is ready, able and willing to commit its vessels to this service. PFEL points out that Java Pacific's vessels arrive in the Philippines before the 10th of the month, and therefore prior to the time when monthly storage reports are made by mine operators to the Constabulary. This, it contends, would render the service inadequate because of consequent difficulties in securing discharge permits from the authorities due to the lack of such reports. This argument appears to come as an afterthought, supplied by Macondray's letter, in view of the fact that time of vessel arrival was not mentioned as a condition of shipment in the negotiations between Cook and Bargones, during which it was indicated by Cook that Java Pacific's service would be adequate. PFEL's Traffic Manager had no knowledge of such condition. Also, Cook testified that receivers specify a two-week period for delivery which could be made in the early, middle or late part of the month. Even PFEL's service, which is admittedly satisfactory, does not follow a consistent pattern of arrivals after the 10th of the month. Therefore, it must be concluded that if the receivers of explosives in the Philippines have any preference for delivery at a particular time in the month, it is only partially a factor to be taken into consideration in determining adequacy of service. Finally, PFEL argues that Java Pacific's service would not be adequate because it lacks the portable vans or magazines used by PFEL. However, this does not appear to be a significant factor in determining adequacy since Java Pacific's method of handling explosives complies with Coast Guard rules.

"20. Equalization on explosives, as practiced in the past by PFEL, has obviously resulted in overpayments to du Pont, the extent of which cannot be determined here. Manifestly, a flat charge of $10.96 (a factor used in the equalization) for barging quantities ranging from 40 to 400 tons a distance of 40 miles is absurdly low. This follows from the fact that such charge does not reflect any direct cost of labor and

equipment; also the fact that the regular common carrier charge for such service is $18.80 per ton. The testimony in support of this flat charge was extremely vague and was unsupported by any first hand knowledge of the operation which it was supposed to cover.

"21. PFEL has continued to offer equalization on shipments of explosives since October 12, 1955, the effective date of the Board's Order, and has failed to file any report thereof to the Conference as required by Rule 2 of the conference tariff. The evidence is not clear that the amounts billed by du Pont have been paid, but such payment would violate the plain terms of the Order. In extenuation of PFEL's course, it must be said that the Board's order condemning equalization on explosives was based upon a mistake of fact, namely, its erroneous finding that there was adequate service from Northwest ports. (See Finding 17).

"22. Public Counsel contend, on brief, that the Board's prohibition of equalization may be circumvented by unlimited transshipment, and suggest that the Board clarify its Report, page 21, on emergency transshipment. This is dealt with hereafter.

"*Ultimate findings and conclusions.*

"23. The practice of equalization on explosives from du Pont, Washington, has been justified on the basis of services as scheduled during and since the prior hearing, except to the extent of over-equalization indicated in Findings 6 and 20. However, such practice would not be justified should Java Pacific institute the service for explosives traffic which it proposed at the further hearing. (See Findings 13 and 19).

"24. The Report and Order of the Board herein, issued October 12, 1955, should be modified to reflect the findings of fact and conclusions made herein."

The foregoing is the initial decision of the examiner in this matter. Exceptions thereto have been filed by complainants, Public Counsel, and PFEL. Replies have been filed by complainants and PFEL. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

Exceptions of complainant and Public Counsel.—Complainants except principally (1) to the admission of certain letters in evidence and to the amount of credence, although slight, given by the examiner to the contents of those letters, (2) to the examiner's finding that witness Bargones conceded that Java Pacific's method of handling explosives "would not be the most economical or safest way of handling dynamite", and (3) to the finding that there is not now adequate direct service for shipment of explosives from du Pont, Washington.

We reject the first principal exception. As we have recently indicated in *Practices of Fabre Line and Gulf/Mediterranean Conf.*, 4 F. M. B. 611 (1955), the Administrative Procedure Act permits the introduction of hearsay evidence in agency proceedings subject to the requirement that rules or orders issued by the agency be supported by reliable, probative, and substantial, as distinguished from hearsay, evidence. Since the examiner found contrary to the proposition for which the letters were offered, namely, that more than one sailing per month is necessary to meet the needs of the dynamite shipper, we consider complainant's argument to be moot.

The same disposition may be made of the second principal exception. The examiner ultimately found the difference in handling methods to be insignificant to a determination of adequacy, in view of the fact that Java Pacific's handling methods comply with Coast Guard safety regulations. The exception is moot.

In its third principal exception, however, in which Public Counsel joins, complainant argues that while it is literally true that Java Pacific has not actually provided direct sailings from Puget Sound to the Philippines since 1953, it has at all times since 1950, when it first instituted the direct service, been available to handle the dynamite shipments in question. In this regard Public Counsel argues that "the record clearly shows * * * that Java Pacific is not only *now* ready, able and willing to commit its vessels to this service 'but *has continuously* been ready, able and willing' to do so for a number of years in the past" (emphasis in text). Public Counsel further argues that Java Pacific's present failure to serve Blake Island last has been caused by PFEL's continued equalization and Java Pacific's resultant inability to obtain the cargo. Inadequacy so caused, it is argued, is not, in fact, inadequacy at all.

We agree that the present lack of direct service by Java Pacific has been caused in part by the practice of equalization. We must find, however, a present inadequacy of direct service for carriage of dynamite from Blake Island to the Philippines. Had it not been for PFEL's disregard of the Board's order by continuing to ship du Pont explosives through San Francisco, Java Pacific would in all probability presently provide a direct service as its solicitation of these cargoes subsequent to our order clearly indicates. The fact remains that Java Pacific discontinued its direct service to the Philippines in 1953 and its present last outbound port of call is Vancouver, B. C., rather than Seattle or Blake Island. We must therefore sustain the examiner's conclusion, although the present inadequacy has been caused, in part, by PFEL's equalization on dynamite shipments. We will leave the

record open for a period of 30 days, however, within which we will expect Java Pacific to give assurances of its intention to initiate immediate and regular direct service. As evidence of an intention to adjust its sailing schedule to provide Seattle, Blake Island, or du Pont as its last outbound call, we will accept a revised tariff or schedule reflecting the adjustment. If its sailings are to be so adjusted, we will by order prohibit PFEL from equalizing on explosive shipments originating in the Northwest, except when special conditions exist.

Exceptions of PFEL.—Although PFEL concurs in the examiner's conclusion that direct service from Puget Sound to the Philippines is inadequate, it has filed seven exceptions to the initial decision. Those exceptions and our position thereon are as follows:

1. PFEL excepts to the examiner's conclusion that the practice of equalizing on explosives from du Pont "would not be justified should Java Pacific institute the service for explosives traffic which it proposed at the further hearing". Such a finding, it is urged, is beyond the scope of the January 9, 1956, order of the United States Court of Appeals, *supra*, of our order of January 25, 1956, and of the complaint herein, which involves past equalization practices. In any event, PFEL further maintains that the examiner erred in finding a monthly sailing adequate to meet shipper needs.

PFEL's view appears to require a conclusion that we are rigidly limited in our findings and conclusions by the precise language of a complaint or order of remand, regardless of the facts which may be developed *and argued* by the parties to the proceeding.

We do not share this view of our duties under the Shipping Act, 1916 ("the Act"). In our view, we would be remiss in our duties if, assuming actual direct service by Java Pacific, we did not, acting on this record, prevent continued unlimited equalization on dynamite by PFEL. As stated in *Chesapeake & O. Ry. Co.* v. *United States*, 11 F. Supp. 588, 592 (1935), in discussing an Interstate Commerce Act provision similar to our section 22:

> * * * after a complaint is filed before the commission, it becomes the duty of the commission to investigate the complaint and take proper action upon its own motion * * * its power is not restricted by the issues raised on the complaint, provided * * * that the (respondent) * * * had full opportunity to make (its) defense.
>
> It is the duty of the commission to look to the substance of the complaint rather than its form and it is not limited in its action by the strict rules of pleading and practice which govern courts of law.

This Board, like other administrative agencies, has an affirmative duty to investigate as well as to decide, in consonance with its position as trustee of the public interest in matters within its jurisdiction.

See *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134 (1940); *United States* v. *Morton Salt Co.*, 338 U. S. 632 (1950). We cannot discharge that duty by ignoring an unjust discrimination which will, according to the facts in this record, exist if Java Pacfic should resume its direct service from Puget Sound to the Philippines. We must, rather, inform ourselves as to whether Java Pacific will reinstitute its direct service. It is clear that this complaint, in substance, has sought our aid to correct a loss of traffic to the Pacific Northwest and, in addition, to prevent future traffic losses. Continued unlimited equalization of dynamite, if adequate service becomes immediately available, would result in such a loss of traffic to Blake Island, a Puget Sound port.

PFEL further urges that there can be no unjust discrimination between ports "when in fact the explosives traffic involved has not moved and will not move through the complainant ports (sic) of Seattle, irrespective of the outcome of this case, and there is no evidence of any port interest adversely affected by equalization on explosives." The argument is without merit; as we found in our earlier report, the traffic would move, but for equalization, through Blake Island, which is the explosives loading area for vessels calling at Seattle. Blake Island, whether or not within the port area of the Port of Seattle, has suffered and will continue to suffer a loss of traffc. Our jurisdiction under section 22 of the Act does not depend on whether complainant, rather than another, is injured. *Isthmian S. S. Co.* v. *United States*, 53 F. 2d 251 (S. D. N. Y. 1931).

2. PFEL excepts to the examiner's finding that no requirement is shown for the necessity of more than one monthly sailing, urging that we found in our earlier report that a greater frequency was needed. This further hearing has been held on that precise question, among others, and a full record developed. PFEL presents no arguments of fact which have not been considered by the examiner, and none which would justify reversing his finding in this respect. We find that the examiner correctly evaluated the evidence on this issue, and will accordingly modify the contrary discussion in our earlier report, but with the qualification that in the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing of a conference member from a terminal through which such explosives would normally move at a date which will meet the needs of such shipper or his consignee, equalization will be permitted on such shipment provided the shipper certifies to the conference the need for space at such date and gives 48 hours after the receipt of such certification for the conference to name a conference carrier which will provide space on a direct sailing which will meet the shipper's need.

3. PFEL excepts to the finding that Java Pacific's monthly service would be adequate for du Pont's explosives traffic, urging that Java Pacific has made no firm commitment to reestablish its direct Puget Sound-Philippines service, and that the examiner erred in rejecting evidence tending to show that Java Pacific's service would be inadequate. A proper finding, it is stated, would reflect the desire of receivers to have delivery after the 8th or 10th day of the month, the fact that PFEL loading methods are superior, and the desire of receivers to keep down capital outlay.

We ourselves will ascertain whether or not Java Pacific will reinstitute its direct service, in spite of the fact that the evidence overwhelmingly indicates its intention to do so. The findings considered proper by PFEL appear to us, as to the examiner, to be entitled to little weight. First, the evidence indicates that buyers presently receive delivery, after transshipment, prior to the 8th or 10th of the month in a large number of instances; next, the handling methods of both PFEL and Java Pacific are acceptable to Coast Guard requirements—we have no concern here with the comparative merits of each within that acceptability; and finally, we can see little difference, even if relevant to the issues, between the capital outlay necessary to take advantage of 13 sailings and the outlay involved in 12 shipments. However, in paragraph 2 next above, we have set forth conditions which will permit equalization in the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing of a conference member from a terminal through which such explosives would normally move at a date which will meet the needs of such shipper or his consignee.

4. PFEL's fourth exception, that no injury to Seattle has been shown, has been answered elsewhere in this report as well as in our original report.

5. PFEL next urges, in substance, that we should not invoke our jurisdiction solely in aid of Java Pacific, a foreign-flag carrier. We take this to be an argument that discrimination between ports through equalization is justified if the carrier serving the port is foreign flag. We cannot accept such an argument. First, this proceeding was initiated by complaint of the Northwest ports and not of Java Pacific. More important, however, American-flag carriers and the commerce of the United States are not promoted by quasi-judicial discrimination against vessels of other nations, nor does the Act contemplate such discrimination. Our decision here, under the Act, may in no way differ from the decision which would issue were Java Pacific the equalizing carrier and PFEL the carrier unable to procure cargo because of equalization.

6. PFEL agrees with the examiner that his findings on overequalization are beyond the scope of the remand, and excepts to and demands deletion of the findings made in this regard. It is further urged that the examiner's finding that PFEL has equalized on dynamite shipments in violation of our October 1955 order should be disregarded in view of his ultimate finding that adequate service is not available. Little discussion accompanies these exceptions.

We disagree that the matter of overequalization is entirely beyond the scope of the remand, although we agree that the question of whether PFEL and/or du Pont have violated section 16 of the Act since 1953 by giving or receiving, respectively, transportation at less than the regular freight rates which would otherwise be applicable, is beyond the scope of *this* proceeding. Accepting the assertion that du Pont and San Francisco shippers are keenly competitive, the fact of overequalization, if established, would go a long way toward explaining du Pont's desire for continued "equalization" and the competitive advantage thereby acquired, its assertion that it needs more than a monthly service, and its reluctance to utilize Java Pacific's services, although it has indicated to Java Pacific that it considers that line's services to be satisfactory. Moreover, while such a finding would have no bearing on the affirmative conclusions of our earlier report and accordingly cannot alter the determinations of our report and order presently under judicial review, it would necessitate modification of that portion of our report which considers the relief afforded complainants under section 15 of the Act to have rendered moot the alleged violations of sections 16 and 17. We accordingly will modify the earlier report by stating the question of violation by PFEL of sections 16 and 17 will be made the subject of a separate Board investigation. In view of the indication in this proceeding that other lines also equalize on explosives originating in du Pont but shipped out of San Francisco, we will join as respondents in the contemplated proceeding any other line which may have equalized under similar circumstances.

7. Finally, PFEL excepts generally to the failure to find facts as requested in its brief to the examiner, directing attention specifically (a) that the record does not support a finding that dynamite shipments were a factor in the institution or suspension of Java Pacific's direct service, (b) that the examiner erred in failing to find that it is impracticable for du Pont to divide its shipments among two or more carriers, a necessity which will arise if equalization is not permitted on all shipments, and (c) that the examiner failed specifically to find that the Board erred in officially noticing that "outbound sailings

calling at Pacific Northwest ports en route Philippines average about four per week * * *."

Proposed findings and conclusions of PFEL, as well as those of other parties hereto, which are not specifically or implicitly included in the initial decision, or in this report, have been considered and found unrelated to material issues or not supported by the evidence.

On the specific matters raised in this exception we have the following comments:

(a) The testimony of witness Bargones does support the chief examiner's finding concerning the influence of the dynamite shipments on Java Pacific's service. In the light of the examiner's and our ultimate finding that equalization on dynamite shipments prior to our October order has been justified by an inadequacy of direct service from Puget Sound to the Philippines, whatever the cause of the inadequacy, we fail to understand the relevance of the PFEL exception.

(b) No valid reason has been shown for finding that it would be impractical to divide shipments between Java Pacific and PFEL, if in the future du Pont should require more than one sailing per month. We do not consider the shipper's desire "to hold a hammer over (the carrier's) head" [2] to be a valid reason.

(c) The examiner did correct the Board's error in taking official notice of service to the Philippines, by finding the correct number of sailings, foreign and American flag. In addition to adopting the examiner's finding in this regard, we will modify our earlier report by substituting for the word "Philippines", appearing at line 18, 4 F. M. B. 672, the words "far eastern ports".

Another matter in relation to our earlier report has been brought to our attention by Public Counsel. While the conference chairman in the earlier proceeding indicated that transshipment [3] between ports is effected by conference carriers only in rare circumstances, it appears that since our earlier report the conference is of the view that any carrier serving both areas may absorb, without limit, the transportation costs of cargo originating in the northwest area and ship such cargo to and from San Francisco. Public Counsel urges that while the earlier report, at page 678, obviously intended to limit transshipment to emergency situations, the Board's condemnation of

[2] Transcript p. 739.

[3] "The movement from the carriers' dock or terminal at the first place of delivery of the cargo to the carriers' dock or terminal, at which the vessel loads the cargo. It is exercised when carriers may be, for operating reasons or other reasons, don't call at ports that they had originally scheduled to call, and cargo they may have received can then be brought to a subsequent port." (TR 971) (Page 27 Public Counsel brief dated March 27, 1956).

unjustified equalization is presently being thwarted by transshipment. For this reason it is urged the earlier report should be clarified.

While the record does not entirely bear out Public Counsel's statement that the Board's condemnation of unjustified equalization is presently being thwarted by transshipment, we feel that, since this situation may arise, it is advisable to point out that the diversion of cargo from a port through which it would normally move would be unjustly discriminatory and unfair between ports within the meaning of section 15 of the Act and detrimental to the commerce of the United States as contrary to the principles of section 8 of the Merchant Marine Act, 1920, if accomplished by transshipment to the same extent as if accomplished by equalization.

In consonance with the foregoing, we hereby adopt the examiner's initial decision, as supplemented hereby and except as inconsistent herewith. We conclude:

1. The practice of proper equalization under the tariff rules on explosives from du Pont, Washington, has been justified on the basis of an inadequacy of scheduled direct steamship service from Puget Sound to the Philippines; and will continue to be justified until such time as direct approximately monthly sailings are provided.

2. A regular direct service from Puget Sound to the Philippines with a frequency of approximately one sailing per month would be adequate to meet the normal needs of shippers of explosives from that area.

3. In the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing of a conference member from a terminal through which such explosives would normally move at a date which will meet the needs of such shipper or his consignee, equalization will be permitted on such shipment provided the shipper certifies to the conference the need for space at such date and gives 48 hours after the receipt of such certification for the conference to name a conference carrier which will provide space on a direct sailing which will meet the shipper's need.

4. PFEL's equalization on explosives may have resulted in overpayments to du Pont. A separate proceeding will be commenced to determine whether the PFEL overpayments, if made, are in violation of the Act.

5. Our prior report is modified by elimination of the following language at page 676:

*** * * although a greater frequency is required to meet shippers needs. PFEL admits, however, that nonconference vessels are able to provide the necessary service from the Northwest * * * Further since it is admitted that there is no inadequacy of service to accommodate this cargo but merely an insufficient**

number of conference sailings, we conclude that the conference has not justified the prima facie discrimination against the Seattle area which is inherent in the practice of equalizing inland transportation costs of moving this cargo to San Francisco.

The earlier report is further modified by clarification of the passage relating to transshipment and by substitution of "far eastern" for "Philippines", as hereinbefore set out.

The record will be held open for 30 days, within which time we will expect Java Pacific to advise us whether it has adjusted its sailings to provide Blake Island in Puget Sound as its last call on direct sailings to the Philippines. An appropriate order will be entered at that time.

Board Member Stakem did not take part in this decision.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 10th day of September A. D. 1956

No. 723

CITY OF PORTLAND, OREGON, ET AL.,

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

The Board having served its Report on Further Hearing herein on July 20, 1956 (which report is hereby referred to and made a part hereof), in which the record was held open for 30 days within which time Java Pacific & Hoegh Lines was to advise the Board whether it has adjusted its sailings to provide Blake Island in Puget Sound as its last call on direct sailings to the Philippines; and

It appearing, That the practice of proper equalization under the tariff rules on explosives from du Pont, Washington, has been justified on the basis of an inadequacy of scheduled direct steamship service from Puget Sound to the Philippines, and that such practice will continue to be justified until such time as approximately monthly direct sailings are available; and

It further appearing, That a regular direct service from Puget Sound to the Philippines with a frequency of approximately one sailing per month would be adequate to meet the normal needs of shippers of explosives from that area; and

It further appearing, That on August 7, 1956, the Board was formally advised that Java Pacific & Hoegh Lines will make calls approximately monthly at Blake Island when explosive cargo, in any quantity, is offered, and in such cases Blake Island will be the last loading port prior to proceeding directly to Philippine Island ports of discharge;

It is ordered, That equalization on explosives from du Pont, Washington, to Philippine ports is no longer justified;

It is further ordered, That in the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing from a terminal through which explosives would normally move at a date which reasonably will meet the needs of such shipper or his consignee, equalization shall be permitted on such shipment, *Provided*, That the shipper certifies to the conference the need for space on such date and allows 48 hours after receipt of such certification for the conference to name a conference carrier which will provide space on a direct sailing which reasonably will meet the shipper's need.

By the Board.

(SEAL) (Sgd.) A. J. WILLIAMS,
Secretary.