FEDERAL MARITIME BOARD

No. S–72

ISTHMIAN LINES, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY

No. S–74

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR INCREASE IN SUBSIDIZED SAILINGS, ROUND-THE-WORLD SERVICE

No. S–75

AMERICAN EXPORT LINES, INC.—APPLICATION FOR INCREASED SAILINGS ON TRADE ROUTE 18

No. S–76

CENTRAL GULF STEAMSHIP CORPORATION—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY

Submitted June 16, 1959. Decided December 14, 1959

1. Isthmian Lines, Inc., is operating an existing service in its westbound round-the-world service to the extent of 21 sailings annually, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of subsidy to Isthmian for this service.
2. Without the cargo carryings of approximately 7 sailings per year in addition to the 21 existing sailings of Isthmian Lines, Inc., the service provided by vessels of United States registry in the westbound round-the-world service of Isthmian would be inadequate, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of subsidy to Isthmian for such additional 7 sailings.
3. Including the cargo carryings of the 21 existing annual sailings of Isthmian Lines, Inc., and the 7 additional annual sailings, service provided by ves-

sels of United States registry in the westbound round-the-world service of Isthmian is adequate, and section 605(c) of the Merchant Marine Act, 1936, as amended, is a bar to the award of subsidy for the operation of vessels on such service in excess of 28 sailings per year.

4. The service provided by vessels of United States registry in the westbound round-the-world service of American President Lines, Ltd., is adequate, and section 605(c) of the Merchant Marine Act, 1936, as amended, is a bar to the award of subsidy to American President Lines for the operation of additional vessels thereon.
5. Inbound service provided by vessels of United States registry from the Red Sea and Gulf of Aden to U.S. North Atlantic and California ports is inadequate, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the modification of American President Lines' operating-differential subsidy contract for the operation of its existing westbound round-the-world vessels in such service.
6. Isthmian Lines, Inc., is operating an existing service in its India-Pakistan-Ceylon service to the extent of 16 sailings annually, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of subsidy to Isthmian for this service.
7. Service provided by vessels of United States registry in the India-Pakistan-Ceylon service is inadequate to the extent of 8 sailings per year over the 16 annual existing sailings of Isthmian, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of a subsidy contract to Isthmian for the operation of such additional vessels thereon. Section 605(c) does interpose a bar to the award of subsidy for annual sailings in excess of 24.
8. Isthmian Lines, Inc., is operating an existing service in its Persian Gulf service to the extent of 14 sailings annually, and section 605(c) is not a bar to the award of subsidy to Isthmian for this service.
9. Neither Central Gulf Steamship Corporation nor American Export Lines, Inc., is operating an existing service in the Persian Gulf service.
10. Service provided by vessels of United States registry in the Persian Gulf service is inadequate to the extent of 20 sailings per year over the 14 annual existing sailings of Isthmian, but section 605(c) interposes a bar to the award of subsidy in excess of 34 sailings per year.
11. Continuation of Isthmian's Atlantic-Gulf/Hawaii service will not result in unfair competition to any person, firm, or corporation operating exclusively in any domestic service, and would not be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended. Permission to continue such service under section 805(a) of the Act granted.
12. Continuation by States Marine Corporation of Delaware of its intercoastal service between United States Gulf ports and United States Pacific ports will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and would not be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended. Permission to continue such service under section 805(a) of the Act granted.
13. Continuation of States Marine's intercoastal Pacific coast to Atlantic coast lumber service will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and would not be prejudicial to the objects and policy of the Merchant

Marine Act, 1936, as amended. Permission to continue such service under section 805(a) of the Act granted.

Herman Goldman, *Elkan Turk*, *Irving Zion*, *George F. Galland*, and *Robert N. Kharasch* for Isthmian Lines, Inc.

Warner W. Gardner and *Vern Countryman* for American President Lines, Ltd.

Carl S. Rowe and *James D. Simpson* for American Export Lines, Inc.

Ronald A. Capone, *Robert E. Kline, Jr.*, *Joseph M. Jones*, and *George Denegre* for Central Gulf Steamship Corporation.

Odell Kominers and *J. Alton Boyer* for Lykes Bros. Steamship Co., Inc., Weyerhaeuser Steamship Company, Luckenbach Steamship Co., Inc., and Pacific Far East Line, Inc., *Willis R. Deming* and *Alvin J. Rockwell* for Matson Orient Line, Inc., and Matson Navigation Company, *John J. O'Connor* and *Richard W. Kurrus* for Isbrandtsen Company Inc., and *Ronald A. Capone*, *Robert E. Kline, Jr.*, and *Russell T. Weil* for United States Lines Company, interveners.

Robert E. Mitchell, *Edward Aptaker*, and *Robert J. Blackwell* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

Docket No. S-72:

By application filed January 7, 1957, as amended, Isthmian Lines, Inc. (Isthmian), seeks an operating-differential subsidy on its westbound round-the-world service, India-Pakistan-Ceylon service, and Persian Gulf service, and requests the Board to make the findings required under section 605(c) [1] of the Merchant Marine Act, 1936, as amended (the Act).

Applicant requests a single subsidy contract covering the three services, with permission to interchange vessels freely, with a minimum of 24 and a maximum of 36 sailings a year in each service. Permission also is requested under section 805(a) of the Act [2] to continue operation of a joint service with Matson Navigation Company (Matson) between United States Atlantic and Gulf ports and Hawaii under Joint Service Agreement No. 7707-5, approved by the Board on October 18, 1956. Applicant further seeks permission

[1] See appendix A.
[2] See appendix B.

under section 805(a) for its parent company, States Marine Corporation of Delaware (States Marine), to continue two intercoastal services—one between United States Gulf ports and United States Pacific ports, and the other confined to lumber from United States Pacific ports to United States Atlantic ports as part of its tricontinent service.

Docket No. S-74:

By application filed April 17, 1957, as amended, American President Lines, Ltd. (APL), seeks an increase in the number of subsidized sailings under its operating-differential subsidy agreement from the present 24 to 28 a year to 34 to 38 a year in its westbound round-the-world service, by the employment of three additional owned vessels, and for the privilege of calling all westbound round-the-world subsidized voyages at ports in the Red Sea and Gulf of Aden, Mediterranean, Spain, and the Gulf of Cadiz (but not to load cargo in Spain for United States North Atlantic ports). Applicant requests the Board to make the findings required under section 605(c) of the Act. Section-805(a) permission is requested for the additional subsidized sailings to carry intercoastal cargoes westbound.

Docket No. S-75:

American Export Lines, Inc. (Export), by application dated June 11, 1957, as amended, seeks amendment of its operating-differential subsidy agreement by increasing the present 22 minimum—26 maximum sailings a year in its Line "E" India service (Trade Route No. 18) to 34 to 50 sailings a year, the additional 12 to 24 sailings to provide service between United States Atlantic and Gulf ports and ports in the Persian Gulf. Applicant requests the Board to make the findings required under section 605(c) of the Act.

Docket No. S-76:

By application dated February 21, 1958, as amended, Central Gulf Steamship Corporation (Central Gulf) requests operating-differential subsidy for a minimum of 16 and a maximum of 24 sailings a year between United States Gulf and Atlantic ports and Trade Route No. 18 ports on the Red Sea and Persian Gulf, and in India, East Pakistan, West Pakistan, and Ceylon, with the privilege of calling at Beirut and Port Said. Applicant requests the Board to make the findings required under section 605(c) of the Act.

The four proceedings were consolidated for hearing, which was held before an examiner between February 10 and April 4, 1958.

In No. S–72, interveners were APL, Export, United States Lines Company (U.S. Lines), Lykes Bros. Steamship Co., Inc., Matson Orient Line, Inc. (Matson Orient), and Matson Navigation Co. (Matson). Pope and Talbot, Inc., and Weyerhauser Steamship Company intervened to oppose applicant's request for section-805(a) permission. Pope and Talbot, Inc., withdrew before hearing, Weyerhauser Steamship Company withdrew on March 10, 1958, and Matson Orient and Matson Navigation did not participate in the hearing.

In No. S–74, interveners were Isthmian, Export, U.S. Lines, Luckenbach Steamship Co., Inc., Pacific Far East Line, Inc. (PFEL), and Matson Orient. PFEL was directed by the examiner to furnish applicant certain traffic data, and on appeal therefrom we ordered compliance. Upon failure to comply, we then reconsidered and by order of April 3, 1958, denied the petition of PFEL for leave to intervene.

In No. S–75, interveners were APL, Isbrandtsen Company, Inc., (Isbrandtsen), Isthmian, and Central Gulf, and in No. S–76 interveners were APL, Isbrandtsen, Isthmian, and Export.

In his recommended decision the examiner concluded and found:

(1) That Isthmian is operating an existing westbound round-the-world service to the extent of 19 sailings annually, within the meaning of section 605(c) of the Act;

(2) That the effect of the granting of an operating-differential subsidy contract to Isthmian for its westbound round-the-world service would not 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;

(3) That section 605(c) does not interpose a bar to the award of subsidy to Isthmian for its existing westbound round-the-world service;

(4) That present and authorized service provided and to be provided by vessels of United States registry in Isthmian's westbound round-the-world service is not shown to be inadequate, within the meaning of section 605(c), and additional vessels of United States registry are not required to be operated in such service in the accomplishment of the purposes and policy of the Act;

(5) That section 605(c) does interpose a bar to the granting of an operating-differential subsidy contract to Isthmian for the operation of additional vessels in its westbound round-the-world service;

(6) That present and authorized service provided and to be provided by vessels of United States registry in APL's westbound

round-the-world service is not inadequate, within the meaning of section 605(c), and that in the accomplishment of the purposes and policy of the Act additional vessels should not be operated thereon;

(7) That section 605(c) does interpose a bar to the granting of an operating-differential subsidy contract to APL for the operation of additional vessels on its westbound round-the-world service;

(8) That Isthmian is operating an existing service of 15 sailings annually between United States Gulf and Atlantic ports and ports in India, Pakistan, and Ceylon, within the meaning of section 605(c), and that the effect of granting an operating-differential subsidy contract to Isthmian for this service would not 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;

(9) That Isthmian is not operating an existing India-Pakistan-Ceylon service to the extent of the nine to 21 additional sailings here requested, within the meaning of section 605(c);

(10) That present United States-flag service in the India-Pakistan-Ceylon service is inadequate, within the meaning of section 605(c), and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon;

(11) That section 605(c) is not a bar to the granting of the subsidy requested by Isthmian for the additional sailings in the India-Pakistan-Ceylon service;

(12) That Isthmian is an existing operator, within the meaning of section 605(c), to the extent of 14 sailings a year in the Persian Gulf service, and that an award of subsidy covering this service would be neither unduly advantageous to Isthmian nor unduly prejudicial to citizens of the United States operating United States-flag vessels in competition with Isthmian;

(13) That section 605(c) does not interpose a bar to the award of subsidy to Isthmian for its existing Persian Gulf service;

(14) That Central Gulf does not have the status of an existing operator, within the meaning of section 605(c), on the Trade Route No. 18 service;

(15) That the service already provided by vessels of United States registry in the Persian Gulf service is inadequate, within the meaning of section 605(c), and in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon;

(16) That section 605(c) does not interpose a bar to granting the applications of Isthmian, American Export, and Central Gulf for subsidization of proposed Persian Gulf services;

(17) That Isthmian and its predecessor have been in continuous bona-fide operation in the Atlantic and Gulf/Hawaii trade since 1934, and that Isthmian is entitled as a matter of law to the requested permission under section 805(a) of the Act;

(18) That Luckenbach Gulf Steamship Co. and its successor, States Marine, were in bona-fide operation as a common carrier by water in 1935 over the route or routes or in the trade or trades (Gulf intercoastal) for which application is here made, and that States Marine has so operated since that time except as to interruptions over which its predecessor in interest had no control;

(19) That granting the application for permission under section 805(a) for States Marine to continue its Gulf intercoastal general cargo service and its Pacific to Atlantic lumber service will not result in unfair competition to any domestic operator, will serve the public interest and convenience, and will not be prejudicial to the objects and policy of the Act; and

(20) That the service description in APL's operating-differential subsidy agreement should be amended to permit privilege calls by vessels in its westbound round-the-world service at ports on the Red Sea and Gulf of Aden for cargo destined to California ports.[3]

Exceptions to the recommended decision and replies thereto were filed, and the matter has been orally argued. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in this proceeding.

The operations of each of the applicants at the time of hearing were as follows:

Isthmian:

(1) Westbound round-the-world service—from United States Atlantic ports to California via the Panama Canal, thence to ports in the Philippine Islands, Indonesia, Vietnam, Thailand, Singapore, Malayan and Indonesian ports on the Straits of Malacca, Ceylon, Malabar Coast of India, Djibouti, and occasionally other Red Sea ports, Suez Canal, thence to United States North Atlantic ports via Halifax, N.S. If subsidized, the itinerary will remain the same.

(2) India-Pakistan-Ceylon service (Trade Route No. 18)—between United States Gulf and Atlantic ports and ports in Lebanon, Egypt,

[3] This finding was made in a recommended supplemental decision.

Aden, Saudi Arabia, Pakistan, east India, East Pakistan, and Ceylon. Inbound cargo is loaded at east India, East Pakistan, Ceylon, and Red Sea ports, the vessels usually returning to United States South Atlantic and Gulf ports. If subsidized, the route would remain the same, except that more frequent inbound calls are to be made at North Atlantic ports.

(3) Persian Gulf service (Trade Route No. 18)—between United States Gulf and Atlantic ports and ports in Iran, Saudi Arabia, Iraq, West Pakistan, and India, with occasional calls at ports in Lebanon and Egypt, and with frequent inbound calls at Halifax. If subsidized, the itinerary will remain the same.

(4) Atlantic-Gulf-Pacific Far East service—vessels in this service, which was inaugurated in June 1956, load at United States Atlantic and/or Gulf ports and proceed via the Panama Canal to California to complete loading for ports in Japan, Korea, Formosa, and occasionally Vietnam. Subsidy is not requested on this route.

(5) Hawaiian Islands service—between United States Atlantic and Gulf ports and the Hawaiian Islands. Since 1934 this service has been operated jointly with Matson under Joint Service Agreement (F.M.B.) No. 7707, as amended. Section 805(a) permission is sought to continue this service.

Isthmian also operated an eastbound round-the-world service from 1952 until October 1956, when it was suspended. Vessels in this service loaded at United States Gulf and Atlantic ports, proceeded through the Suez Canal and Red Sea to west India, Indonesia-Malaya, and some southern Far East ports. Those which continued eastward usually called at Hawaii to load cargo for United States Atlantic and Gulf ports. During the period 1952–56, the average number of sailings in this service was 11.2 a year, of which an average of 6.2, instead of continuing eastward around the world, turned at Indonesia-Malaya and returned via the Suez Canal to Halifax and United States Atlantic and Gulf ports.

Isthmian's services have been operated with a fleet of 24 owned C–3 type vessels, with a speed of about 16½ knots, and some time-chartered vessels.

APL:

(1) Westbound round-the-world service—from United States North Atlantic ports via the Panama Canal to California, thence to Japan, Korea, Okinawa, Formosa, Hong Kong, Vietnam, Thailand, Malaya, Ceylon, west coast of India, Pakistan, Egypt, Italy, Mediterranean France, United States Atlantic ports. Service to the Philippine Islands was suspended late in 1957. Applicant's present

operating-differential subsidy contract authorizes a minimum of 24 and a maximum of 28 sailings a year on this route; its application is for 10 additional sailings. The application also seeks written permission under section 805(a) to carry intercoastal cargo from Atlantic to Pacific ports on the ten additional sailings.

(2) Atlantic/Straits service—from United States Atlantic ports via the Panama Canal to San Francisco, Hong Kong, Philippine Islands, Indochina, Thailand, Indonesia, and Malaya, returning via the Philippine Islnds and California to United States Atlantic ports. Current authority is for a minimum of 24 and a maximum of 28 subsidized sailings a year.

(3) Transpacific passenger and cargo service (Trade Route No. 29–E)—from California to Hawaii, Japan, Philippine Islands, Hong Kong, and return to California via Japan and Hawaii. Sailings are about twice a month under authorization for 24 to 26 sailings a year.

(4) Transpacific freight service (Trade Route No. 29–F)—between California, Japan, Hong Kong, and the Philippine Islands, with calls in Korea, Okinawa, Formosa, Indochina, and Thailand as traffic offers. Sailings are approximately fortnightly under authority to make 24 to 26 sailings a year.

APL has employed six Mariners and two C–3P type passenger combination vessels in its round-the-world service. The Mariners operate at 20½ knots and the C–3P's at 16½ knots. In its Atlantic/Straits service it employs two AP–3 vessels and six C–3's, both of which operate at 16½ knots. Three combination vessels are operated in the transpacific passenger/cargo service, and the transpacific freight service is operated with two Mariners and three C–3 type vessels.

American Export:

(1) Passenger service (Trade Route No. 10)—30 sailings a year with two P–3 type vessels between New York, Naples, Genoa, and Cannes.

(2) Line D—Alexandria express service (Trade Route No. 10)—between United States North Atlantic ports and French Mediterranean ports, ports on the west coast of Italy, Egypt, Palestine, Israel, Syria, Lebanon, and Greece. Sailing frequency is fortnightly with four C–3 type vessels.

(3) Line F—Mediterranean freight service (Trade Route No. 10)—between United States North Atlantic ports and ports in the Mediterranean Sea (excluding Egypt), Black Sea, Aegean Sea, Adriatic Sea, other minor seas which are arms of the Mediterranean, and Atlantic ports from the northern boundary of Portugal to the south-

ern boundary of French Morocco. Eight sailings a month are provided by two VC–2 vessels, four C–2, and 10 C–3 type vessels.

(4) Line E—India service (Trade Route No. 18)—between United States Atlantic ports and ports in the Gulf of Suez, Red Sea, Gulf of Aden, Pakistan, India, Ceylon, and Burma, with privilege of calling at any other ports within the limits of Lines D and F. Eight C–3 type vessels provide semimonthly sailings under the current authorization for a minimum of 22 and a maximum of 26 sailings. This is the service proposed to be enlarged by the application.

Central Gulf:

Central Gulf was formed in April 1947, and until September 1957, operated owned and chartered vessels in the bulk cargo trades. In September 1957 applicant inaugurated an American-flag liner service from United States Gulf and Atlantic ports to Beirut and ports on the Red Sea and Persian Gulf and in Ceylon and Pakistan, on Trade Route No. 18. It is on this service that applicant seeks subsidy. Applicant's two owned AP–2 type vessels and six chartered vessels are employed.

Under section 605(c), if the proposed service to be subsidized is not an "existing service", within the meaning of that section, then, in order to enter into a subsidy contract, we must determine under the first part of the section that the existing service by United States-flag vessels is inadequate. If, however, the service proposed for subsidy is an "existing service", then the second part of section 605(c) is controlling, and inadequacy of United States-flag service is not a requirement unless we find that the effect of awarding the subsidy contract would be to give undue advantage or be unduly prejudicial as between citizens of the United States operating a competitive service.

I. Westbound Round-the-World Service

A. *Isthmian:*

Isthmian claims a performance record on its westbound round-the-world service (WRW) of 33 sailings per year, on an average, and asserts that this justifies the finding that it has maintained an "existing service" of 33 annual sailings which would support the grant of the requested subsidy for 24 to 36 WRW sailings. This total is based upon four classes of sailings:

First, by vessels which loaded at Atlantic and California ports and proceeded westward to the southern Far East and Indonesia-Malaya, the so-called "terminal area", there loaded inbound cargo and returned to United States Atlantic ports by way of the Suez Canal. Average turnaround time was 124 days. These sailings are herein-

after designated "WRW–PS", indicating westbound round-the-world-Panama-Suez sailings.

Second, by vessels that had been loaded at Atlantic and California ports with the full intention of continuing the voyage westward, but which, because of unforeseen operational difficulties, turned at Indonesia-Malaya and returned to the United States eastward via Hawaii and the Panama Canal. These sailings are identified as "WRW-PP", indicating westbound round-the-world-Panama-Panama sailings.

Third, by vessels loaded at United States Gulf and Atlantic ports and sailing east through the Mediterranean Sea, Suez Canal, and Red Sea to west India and Indonesia-Malaya. Some of these vessels then proceeded to the Philippine Islands and Hawaii, thence through the Panama Canal to United States Gulf and Atlantic ports, and are designated "ERW–SP", meaning eastbound round-the-world-Suez-Panama sailings.

Fourth, by those vessels assigned to the eastbound round-the-world service, which, upon reaching Indonesia-Malaya, were turned and routed westward via Suez to United States Atlantic ports. These sailings are designated "ERW–SS", meaning eastbound round-the-world-Suez-Suez.

Table I shows for the years 1952 through 1956 the number of sailings conducted by Isthmian in its four classes of services.

TABLE I. *Round-the-world sailings of Isthmian (1952–56)*

OUTBOUND

Class	1952	1953	1954	1955	1956	Total	Average
WRW-PS	20	18	19	19	18	94	18.8
WRW-PP	1	4	6	4	0	15	3.0
ERW-SP	4	2	7	8	4	25	5.0
ERW-SS	9	10	4	3	5	31	6.2
Total	34	34	36	34	27	165	33.0

INBOUND

WRW-PS	22	18	20	18	19	97	19.4
WRW-PP	1	4	6	4	0	15	3.0
ERW-SP	4	1	5	8	7	25	5.0
ERW-SS	8	11	6	3	6	34	6.8
Total	35	34	37	33	32	171	34.2

We agree with the conclusion of the examiner that only the WRW–PS sailings, i.e., those voyages which made a complete westbound sailing around the world, constitute "existing service" on Isthmian's WRW service within the meaning of section 605(c).

The WRW–PP vessels proceeded only half way around the world, and were actually complete voyages on Trade Route No. 17, Service

No. 1, i.e., "U.S. Atlantic (via Panama Canal) and California to Indonesia-Malaya and return, including Far East Ports-Hong Kong and south en route."

The ERW–SS vessels proceeded only half way around the world and were actually complete voyages on Trade Route No. 17, Service No. 2, i.e., "U.S. Gulf and Atlantic via Suez to Indonesia-Malaya and return."

We agree with the conclusion of the examiner that the fact that the sailings in Services Nos. 1 and 2 of Trade Route No. 17 furnished service at some of the ports served by the true WRW sailings is not a basis for considering the outbound portion of each WRW–PP sailing and the inbound portion of each ERW–SS sailing as constituent parts of one WRW sailing. This patchwork service was not in general accord with the WRW service for which subsidy is sought, and cannot be considered "existing service" within the meaning of section 605(c).

It is apparent from the record that the ERW sailings also differed substantially from the WRW service for which subsidy is requested. These vessels generally served Gulf ports and provided no California service, while the westbound sailings did not serve the Gulf but provided an inbound and outbound service to California. Furthermore, even if it could be concluded that these eastbound sailings were in general accord with the service provided by the westbound service, the eastbound service was suspended several months before the application for subsidy was filed, and should not for that reason be considered as "existing service" within the meaning of section 605(c).

During the period 1952 through 1956, Isthmian operated from a low of 18 to a high of 22 annual sailings in its WRW service. We think it reasonable to conclude, and we so find, that Isthmian is operating an existing service in such service to the extent of 21 sailings annually; that the effect of granting an operating-differential subsidy contract to Isthmian for such service will not 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; and that section 605(c) does not interpose a bar to the award of subsidy to Isthmian for such service.

Applicant has requested subsidy on the WRW service up to a maximum of 36 annual sailings. In order to find that section 605(c) does not interpose a bar to the award of subsidy for sailings in excess of the 21 existing sailings per year, we must determine under the first part of that section that the present service by United States-flag vessels is inadequate, and that in the accomplishment of the purposes

and policy of the Act additional vessels should be operated in the service.

In the outbound portion of the WRW service, for the period 1953 through 1956, bulk (nonliner) cargo carryings were small. On the inbound portions of the route bulk carryings have been somewhat larger but have declined. Isthmian's participation in the nonliner carryings during this period have been minor, and nothing in the record indicates a future trend toward significant bulk carryings on liner vessels in the Isthmian WRW service. We will therefore consider only liner commercial cargo carryings in determining United States-flag participation on this route.

We do not agree with the examiner that the cargo carryings of the WRW–PP sailings and the ERW sailings of Isthmian should be excluded from our calculations of United States-flag carryings on this route, for the reason that they were considered not to be "existing service" within the meaning of section 605(c). Regardless of the direction and the route traveled by these vessels, the fact is that they carried cargoes under United States flag, and such carryings cannot be ignored in determining United States-flag participation on the route.

Table II shows the average annual movement, in thousands of long tons, of liner commercial cargo, outbound and inbound, on the various segments of Isthmian's WRW route for the period 1953 through 1956.

TABLE II. *Liner commercial cargo carried on Isthmian's westbound and round-the-world service, 1953–56*

[In thousands of long tons]

OUTBOUND

	All flags	U.S. flag	Percent U.S.
From Atlantic:			
To southern Far East	399	138	35
To Indonesia-Malaya	132	57	43
From California:			
To southern Far East	338	207	61
To Indonesia-Malaya	64	35	55
Total outbound	933	437	47

INBOUND

To Atlantic:			
From southern Far East	1,399	238	17
From Indonesia-Malaya	500	169	34
From India-Pakistan-Ceylon	224	127	57
From Red Sea	37	14	39
To California:			
From India-Pakistan-Ceylon	10	3	36
From Indonesia-Malaya	74	32	43
Total inbound	2,244	583	26
Total outbound and inbound	3,177	1,020	32

The foregoing statistics indicate 47 percent United States-flag participation outbound, 26 percent inbound, and 32 percent over-all; however, they do not present the full picture of United States-flag participation which we must consider in making our determinations under section 605(c). As stated in *American Pres. Lines, Ltd.—Increased Sailings, Route 17*, 5 F.M.B.—M.A. 359 (1957), at page 368,

> * * * our determination as to adequacy of United States-flag participation under section 605(c) must be based upon present and probable future conditions, and cannot be unduly concerned with conditions in the past.

In considering present and probable future conditions on Isthmian's WRW service it is necessary to evaluate certain additional factors affecting United States-flag participation.

In *American Pres. Lines, Ltd.—Increased Sailings, Route 17, supra*, section 605(c) was found to present no bar to an increase of APL's subsidized sailings on Service No. 1 of Trade Route No. 17 [4] from a minimum of 12 and a maximum of 16 per year to a minimum of 24 and a maximum of 28 sailings per year. From 1952 through 1956, APL averaged 12.8 sailings per year from United States Atlantic and California ports to areas included in Isthmian's WRW service. APL carryings of liner commercial cargo to those areas averaged about 50,000 tons per year, or approximately 3,900 tons per sailing.[5] At this rate the authorized maximum of 28 sailings would furnish capacity for approximately 109,000 tons per year, or 59,000 tons in excess of the 1952–56 average carryings of 50,000 tons.

In *United States Lines Co.—Increased Sailings, Route 12*, 5 F.M.B. 379 (1958), it was found that the present service on Trade Route No. 12 [6] by vessels of United States registry was inadequate, and that section 605(c) interposed no bar to the granting of an operating-differential subsidy contract to U.S. Lines for the operation of 12 sailings a year in addition to its then existing service of a maximum of 24 sailings. In the period 1952 through 1956, U.S. Lines averaged 20 sailings per year on this route, on which an annual average of about 30,000 tons of liner commercial cargo were carried outbound to points on Isthmian's WRW service, or approximately 1,500 tons per sailing. Nearly all these sailings were made with C–2 vessels having a sub-

[4] Service No. 1 of Trade Route 17 is described as: "U.S. Atlantic (via Panama Canal) and California to Indonesia-Malaya and return, including Far East ports—Hong Kong and South en route."

[5] This figure is higher than the examiner's comparable figure of 2,804 tons, since it includes California carryings excluded by the examiner.

[6] Described as: "Between U.S. Atlantic ports (Maine-Atlantic Coast Florida to but not including Key West) and ports in the Far East (Japan, Formosa, the Philippines and continent of Asia from Union of Soviet Socialist Republics to Siam, inclusive)."

stantially smaller capacity than the Mariner vessels now being used exclusively by the company on the route. In 1956, using a mixed fleet of C–2's and Mariners, U.S. Lines carried approximately 1,800 tons of liner commercial cargo outbound from the Atlantic to points in the southern Far East served on Isthmian's WRW service. We consider it reasonable to assume that the exclusive Mariner service will carry at least 2,000 tons of such cargo per sailing. It is apparent, therefore, that U.S. Lines will have the capacity to carry approximately 70,000 tons outbound on Isthmian's WRW service, or about 40,000 tons per year more than it has been carrying.

In *Matson Orient Line, Inc.—Subsidy, Route 12*, 5 F.M.B. 410 (1958), it was held that section 605(c) presented no bar to an award of subsidy to Matson Orient for up to 24 sailings per year. Assuming the use by Matson Orient of C–2 vessels, the smallest which could be used in this service, and further assuming that such vessels would carry the same proportion of cargo outbound to points on Isthmian's WRW service as did U.S. Lines with C–2 vessels, or 1,500 tons per sailing, then Matson Orient will offer additional capacity on Isthmian's outbound WRW service of at least 36,000 tons per year.[7]

In summary, if the total liner commercial cargo moving outbound on Isthmian's WRW service remains at approximately the 1956 level, then United States-flag present and authorized participation would be adjusted as shown in table III.

TABLE III

[In thousands of long tons]

	All flags	U S. flag	Percent U S.
1956 total average outbound traffic—Atlantic and California to Far East, Indonesia, and Malaya	1,041	483	46
APL		59	
U.S. Lines		40	
Matson Orient [1]		36	
	1,041	618	59

[1] See footnote 7.

If we assume an annual increase in the total outbound cargo movement of 2 percent each year for 1957 and 1958, the present and authorized United States-flag participation would be 57 percent, calculated as in table IV.

[7] In certain tables following, adjustments are made for Matson Orient additional capacity. In each instance, if cargo statistics for Matson Orient were not included, the resulting change would not affect the conclusions we reach hereafter.

TABLE IV

[In thousands of long tons]

	All flags	U S. flag	Percent U S.
1956 total outbound traffic—Atlantic and California to Far East, Indonesia, and Malaya	1,041	483	46
2 percent increase in 1957 and 1958	42		
APL		59	
U S. Lines		40	
Matson Orient [1]		36	
	1,083	618	57

[1] See footnote 7.

As to inbound traffic on Isthmian's WRW service, certain adjustments also must be made in calculation of present and future United States-flag participation. From the southern Far East to Atlantic ports, table II shows that for the period 1952 through 1956, an average of 1,399,000 tons of liner commercial cargo moved per year, of which only 238,000 tons, or 17 percent, was on United States-flag vessels. This cargo consisted primarily of sugar and ores from the Philippine Islands, and moved predominantly the shortest route eastward through the Panama Canal. Isthmian carries none of this cargo westward through Suez, and Isthmian's president testified that they should be excluded from the inbound carryings on its WRW service. Thus, a meaningful analysis of United States-flag participation inbound can be achieved only if the Philippine cargo is excluded. In 1956, 1,440,277 tons of liner commercial cargo moved from the Philippines to the Atlantic, of which 266,202 tons was on United States-flag vessels. This cargo properly should be excluded from the 1956 inbound statistics with respect to Isthmian's WRW service.

As previously noted, APL's Atlantic/Straits service in the future may operate up to 28 sailings inbound from countries on Isthmian's WRW service. In the period 1952 through 1956, APL's Atlantic/Straits vessels carried an average of approximately 30,000 tons of liner commercial cargo per year on an average of 12.4 annual sailings. Based upon this past record of about 2,400 tons of such cargo per sailing, APL can, through its 28 annual sailings, offer inbound capacity on this route for 67,000 tons of cargo, or approximately 37,000 tons per year more than it has carried in the past.

U.S. Lines' inbound Trade Route No. 12 vessels carry only negligible amounts of cargo from points on Isthmian's WRW service, and since Matson Orient's Trade Route No. 12 service is projected to follow an itinerary substantially similar, it is reasonable to assume that its service similarly will have negligible effect on United States-flag carryings inbound on Isthmian's WRW service.

In summary, assuming that the total inbound cargo movement on Isthmian's WRW route remains at about the 1956 level, United States-flag participation should be adjusted in accordance with table V.

TABLE V

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
1956 inbound traffic—southern Far East, Indonesia-Malaya, India-Pakistan-Ceylon to Atlantic and California	2,353	585	25
Less. Philippine to Atlantic	1,440	266	
Subtotal	913	319	
Add: APL		37	
Total	913	356	39

The foregoing adjustments are generally in accord with the procedure followed by the examiner. Minor variations in calculations have caused our estimate of projected United States-flag participation to differ slightly from the estimates of Public Counsel and the examiner. The difference is only one percent on the outbound and inbound portion of the route, and our estimate of 49 percent United States-flag participation on the route as a whole is identical to the figure arrived at by Public Counsel and the examiner.

In its reply brief and exceptions, Isthmian contends that the foregoing method of projecting future United States-flag participation on its WRW service is based upon an erroneous assumption that additional sailings of APL, U.S. Lines, and Matson Orient will divert cargo only from foreign-flag competition and none from existing United States-flag sailings. While we recognize that new United States-flag sailings on the route will not divert cargo exclusively from foreign-flag lines, it is apparent that to the extent some cargo may be diverted from other United States-flag service, such diversion will increase free space on United States-flag vessels and thus increase available United States-flag capacity in the trade. We therefore consider the foregoing statistics as reasonably indicative of present and projected United States-flag participation on the Isthmian WRW route.

Combining tables IV and V, the total projected inbound and outbound United States-flag participation on Isthmian's WRW service, assuming a 2-percent increase in outbound traffic for 1957 and 1958, and assuming that inbound traffic remains at 1956 levels, would be as shown in table VI.

TABLE VI

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
Outbound	1,083	618	57
Inbound	913	356	39
	1,996	974	49

The foregoing computation includes cargo which has been carried by Isthmian on certain sailings which we have not considered to be part of Isthmian's "existing service" on its WRW service, within the meaning of section 605(c), but which have made a contribution on this route. These sailings were the WRW–PP sailings, the ERW–SP sailings, and the ERW–SS sailings previously discussed.

Isthmian WRW sailings averaged approximately 5,500 tons of liner commercial cargo per sailing outbound and inbound during the period 1953–56. During the same period, the WRW–PP sailings and the WRW–SP and the ERW–SS sailings carried an annual average of approximately 40,000 tons of liner commercial cargo outbound and inbound to and from foreign ports on Isthmian's WRW service.

We recognize that Isthmian, under subsidy, will not be providing services which correspond to its past WRW–PP, ERW–SP, and ERW–SS sailings, but all its carryings on this route will be provided by complete WRW–PS sailings. Based upon the prior average carryings per sailing of about 5,500 tons inbound and outbound on its 21 existing WRW sailings, it is apparent that the past carryings by Isthmian on its WRW–PP, ERW–SP, and ERM–SS sailings are the equivalent of approximately seven complete WRW sailings per year. Without these annual carryings of about 40,000 tons inbound and outbound, United States-flag participation of 57 percent outbound, 39 percent inbound, and 49 percent over-all, as shown in table VI, would become 53 percent, 35 percent, and 45 percent, respectively. This cargo has been captured in the past by United States-flag vessels operated by Isthmian, and without the availability of vessel capacity would, at least to some extent, be lost to United States-flag sailings. We conclude, therefore, that without approximately seven sailings per year in addition to its existing service of 21 sailings per year, United States-flag service on Isthmian's WRW service would be inadequate, and that in the accomplishment of the purposes and policy of the Act such additional vessels should be operated thereon.

We are convinced, however, that projected United States-flag participation on this route of 57 percent outbound, 39 percent inbound,

and 49 percent over-all, which includes the carryings of Isthmian's existing service plus the approximately seven additional sailings we have found to be needed, is adequate.

Outbound, Isthmian's carryings have been declining, and free space available at last port of loading has averaged 14 percent on a weight basis during the period 1953 through 1956. Inbound, Isthmian's carryings also have been declining, and free space at first port of arrival has risen in recent years to over 50 percent.

In view of these factors, we cannot find that projected United States-flag participation on this route of 57 percent outbound, 39 percent inbound, and 49 percent over-all, is inadequate.

Isthmian has applied for a subsidy contract to operate up to a maximum of 36 sailings per year in its westbound round-the-world service. Under the standards of section 605(c), we have found an "existing service" of approximately 21 sailings per year, and that without operation by Isthmian of approximately seven additional annual sailings, United States-flag participation on this route would be inadequate. It is apparent that under these findings subsidy cannot be permitted for the maximum of 36 sailings per year, but must be limited under the standards of section 605(c) to no more than 28 sailings per year.

We conclude that section 605(c) does not interpose a bar to the award of subsidy to Isthmian for the operation of up to a maximum of 28 sailings per year in its proposed westbound round-the-world service, but that section 605(c) does interpose a bar to the award of subsidy to Isthmian for the operation of vessels on such service in excess of 28 sailings per year.

B. *American President Lines*:

The round-the-world westbound service of APL differs from the service of Isthmian, previously considered, in that Isthmian omits Japan, Korea, Formosa, and Okinawa, all of which APL serves; Isthmian calls regularly at Indonesia while APL does not; Isthmian omits Bombay and Karachi, which APL serves; and Isthmian confines its Mediterranean calls to the eastern area while APL calls in the western Mediterranean.

APL does not claim that it is operating an existing service as to any of the ten additional subsidized sailings requested. The only issues for determination under section 605(c), therefore, are whether United States-flag service on APL's round-the-world westbound route is adequate, and whether in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

Since the record indicates that APL participates only slightly in the carriage of nonliner cargo over its RWW route, our conclusion as to

cargo movement on this route will be limited to liner commercial carryings.

Table VII shows the total outbound and inbound liner commercial cargo moving over APL's RWW service, and the percentage of United States-flag participation therein.

TABLE VII. *Liner cargo movements on RWW route of American President Lines*

[In thousands of long tons]

Year	Outbound			Inbound			Over-all U.S. percent
	Total	U.S. flag	U.S. percent	Total	U.S. flag	U.S. percent	
1953	2,852	1,071	38	2,563	933	36	37
1954	3,064	1,217	40	2,414	698	29	35
1955	3,269	1,398	43	2,496	740	30	37
1956	3,843	1,766	46	2,652	808	30	40
Average	3,257	1,363	42	2,531	795	31	37

The foregoing statistics include traffic to and from the Philippine Islands. Since the record indicates that APL's RWW service will be of limited significance in the carriage of cargo to and from the Philippine Islands, we agree with the examiner that Philippine traffic should be excluded from our calculations.

The average annual volume of all liner commercial cargo moving outbound to the Philippine Islands from the North Atlantic and California during the period 1953–56 was 470,630 tons, of which 213,045 tons moved on United States-flag vessels. Inbound, the total movement was 1,300,621 tons, of which 211,997 tons were carried on United States-flag vessels. For the reasons above stated, these figures should be deducted in calculating United States-flag participation on the route.

Also included in table VII is an annual outbound movement of approximately 1,000,000 tons of coal from the United States Atlantic coast to the Far East, of which approximately 800,000 tons were for Japan. The examiner relied on *American President Lines—Calls, Round-the-World Service*, 4 F.M.B. 681 (1955), and *United States Lines Co.—Increased Sailings, Route 12*, 5 F.M.B. 379 (1958), and retained the coal statistics in his analysis of United States-flag service on APL's RWW service.

The great bulk of the coal movement here under discussion is carried by Japanese vessels which take on a large base load of coal and then carry relatively small amounts of general cargo as common carriers. For this reason the coal traffic is included in over-all compu-

tations as liner cargo, though it is apparent that the carryings are in many respects similar to nonliner tramp operations. We are convinced, therefore, that to leave these carryings in the statistics gives an unrealistic and artificial picture of United States-flag participation in liner commercial carryings over the route.

APL has carried none of this coal cargo in its RWW service since 1951, does not contemplate such carriage in the future, except possibly as distress cargo, and the record indicates that APL's RWW service is not well adapted to any sizeable bulk movement of coal from the Atlantic to Japan. We agree with the analysis of Public Counsel, who pointed out the artificial traffic base which is created by including this bulk coal movement. For example, in 1956 the total liner cargo moving from the Atlantic to Japan was 1,338,000 tons, of which approximately 800,000 tons were bulk coal, leaving only about 538,000 tons of regular liner commercial cargo. Even if United States-flag operators carried every ton of this liner cargo, United States-flag participation would be only 40 percent of the total outbound movement, including coal. Thus, United States-flag participation would appear to be under the conventional 50-percent standard of adequacy when in reality United States-flag vessels would have secured 100 percent of all liner cargo, except coal, moving on the route.

While we recognize that in prior proceedings we have not excluded these coal statistics, we are persuaded that their exclusion is proper in this case. In *American President Lines—Calls, Round-the-World Service*, *supra*, APL urged that the most realistic approach to this problem would be to give the coal traffic one-quarter weight only by deducting three-fourths of the movement from the traffic data. Public Counsel urges that we adopt that approach here. We agree, and conclude that three-fourths of the annual coal movement, or 600,000 tons, should be eliminated from the total outbound traffic statistics on APL's RWW service.

From 1952 through 1956, APL's Atlantic/Straits vessels carried an average of 2,100 tons per sailing outbound to countries (other than the Philippines) on APL's RWW route. With a maximum of 28 sailings per year authorized in *American Pres. Lines, Ltd.—Increased Sailings, Route 17*, *supra*, APL will have the capacity to load about 58,000 tons of Atlantic and California cargo, or approximately 31,000 tons more outbound per year than its past average carryings.

Recent authorizations to U.S. Lines and Matson Orient (*United States Lines.—Increased Sailings, Route 12*, *supra*, and *Matson Orient Line, Inc.—Subsidy, Route 12*, *supra*) will provide for approximately 513,000 additional tons of capacity for liner commercial cargo

from Atlantic ports to the Far East. Agreeing with APL's contention that approximately 85 percent of this capacity should reasonably represent future carryings, and assuming, very conservatively, that 50 percent of such carryings would be to areas served by APL's RWW service, projected future United States-flag outbound carriage should be increased by 218,000 tons per year.

As we have previously shown, APL's Atlantic/Straits service, under its increased authorization up to a maximum of 28 sailings per year, will have inbound capacity to carry approximately 37,000 additional tons per year from countries on APL's RWW route (excluding the Philippines). Inbound on Trade Route No. 12, U.S. Lines and Matson Orient will provide additional capacity from the Far East to the Atlantic. APL points out, however, that it does not purport to carry any appreciable inbound cargo on its RWW service from Trade Route No. 12 areas to the Atlantic, and that such cargo is not included in the inbound statistics in table VII. For these reasons, we agree that no adjustment should be made in projected United States-flag capacity because of authorized sailing increases for U.S. Lines and Matson Orient on Trade Route No. 12.

If we assume that 1956 figures for total outbound liner commercial cargo on APL's RWW service are increased by 2 percent per year for 1957 and 1958, and apply the adjustments we have found necessary, the present and authorized United States-flag participation outbound would be as shown in table VIII.

TABLE VIII

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
1956 outbound traffic	3,843	1,766	46
2 percent increase in 1957 and 1958	155		
	3,998		
Deduct—Philippine Islands	470	213	
	3,528	1,553	
Deduct Japanese coal	600		
Add—APL Atl./Straits		31	
Add—U.S. Lines and Matson Orient, T.R. 12 [1]		218	
	2,928	1,802	62

[1] See footnote 7

Applying the same adjustments to annual average figures for the 1953–56 total cargo movement, instead of 1956 carryings alone, we would reach the projected United States-flag participation figures shown in table IX.

TABLE IX

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
Average 1953-56 outbound traffic	3,257	1,363	42
Add—2 percent increase for 1957 and 1958	131		
	3,388		
Deduct—Philippine Islands	470	213	
	2,918	1,150	
Deduct—Japanese coal	600		
Add—APL Atl./Straits		31	
Add—U.S. Lines and Matson Orient, T.R. 12 [1]		218	
	2,318	1,399	60

[1] See footnote 7.

Assuming that the liner commercial cargo movement inbound on APL's RWW service remains at approximately the 1956 level, and applying the adjustments which we have found necessary, the present and authorized United States-flag participation inbound would be as shown in table X.

TABLE X

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
1956 inbound traffic	2,652	808	30
Deduct—Philippine Islands	1,301	212	
		596	
Add—APL Atl./Straits		37	
	1,351	633	47

Applying the same adjustments to annual average figures for the 1953–56 total inbound cargo movement, instead of to 1956 carryings alone, we would reach the projected United States-flag participation figures shown in table XI.

TABLE XI

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
Average 1953–56 inbound traffic	2,531	795	31
Deduct—Philippine Islands	1,301	212	
		583	
Add—APL Atl./Straits		37	
	1,230	620	50

In summary, combining tables VIII and X, based on 1956 carryings, present and authorized United States-flag participation on APL's RWW route would be as shown in table XII.

TABLE XII

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
Outbound	2,928	1,802	62
Inbound	1,351	633	47
Total	4,279	2,435	57

Combining tables IX and XI, based on average total carryings for the years 1953–56, present and authorized United States-flag participation on APL's RWW route would be as shown in table XIII.

TABLE XIII

[In thousands of long tons]

	All flags	U.S. flag	Percent U.S.
Outbound	2,318	1,399	60
Inbound	1,230	620	50
Total	3,548	2,019	57

Upon the foregoing analysis of present and authorized service on APL's RWW route, we conclude that service by vessels of United States registry is adequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should not be operated thereon. Section 605(c) does interpose a bar to the award of an operating-differential subsidy contract to APL for the operation of additional vessels on its round-the-world westbound service.

In his recommended supplemental decision the examiner recommended that APL's application for the privilege of calling at Red Sea and Gulf of Aden ports on its present round-the-world westbound sailings be granted insofar as service to California is concerned, but denied insofar as service to the North Atlantic is concerned.

The liner commercial cargo carryings from the Gulf of Aden and Red Sea to United States North Atlantic and California ports for the years 1953 through 1956 are shown in table XIV.

TABLE XIV

	To North Atlantic			To California		
	Total tons	Tons U.S. flag	Percent U.S.	Total tons	Tons U.S. flag	Percent U.S.
1953	42,033	20,413	49	1,982	1,846	93
1954	30,664	13,040	42	2,590	1,443	56
1955	41,911	15,893	38	2,876	339	12
1956	31,375	6,955	22	3,683	264	7
Average	36,496	14,075	39	2,782	973	35

The basis for the examiner's conclusion that APL should not be permitted to serve the North Atlantic on this service appears to be that Export's inbound service from the Red Sea and Gulf of Aden to the North Atlantic has substantial free space, and therefore service from the Red Sea and Gulf of Aden should be found adequately serviced by United States-flag vessels, even though United States-flag participation averaged only 39 percent for the period 1953 through 1956 and has steadily declined from 49 percent in 1953 to only 22 percent in 1956.

We cannot agree with the examiner that available free space on an inbound service which covers a long and comprehensive trade route should, of itself, require a finding that such service is adequate as to certain isolated segments on that route. We consider that the record supports the finding, and we so conclude, that inbound service from the Red Sea and Gulf of Aden to North Atlantic and California ports is inadequate, that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon, and that section 605(c) does not interpose a bar to the modification of APL's operating differential subsidy for the operation of its existing round-the-world westbound vessels in such service.

II. India-Pakistan-Ceylon Service

Isthmian:

Isthmian has continuously operated the only United States-flag service to India, Pakistan, and Ceylon since 1923 (I–P–C service). At present, and as proposed under subsidy, vessels load at United States Gulf and Atlantic ports and sail eastward to Beirut, Lebanon, Alexandria, Egypt, Red Sea ports, Karachi, West Pakistan, Bombay, east India, and East Pakistan. Homeward voyages commence at Chittagong, East Pakistan, or Calcutta, east India, proceed thence to Ceylon, Red Sea ports, through the Suez Canal and Mediterranean Sea usually to United States South Atlantic ports, and complete discharging at Gulf ports. With subsidy, more frequent inbound calls would be made at North Atlantic ports.

Sailings by Isthmian on its I–P–C service have averaged 15.3 per year outbound and 15.5 per year inbound throughout the period 1953–1956. In addition, Isthmian operated an average of 11.2 sailings per year during this period on its eastbound round-the-world service; part of the outbound cargo was carried to some of the areas on the I–P–C route. Isthmian asserts that adding its 15 regular I–P–C sailings to the 11 ERW sailings works out to an average of 26 sailings per year as an "existing service", within the meaning of section 605(c).

Since the ERW sailings served the I–P–C service only incidentally and were suspended in October 1956, some months before the application for subsidy was filed, we will not consider any of them as part of an "existing" I–P–C service. We conclude, therefore, that Isthmian is operating an existing service in its I–P–C service to the extent of 16 sailings annually; that the effect of granting an operating-differential subsidy contract to Isthmian for such service will not 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; and that section 605(c) does not interpose a bar to the award of subsidy to Isthmian for its existing I–P–C service.

Since Isthmian has requested subsidy up to a maximum of 36 annual sailings on its I–P–C service, the question of whether section 605(c) interposes a bar to subsidy for sailings in excess of 16 "existing" annual sailings depends upon whether the service already provided by vessels of United States registry is inadequate, and whether, in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon.

The average annual volume of liner and nonliner commercial cargo, in thousands of long tons, outbound and inbound, on the various segments of Isthmian's I–P–C route, for the period 1953 through 1956, appears in table XV. Included in the statistics are carryings of Isthmian's eastbound round-the-world vessels to eastern Mediterranean, Red Sea, and I–P–C destinations, consisting of an annual average of 44,000 tons outbound and 23,000 tons inbound. While these sailings have not been included in the 16 "existing sailings" of Isthmian on this route, they have contributed to United States-flag participation on the route. Without the cargo carried by the ERW vessels, United States-flag participation in liner carryings would be only 46 percent outbound, 48 percent inbound, and 47 percent over-all, as compared with 52 percent, 50 percent, and 51 percent, shown in table XV, including these ERW cargo carryings.

The I–P–C cargo carried by these ERW sailings has been captured in the past by United States-flag vessels operated by Isthmian, and without the availability of vessel capacity to move such cargo it would, at least to some extent, be lost to United States-flag sailings. We further recognize that to some degree the bulk-type nonliner cargoes are susceptible of liner movement in this trade. We do not agree with the examiner, however, that all such movement should be considered in our determinations of adequacy of United States-flag service, since the special circumstances found to exist in *States Steamship Co.—Sub-*

TABLE XV. *Outbound and inbound movement of commercial cargo on Isthmian's I–P–C service route, average per year, 1953–56*

[In thousands of long tons]

	Liner			Nonliner			Total		
	All flags	U.S. flag	Percent U.S.	All flags	U.S. flag	Percent U.S.	All flags	U.S. flag	Percent U.S.
OUTBOUND									
From N. Atlantic:									
To I–P–C	270	161	59	109	39	36	379	200	53
To Red Sea	46	30	65	10	2	20	56	32	58
To Med. Egypt, Leb.	163	90	56	159	41	26	322	131	41
Sub total	479	281	59	278	82	29	757	363	48
From So. Atl. & Gulf:									
To I–P–C	195	84	43	256	61	24	451	145	32
To Red Sea	39	14	37	4	0	0	43	14	33
To Med. Egypt, Leb.	74	29	39	58	11	19	132	40	30
Subtotal	308	127	40	318	72	23	626	199	32
Total	787	408	52	596	154	26	1,383	562	41
INBOUND									
To N. Atlantic:									
From I–P–C	576	287	50	720	119	17	1,296	406	31
From Red Sea	37	14	39	132	28	21	169	42	25
From Med. Egypt, Leb.	24	13	55				24	13	55
Subtotal	637	314	49	852	147	17	1,489	461	31
To So. Atl. & Gulf:									
From I–P–C	153	88	58	59	10	17	212	98	46
From Red Sea	3						3		
From Med. Egypt, Leb.	13	7	54				13	7	54
Subtotal	169	95	56	59	10	17	228	105	46
Total	806	409	50	911	157	17	1,717	566	33
Total outbound and inbound	1,593	817	51	1,507	311	21	3,100	1,128	36

sidy, Pacific Coast/Far East, 5 F.M.B. 304 (1957), do not here exist.[8]

It is apparent that without the vessel capacity to carry the cargoes in this service previously carried by the ERW vessels, United States-flag participation of 46 percent outbound, 48 percent inbound, and 47 percent over-all, previously referred to, would be inadequate. We do not feel, however, that the service is inadequately served to the extent of the maximum of 36 annual sailings per year requested by Isthmian, which is 20 more than the 16 we have previously found to be existing. Considering the traffic previously carried by the ERW sailings, and the availability of some of the nonliner-type cargoes for liner movement, we find that the service is inadequate to the extent of 8 sailings per annum in addition to the 16 existing sailings of Isthmian.

[8] (1) "* * * tremendous—and growing—volume of bulk commodities available * * *"; (2) "* * * increasing ability of lines to convert these bulk-type cargoes to liner type"; (3) "* * * comparatively small amount of free space on liners * * *"; (4) "* * * meager participation by American-flag vessels in this nonliner cargo movement * * *."

We conclude that the service already provided by United States-flag vessels is inadequate to the extent of 8 sailings per year over the 16 annual sailings in the existing service of Isthmian, and that in the accomplishment of the purposes and policy of the Act such additional vessels should be operated thereon. We further conclude that with a total of 24 sailings per year by United States-flag vessels, service by vessels of United States registry in the I–P–C service would be adequate. Section 605(c) does interpose a bar to the award of an operating-differential subsidy contract for the operation of additional vessels thereon for service in excess of 24 sailings per year.

III. Persian Gulf Service

Isthmian, Central Gulf, and Export all seek subsidy for service to the Persian Gulf. The total number of subsidized sailings requested is from a minimum of 52 to a maximum of 84 sailings per year, consisting of Isthmian's request for 24 to 36 sailings, Central Gulf for 16 to 24 sailings, and Export for 12 to 24 sailings. Only Isthmian and Central Gulf claim existing service in the trade.

A. *Isthmian:*

Isthmian's United States-flag ships inaugurated the first direct service from the United States to the Persian Gulf in 1936, and until late September 1957 operated the only United States-flag service. In the present service, which is proposed to be continued under subsidy, the vessels load at United States Gulf ports, proceed to Atlantic ports, thence to the eastern Mediterranean ports of Beirut and Alexandria, through the Suez Canal and Red Sea direct to Persian gulf ports. The inbound trade being substantially less than the outbound, some of the sailings have returned by way of Bombay or Karachi, as cargo offered. Under subsidy, at the requested minimum of 24 sailings a year, Isthmian contemplates that about half of the outbound sailings will come home by way of Karachi-Bombay. Vessels sailing outbound have been virtually fully loaded, on the basis of a stowage factor of 110 cubic feet, and throughout the period 1953–56 usable open space on sailing from the last United States port has averaged but 4 percent of weight capacity and 6 percent of bale cubic capacity. Cargo for Persian Gulf and Red Sea ports aggregated 93 percent and 6 percent, respectively, of the total carryings. Inbound vessels have arrived at the first United States port with increasingly large percentages of open cargo capacity. For the four-year period this has averaged 59 percent of the weight capacity. During this period there was an average of 14 outbound sailings a year, with an average of approximately 4,000 long tons of commercial cargo, and 14.3 inbound sailings, with an average of approximately 1,200 tons.

Isthmian's service to the Persian Gulf continued at approximately monthly frequency until July 1957, at which time it was increased to two sailings a month. According to applicant, if the service applied for, namely, 24 to 36 sailings a year, is compared with the present level of service, then "existing service" is at the level of 24 sailings a year or better. Sailings commenced subsequent to the date of filing the subsidy application (in this case, January 7, 1957) will not be considered in determining existing service.

We conclude that Isthmian is an existing operator in the Persian Gulf service, within the meaning of section 605(c), to the extent of 14 sailings a year, and that an award of subsidy covering this service would be neither unduly advantageous to Isthmian nor unduly prejudicial to citizens of the United States operating United States-flag vessels in competition with Isthmian. Section 605(c) does not interpose a bar to the award of subsidy to Isthmian for its existing service of 14 sailings per year.

To reach a favorable finding under section 605(c) with respect to the balance of 22 sailings per year, we must determine that United States-flag service in the Persian Gulf trade is inadequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

B. *Central Gulf:*

Central Gulf requests an operating-differential subsidy for a minimum of 16 and a maximum of 24 sailings a year in a service between United States Gulf and Atlantic ports and Trade Route No. 18 ports on the Red Sea and Persian Gulf, in India, East Pakistan, West Pakistan, and Ceylon, with the privilege of calling at Beirut and Port Said. From the time of its organization in April 1947 until September 1957, Central Gulf operated owned and chartered ships in full cargo trades. Deciding to engage in berth operations, a fortnightly service to the Persian Gulf was initially advertised in August 1957, and service began with the sailing in late September 1957 of one of the two owned United States-flag AP–2 type vessels. Thereafter, and up to February 25, 1958, when the application for subsidy was filed, there were nine additional sailings, two of which were made by owned vessels, one by a chartered foreign-flag vessel, and the others by six chartered United States-flag vessels. Most of the vessels called at Beirut and Red Sea ports, all called at Persian Gulf ports and Karachi, and two went to East Pakistan. None served either west India or east India.

Outbound, the vessels sailed fully loaded and with full deck loads; there has been no homeward cargo, all vessels returning in ballast.

Four voyages had been terminated prior to the filing of the application. At the time of hearing Central Gulf had become a member of the Persian Gulf Outward Freight Conference, the Calcutta U.S.A. Conference, and the West Coast of India and Pakistan/U.S.A. Conference. If subsidy be granted, applicant proposes to acquire five C–3 or equivalent type vessels and to operate from United States Gulf and Atlantic ports to Beirut, Red Sea and Persian Gulf ports, Karachi, east India, and East Pakistan; homeward, from East Pakistan and east India to United States North Atlantic and Gulf ports. The estimated turnaround time is 103 days. Central Gulf anticipates securing about 1,500 weight tons of cargo for each sailing.

On the foregoing facts Central Gulf asks that it be found to be operating an existing service on Trade Route No. 18, within the meaning of section 605(c). Existing service is not claimed on inbound service. The foreign-flag vessel was operated by Central Gulf to spread its cost factors, but this does not entitle the sailing to be included as part of an existing United States-flag service.

In *States Steamship Co.—Subsidy, Pacific Coast/Far East, supra*, the Board said at page 311:

> The word "service" in section 605(c) is used, of course, broadly to cover the entire scope of operations. It embraces "much more than vessels; it includes the scope, regularity, and probable permanency of the operations, the route covered, the traffic handled, the support given by the shipping public, and other factors which concern the bona fide character of the operation." *Pac. Transp. Lines, Inc.—Subsidy, Route 29, supra.* None of these elements alone is determinative—nor would a deficiency in any one necessarily be fatal to a finding of existing service.

Eight sailings in the five months preceding the filing of the application fail to constitute a base sufficiently broad to support a finding that Central Gulf has an existing service entitling it to subsidy, without examination as to need. Even if the operations should be found to embrace most of the other elements, probable permanency of the operations cannot be inferred from service during such a short period. Accordingly, we find that Central Gulf does not have the status of an existing operator, under section 605(c), on Trade Route No. 18. Under such circumstances, for applicant to prevail there must be a determination that United States-flag service in the Persian Gulf trade is inadequate and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

C. *American Export:*

Export originally requested, in 1940, authority to operate a subsidized service to the Persian Gulf; this was denied, without preju-

dice, however, to the right to resubmit the request if supplemented by a factual showing that the existing service performed by Isthmian Steamship Company was inadequate to meet the needs of commerce on the route. Export has never operated to the Persian Gulf but is now carrying a small quantity of Persian Gulf cargo to Beirut, from whence it is transported overland in various ways to destination.

The instant application, as amended, is for subsidization of a proposed new service of 12 to 24 annual sailings from United States Gulf and Atlantic ports to Port Said, thence through the Suez Canal to Red Sea and Persian Gulf ports. Inbound the vessels would proceed from the Persian Gulf to Karachi, Bombay, Malabar Coast ports in southwest India, thence to Aden and calling at Red Sea ports if cargo offers, and through the Suez Canal to the United States. At first it is intended to use six ships to operate 18 sailings a year, six of the sailings to be from and to the Gulf of Mexico and omitting calls on the Malabar Coast. Turnaround time is estimated at about 120 days, including service to United States Gulf ports. Each outbound sailing is expected to carry from 4,000 to 4,500 tons of cargo to the Persian Gulf and approximately 800 tons to Red Sea ports and Aden, but no cargo to Karachi or Bombay. Inbound carryings are estimated to be about 500 tons a sailing for Atlantic ports; very little cargo is expected for Gulf ports.

As previously noted, export does not claim to be an existing operator in the Persian Gulf service, and to make a favorable finding under section 605(c) with respect to Export's application we must find that United States-flag service in that trade is inadequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

United States-flag participation in the cargo movement in the Persian Gulf trade, for the years 1953 through 1956, is shown in table. XVII. It is apparent from the table that the Persian Gulf service is predominantly an outbound one. Isthmian has operated outbound with negligible free space. For the reasons previously stated with respect to the I–P–C service, we will exclude the nonliner carryings from our determination of adequacy of United States-flag service.

Isthmian's president believes that liner cargo in the Persian Gulf trade will increase gradually, perhaps 3 to 4 percent annually, over the 1956 volume. A consulting economist on behalf of Export estimated that loadings of commercial cargo in this trade may be expected to increase by 7.5 percent a year, and an economist for Isbrandtsen believes the volume of liner commodities in the trade, while continuing to fluctuate, nevertheless will increase during a five-year period but

TABLE XVII. *Commercial cargo movement between United States Atlantic and Gulf ports and Persian Gulf*

[In thousands of long tons]

	Liner			Nonliner			Total		
	All flags	U.S. flag	U.S. percent	All flags	U.S. flag	U.S. percent	All flags	U.S. flag	U.S. percent
Outbound:									
1953	178	62	35	4			182	62	34
1954	182	40	22				182	40	22
1955	217	54	25	20	20	99	237	74	31
1956	253	65	26	79	30	38	332	95	29
Average	208	55	27	26	12	48	233	68	29
Inbound:									
1953	36	25	70	7			44	25	58
1954	34	21	63	9			42	21	50
1955	44	12	28				44	12	28
1956	38	10	26	10			48	10	20
Average	38	17	45	6			44	17	39
Total — outbound — inbound	246	72	29	32	12	38	277	85	31

not more than 3 to 5 percent over the 1956 level. If the 1956 total of 253,000 tons of liner cargo should increase by 3 percent a year, by 1961 the level would be 293,000 tons. Export's estimate of 7.5 percent annual increase would raise the total to 364,000 tons. Transportation by United States-flag vessels of half of these estimates would require 33 to 40 sailings, respectively, with an average loading of approximately 4,500 tons, or 19 to 26 sailings, respectively, in addition to the 14 sailings in Isthmian's existing service. We believe the most realistic forecast is an annual growth of between three and four percent, which will require approximately 34 sailings per year, or 20 sailings in addition to Isthmian's existing service, in order to reach 50-percent United States-flag participation.

The foregoing facts establish, and we conclude, that the service already provided by United States-flag vessels in the Persian Gulf trade is inadequate to the extent of 20 sailings per year over the 14 sailings in the existing service of Isthmian.

The Persian Gulf applications request authorization to serve ports in the eastern Mediterranean and on the Red Sea and certain ports in the I–P–C area, in conjunction with and to support the primary services. The record indicates that these areas are incidental to the service to be provided to the Persian Gulf area, and they are included in the analysis we previously made in connection with the I–P–C services, wherein we found such services inadequately served by United States-flag vessels. We therefore see no reason to isolate and segmentize the traffic statistics for these secondary areas.

The primary Persian Gulf area is patently inadequately served by United States-flag vessels, and our findings under section 605(c) with respect to the Persian Gulf service extend to and include all the areas included in the various applications for subsidy on the Persian Gulf route.

We find and conclude that the Persian Gulf service already provided by United States-flag vessels is inadequate to the extent of 20 sailings per year over the 14 annual sailings in the existing service of Isthmian, and that in the accomplishment of the purposes and policy of the Act such additional vessels should be operated thereon. Section 605(c) does not interpose a bar to the award of an operating-differential subsidy for the operation of such additional vessels thereon. We further conclude that with a total of 34 sailings per year by United States-flag vessels, service by vessels of United States-flag registry would be adequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should not be operated thereon. Section 605(c) does interpose a bar to the award of an operating-differential subsidy for the operation of additional vessels thereon for service in excess of 34 sailings per year.

The selection of which applicant or applicants may be granted subsidy contracts for the 20 sailings in the Persian Gulf service is not within the scope of section 605(c) proceedings, and such determination will be made under other sections of the Act.

IV. Application for Section-805(a) Permission

As previously noted, Isthmian requests section-805(a) permission for the following services:

1. Atlantic-Gulf/Hawaii service of Isthmian.
2. United States Gulf and Pacific coast intercoastal service of its parent company, States Marine.
3. United States Pacific coast ports to Atlantic coast ports lumber service of its parent company, States Marine.

In *States Marine Corp.—Subsidy, Tricontinent, Etc., Services*, 5 F.M.B. 537 (1959), States Marine, Isthmian's parent corporation, requested permission under section 805(a) for all the domestic services here under consideration. All the testimony and exhibits on the domestic issues in that proceeding were incorporated by stipulation into this record, and there was no opposition in this proceeding to the granting of the requested permissions.

1. *Atlantic-Gulf/Hawaii service.* Isthmian began operating in the Atlantic-Gulf/Hawaii trade in 1923, and in 1934 it organized a joint service with Matson Navigation. Except for interruption from 1942

through 1946 because of World War II, service has continued to the present time.

As to the eastbound and westbound Atlantic coast sailings, the pattern of service establishes that Isthmian has "grandfather" rights, within the meaning of section 805(a). It is further apparent that in the eastbound trade to the Gulf, Isthmian similarly is entitled to "grandfather" rights. Isthmian is therefore entitled as a matter of law to the required permission under section 805(a) as to those portions of the Atlantic-Gulf/Hawaii service.

As for the westbound service from the Gulf to Hawaii, however, little or none was provided until 1939, and Isthmian has no "grandfather" rights as to this portion of its Atlantic-Gulf/Hawaii service.

Since 1939, Isthmian has provided a regular and fairly substantial westbound service from the Gulf, which appears to be vital to the economy of Hawaii. No party has protested the grant of permission for the service, and nothing in the record indicates that its continuation would result in unfair competition to any other domestic operator.

We conclude that continuation of Isthmian's Atlantic-Gulf/Hawaii service will not result in unfair competition to any person, firm, or corporation operating exclusively in any domestic service, and that it would not be prejudicial to the objects and policy of the Act. This report will serve as written permission to continue such service.

2. *Gulf and Pacific coast intercoastal service of States Marine.* In 1929, Luckenbach Gulf Steamship Corp. started a general cargo service between the Gulf and the Pacific coast, and in 1953 the company was purchased by States Marine. Except for a period during World War II, the service has been in bona-fide operation since 1935. Under section 805(a), Isthmian is entitled as a matter of law to the required permission for continuation of its Gulf and Pacific coast intercoastal service.

We conclude that continuation of States Marine's Gulf and Pacific coast intercoastal service will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and would not be prejudicial to the objects and policy of the Act. This report will serve as written permission to continue such service.

3. *Pacific coast to Atlantic coast lumber service of States Marine.* States Marine has had Interstate Commerce Commission authority since 1953 to carry intercoastal lumber from the Pacific to the Atlantic, and has operated such a service as an adjunct of its tricontinent service. Only Weyerhaeuser, Pope & Talbot, Inc., Quaker Line, Inc., and Calmar Steamship Corp., in addition to States Marine, operate

in this trade, and of these, Weyerhaeuser, Pope & Talbot, and Quaker Line have proprietary lumber interests. Cargo offered in this service exceeds vessel capacity, no protests were made to States Marine's continuation of such service, and independent lumber shippers need the service.

We conclude that continuation of States Marine's Pacific coast to Atlantic coast lumber service will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and that it would not be prejudicial to the objects and policy of the Act. This report will serve as written permission to continue such service.

APL requests section-805(a) permission to carry intercoastal cargo in the increased westbound round-the-world service for which it seeks subsidy. The conclusion we have reached, that additional vessels of United States registry should not be operated on such service, makes it unnecessary to grant the requested permission.

APPENDIX A

Section 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 duly 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, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper.

APPENDIX B

Section 805(a):

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route

or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

FEDERAL MARITIME BOARD

No. 833

MAATSCHAPPIJ "ZEETRANSPORT" N.V. (ORANJE LINE) ET AL.

v.

ANCHOR LINE LIMITED ET AL.

No. 834

AGREEMENT NO. 8400, BETWEEN ANCHOR LINE LIMITED, THE BRISTOL CITY LINE OF STEAMSHIPS LTD. ET AL.

No. 840

PETITION OF ANCHOR LINE LTD. ET AL., PARTIES TO AGREEMENT NO. 8400

No. 843

IN THE MATTER OF AGREEMENT NO. 8440, BETWEEN ANCHOR LINE LIMITED, THE BRISTOL CITY LINE OF STEAMSHIPS LTD. ET AL., AND THE PROTEST OF ORANJE LINE ET AL. AGAINST APPROVAL THEREOF

Submitted November 3, 1959. Decided December 14, 1959

Respondents in No. 833 have not been shown to have engaged in concerted rate action, cooperative pooling and sailing arrangements, or a conspiracy to drive complainants from the United States Great Lakes-United Kingdom trade, in violation of sections 14 Second and 15 of the Shipping Act, 1916. Complaint dismissed.

The Board has power to act, under the Shipping Act, 1916, with respect to Agreements Nos. 8140 and 8130, covering the trades between United States and Canadian Great Lakes ports and ports on the St. Lawrence River, in Nova Scotia, Newfoundland, and New Brunswick, on the one hand, and ports of

the United Kingdom, on the other hand, notwithstanding that the agreements embrace also the foreign commerce of nations other than the United States. The agreements have not been shown to be detrimental to the commerce of the United States or otherwise to be in contravention of the Shipping Act, 1916. Petition in No. 840 denied.

Approval of Agreements Nos. 8400 and 8440, in substantially the same trade area as is covered by existing approved agreements, would be detrimental to the commerce of the United States. Agreements not approved and Nos. 834 and 843 discontinued.

George F. Galland, *G. Nathan Calkins, Jr.*, *Robert N. Kharasch*, and *Thomas K. Roche* for Oranje Line et al.

Ronald A. Capone, *Cletus Keating*, *Elmer C. Maddy*, and *Robert E. Kline, Jr.*, for Anchor Line Limited et al.

John J. O'Connor for Isbrandtsen Company, Inc., intervener in No. 834.

Edward Schmeltzer, *Edward Aptaker*, and *Robert E. Mitchell* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

These proceedings present related issues and were consolidated for hearing and recommended decision of the examiner. Exceptions were filed to the recommended decision and the matters were orally argued before us. Our findings and conclusions generally comport with those of the examiner.

Pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. 814 (the Act), Anchor Line Limited, The Bristol City Line of Steamships Ltd., Canadian Pacific Railway Company, The Cunard Steam-Ship Company Limited, Ellerman's Wilson Line, Limited, Furness, Withy & Company Limited, Manchester Liners Limited, and The Ulster Steamship Company Limited (Head & Lord Line) (respondents) filed for approval an agreement providing for the creation of a conference to be known as United Kingdom-United States Great Lakes Westbound Freight Conference (the British westbound conference), for the establishment and maintenance of agreed rates, charges, and practices for or in connection with the transportation of cargo in the trade from Great Britain, Northern Ireland, and Eire to United States Great Lakes ports. The agreement was assigned No. 8400, and notice of its filing was published in the Federal Register of January 18, 1958 (23 F.R. 349).

A protest against approval of Agreement No. 8400 was filed February 6, 1958, on behalf of Maatschappij "Zeetransport" N.V. (Oranje Line), A/S Luksefjell, A/S Dovrefjell, A/S Falkefjell, and A/S Rudolf, operating a joint service known as Fjell Line under approved Agreement No. 7763, and And. Smith Rederi A/B and Rederiaktiebolaget Ragne, operating a joint service known as Swedish Chicago Line under approved Agreement No. 8036 (complainants[1]). Complainants are members of Great Lakes-United Kingdom Westbound Conference (the approved westbound conference), created under approved Agreement No. 8140 and covering the westbound trade from ports of the United Kingdom to ports of the Great Lakes of the United States and Canada, the St. Lawrence River, Nova Scotia, Newfoundland, and New Brunswick, and also are members of Great Lakes-United Kingdom Eastbound Conference (the approved eastbound conference), created under approved Agreement No. 8130 and covering the eastbound trade in the same area covered by the approved westbound conference.

On the protest of complainants and upon our own motion, we instituted an investigation by order of April 7, 1958 (No. 834), pursuant to section 22 of the Act, 46 U.S.C. 821, to determine whether operation under Agreement No. 8400 would be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States within the meaning of section 15 of the Act. No action approving or disapproving Agreement No. 8400 was taken by us.

By complaint filed March 31, 1958, as amended (No. 833), it is alleged that (1) respondents had engaged in concerted rate action, cooperative pooling and sailing arrangements, and a conspiracy to drive complainants from the United States Great Lakes-United Kingdom trade, in violation of sections 14 Second, 46 U.S.C. 812 Second, and 15 of the Act; (2) the operations of the British westbound conference contemplated port allocation arrangements not reflected in Agreement No. 8400 as filed; (3) Agreement No. 8400 is unlawful *per se* because it is duplicative of Agreement No. 8140; and (4) Agreement No. 8400 would be detrimental to the foreign commerce of the United States. Complainants request disapproval of Agreement No. 8400, and ask that respondents be enjoined from carrying out such agreement and from continuation of violation of the Act found to exist.

[1] Where the context so indicates, the term "complainants" also will include Liverpool Liners Limited, which was made a party complainant in No. 833 by stipulation of the parties filed May 21, 1958, and Nordlake Line, which was admitted as a party with status similar to that of the other complainants upon stipulation of the parties accepted of record on September 22, 1958.

On May 14, 1958, respondents filed a petition (No. 840) alleging that Agreements Nos. 8140 and 8130 creating the approved westbound and eastbound conferences were and are beyond our authority to approve because they inseparably embrace foreign trade between Canada and the United Kingdom, result in unjust discrimination, are unfair as between carriers, and are detrimental to the commerce of the United States. The petition requests a finding that we are without jurisdiction to approve Agreements Nos. 8140 and 8130, and requests that we withdraw approval thereof, dismiss the complaint in No. 833 and discontinue the investigation in No. 834, and approve Agreement No. 8400. By order of July 11, 1958, we denied complainants' motion to dismiss the petition, and denied the petition insofar as it sought the dismissal of the complaint in No. 833 and the discontinuance of the investigation in No. 834, and set for hearing and investigation, on a consolidated record with Nos. 833 and 834, the remaining issues presented by the petition.

Subsequently, respondents filed for approval under section 15 of the Act an agreement, assigned Agreement No. 8440, providing for the creation of a conference to be known as United States Great Lakes-United Kingdom Eastbound Freight Conference (the British eastbound conference), covering the eastbound trade in the same area covered by Agreement No. 8400. Notice of the filing of the agreement was published in the Federal Register of July 12, 1958 (23 F.R. 5311), and a protest against approval thereof was filed by complainants on August 1, 1958. By order of September 22, 1958 (No. 843), we set for hearing and investigation the issues presented by the filing of Agreement No. 8440 and the protest against approval thereof, consolidated No. 843 for hearing and report with Nos. 833, 834, and 840, and ordered that section-15 action with respect to Agreement No. 8440 be held in abeyance pending decision in the consolidated proceedings.

Complainants intervened in Nos. 834, 840, and 843. Public Counsel intervened in No. 833, pursuant to rule 3(b) of our Rules of Practice and Procedure (46 CFR 201.42). Isbrandtsen Company, Inc., intervened in No. 834 but took no active part in the proceeding.

Up to the date of the hearing, operations into the Great Lakes ports of the United States and Canada, through the St. Lawrence River and connecting waterways, have been limited to smaller vessels because of size and draft limitations imposed by locks and canals. Generally, the vessels operated by complainants and respondents, in the services detailed below, have ranged in capacity from 940 to 2,875 deadweight tons, with the deadweight capacity for transit into the Great Lakes limited to about 1,500 tons. At ports on the St. Lawrence River

below and including Montreal, Que., and ports in Nova Scotia, Newfoundland, and New Brunswick (Canadian seaboard ports), however, no such size and draft limitations apply and operations may be and have been conducted with regular ocean-going cargo vessels. With the opening of the St. Lawrence Seaway in 1959, with its deep-draft locks, canals, and channels, draft limitations are those applicable at particular ports only, and it is likely that changed patterns of operation will ensue.

Fjell Line is the pioneer line in the trade, inaugurating in 1935 a service between Rotterdam, Antwerp, Oslo, London, Liverpool, and Manchester, and ports on the Great Lakes. Except for the period of World War II, it has operated continuously since that time in the Great Lakes-United Kingdom trade. Oranje Line inaugurated a service between the Great Lakes and the United Kingdom and Europe before World War II, and except for the war years, has since been operating in the Great Lakes-United Kingdom trade. These two carriers operate a joint service, known as Fjell-Oranje Line, under approved Agreement No. 8067, and the westbound itinerary generally is London, Antwerp, Glasgow, Montreal, Toronto, Ont., Cleveland, Ohio, Detroit, Mich., Chicago, Ill., and Milwaukee Wis.; eastbound, Chicago, Milwaukee, Sarnia, Ont., Detroit, Cleveland, Hamilton, Ont., Toronto, Montreal, London, Antwerp, Rotterdam, and Glasgow. The order of call changes frequently in both directions.

Swedish Chicago Line commenced operations at the beginning of the 1956 Great Lakes open season of navigation, and its vessels generally follow a westbound itinerary from Scandinavian ports to London or Liverpool and thence to Montreal, Toronto, Buffalo, N.Y., Cleveland, Detroit, Chicago, and Milwaukee, and an eastbound itinerary from Chicago, Milwaukee, Detroit, Cleveland, Hamilton, Toronto, and Montreal to Liverpool and thence to Scandinavian ports. The vessels usually do not call at Bordeaux-Hamburg range ports although calls were made at Rotterdam on two eastbound voyages in 1958. Swedish Chicago Line and Fjell-Oranje Line operate under a port and sailing allocation agreement approved as Agreement No. 8077.

Liverpool Liners inaugurated service at Great Lakes ports in 1958, and its vessels generally follow a westbound itinerary from Liverpool and Dublin to Montreal, Toronto, Hamilton, Cleveland, Detroit, Chicago, and Milwaukee, and eastbound from Chicago, Milwaukee, Cleveland, Toronto, and Montreal to Liverpool and Dublin. Nordlake Line became a party to the approved westbound and eastbound conference agreements in September 1958, but no evidence concerning its operations was presented.

Respondents have operated in the trade between the United Kingdom and Canada for many years, but they did not commence operations individually [2] to and from United States Great Lakes ports until the opening of navigation in 1957. Ellerman's Wilson Line had not offered service to United States Great Lakes ports up to the date of the hearing. Anchor Line advertised sailings in its own name early in 1958 between Glasgow and Chicago, Detroit, Cleveland, Milwaukee, and other United States ports on the Great Lakes, of vessels owned or operated by Head & Lord Line and Bristol City Line, but these advertisements were later changed to show Anchor Line as loading agent at Glasgow for undisclosed principals. There is no indication that any services from the United Kingdom or Eire to United States Great Lakes ports actually have been operated by Anchor Line. Cargo statistics covering the sailings out of Glasgow advertised by Anchor Line were included in the data furnished by the owners or operators of the vessels. Complainants contend that the record confirms the common-carrier status of Anchor Line. To qualify as a common carrier, Anchor Line's undertaking to carry must continue, for a certain period of time at least, subsequent to the receipt of goods for the purpose of transportation. *Agreement No. 7620*, 2 U.S.M.C. 749, 752–3 (1945). We conclude on this record that Anchor Line has not been shown to have operated as a common carrier in the United Kingdom-United States Great Lakes trade.

The remaining respondents have conducted operations to and from United States Great Lakes ports and their vessels, in conjunction with such operations, made calls at Canadian Great Lakes ports, but the identity of the Canadian ports is not shown.

A joint advertising circular was distributed early in 1958, in which the eight respondents announced their intention to conduct individual direct liner services to United States Great Lakes ports. Furness, Withy in 1957 advertised certain of its sailings to United States Great Lakes ports in its own name, but generally, so far as the record shows, the sailings of Canadian Pacific Railway, Cunard, and Furness, Withy were advertised jointly during that year. These advertisements indicated clearly the names of the operators of the respective vessels. No evidence was presented concerning advertising practices of these three respondents during 1958. Practices of the other respondents

[2] The record indicates that a service known as London Liners was advertised in 1956 to and from certain United States Great Lakes ports, under the auspices of Canadian North Atlantic Westbound Freight Conference, detailed *infra*, which was succeeded in 1957 by the individual Canadian-United Kingdom operations of respondents. This service was apparently conducted with vessels operated by Furness, Withy and Canadian Pacific Railway, with London as the sole United Kingdom port of call, but no further details are shown.

are noted below. Advertisements of record relate principally to the westbound services offered by respondents, and were reproduced from publications circulated in the United Kingdom. Because of relatively short distances within Great Britain, cargo originating at inland points may be attracted to any one of serveral ports served by one or more of the respondents, as indicated below.

Bristol City Line commenced operations to United States Great Lakes ports in 1958. The ports served were Glasgow, Avenmouth, Cleveland, Detroit, Milwaukee, and Chicago westbound, and the same United States ports and Swansea, Avenmouth, Liverpool, Belfast, and Glasgow eastbound. So far as the record shows, Bristol City Line advertised its westbound sailings in its own name out of Avenmouth and other South Wales ports only. Westbound sailings out of Glasgow were advertised by Anchor Line in its own name through April 1958, and thereafter by Anchor Line as loading broker for undisclosed principals. Bristol City Line also advertised certain sailings out of Avenmouth and other South Wales ports of Head & Lord Line vessels, at first in its own name and later by identifying the sailings as those of Head & Lord Line vessels and indicating that Head & Lord Line bills of lading would be issued.

Head & Lord Line, on its westbound voyages in 1957, served Liverpool, Belfast, Glasgow, Cleveland, Detroit, Milwaukee, and Chicago; eastbound, the same United States ports and Belfast and Liverpool. In 1958, the ports served eastbound and westbound were Belfast, Liverpool, Dublin, Avenmouth, Glasgow, Cleveland, Detroit, Milwaukee, and Chicago, with Cork as a port of call on one eastbound voyage. Head & Lord Line, so far as the record shows, advertised its 1958 westbound services in its own name out of Liverpool only. The sailings from Glasgow were advertised by Anchor Line, and those from Avenmouth by Bristol City Line, each in its own name at first and later as loading broker or agent as stated above. Sailings to and from Belfast and Dublin, so far as the record shows, were advertised by Head & Lord Line only.

Canadian Pacific Railway inaugurated service to United States Great Lakes ports at the end of the 1957 season of navigation on the Lakes, operating one westbound and two eastbound sailings. In that year the ports served were London and Detroit westbound, and Detroit, Liverpool, and London eastbound. In 1958 it operated approximately alternate sailings from London and Liverpool to Detroit and Cleveland. Eastbound, Detroit and Cleveland were served, with London as the United Kingdom port of call on all voyages except one, on which Liverpool only was served. Buffalo was served on one westbound and eastbound round voyage.

Cunard conducted operations throughout the 1957 and 1958 seasons. Eastbound and westbound the ports served in 1957 were London, Cleveland, and Detroit. Liverpool was added in 1958 as a port of call, and a few calls were made at Buffalo to load or discharge cargo.

Furness, Withy likewise conducted operations in 1957 and 1958 between London, Buffalo, Cleveland, Detroit, Milwaukee, Chicago, and Muskegon, Mich. Eastbound, two calls also were made in 1957 at Liverpool and one at Manchester. Manchester Liners, in 1957 and 1958, served only Manchester in the United Kingdom and the United States Great Lakes ports of Cleveland, Detroit, Milwaukee, and Chicago.

Respondents except Anchor Line, together with The Cairn Line of Steamships Limited and The Donaldson Line Limited, are members of Canadian North Atlantic Westbound Freight Conference and Canada-United Kingdom Freight Conference (the Canadian conferences), regulating their operations westbound and eastbound, respectively, between Canadian Great Lakes and seaboard ports and Great Britain, Northern Ireland, and Eire. These conferences employ exclusive-patronage contract/noncontract rate systems, obligating both shippers and freight brokers, which limit the ability of complainants to procure cargo moving to and from Canadian ports.

Complainants have applied for membership in the Canadian conferences since 1952 but their applications have been denied consistently. Their latest applications were pending at the time of the hearing. Numerous shippers and forwarders in the United States have executed contracts with these conferences in order to take advantage of contract rates out of Montreal. The latter port enjoys inland rate advantages over North Atlantic ports of the United States, and is therefore an important gateway for United States import and export cargo moving to and from the midwestern States. At least 75 percent of the shippers in the westbound United Kingdom-Canadian trade have executed contracts with the Canadian conference covering that trade, and regular shippers rather than occasional shippers are most likely to execute such contracts. Complainants have offered to delete the coverage of Canadian ports from the approved eastbound and westbound conferences, provided they are admitted to membership in the Canadian conferences.

Respondents are unwilling to join the approved westbound and eastbound conferences, with their existing coverage of Canadian Great Lakes and seaboard ports, for several reasons. Such action would require respondents, because of provisions in the conference agreements, to withdraw from the existing Canadian conferences.

They consider that this would be a breach of faith with Cairn Line and Donaldson Line, members of the Canadian conferences not signatories to Agreements Nos. 8400 and 8440. Also, there would then be either multiple conferences or a conference and independent operators (Cairn Line and Donaldson Line) in the United Kingdom-Canadian trade.

Respondents also object to the fact that the headquarters of the approved westbound conference is at Rotterdam, although the conference agreement by its terms relates only to service from the United Kingdom. They fear that, because of the orientation of the approved conferences to the continental trades, and the unanimous vote procedures regarding rate matters followed by those conferences, complainants would be in a position to accord more favorable rates to continental shippers than to shippers in the United Kingdom, and at the same time veto any efforts of respondents to revise rates should it be necesary to do so in order for United Kingdom manufacturers to meet the competition of continental manufacturers. In this connection, respondents make reference to several instances wherein the tariff of the approved westbound conference provides for higher rates from United Kingdom ports to United States Great Lakes ports than the tariff of the United States Great Lakes-Bordeaux/Hamburg Range Westbound Conference provides from continental ports to the same destinations.

The approved westbound and eastbound conferences do not employ exclusive-patronage contract systems in their operations,[3] nor do any of the other conferences whose members serve United States Great Lakes ports. On the other hand, all conferences which serve Canadian Great Lakes or seaboard ports exclusively, so far as here pertinent, employ such systems.

Nordlake Line, Fjell Line, and Oranje Line are members of the United States Great Lakes-Bordeaux/Hamburg Range Eastbound Conference and United States Great Lakes-Bordeaux Range Westbound Conference (approved Agreements Nos. 7820 and 7830), covering the eastbound and westbound trades between United States Great Lakes ports and continental European ports in the Bordeaux/Hamburg range. These conferences at one time also covered London, which was deleted when the approved westbound and eastbound con-

[3] A modification of Agreement No. 7830, which for the first time would institute an exclusive patronage system, with dual contract/noncontract rates, in the United States Great Lakes trades, is under consideration in No. 795, *In the Matter of Agreement No. 7830–2*, which is pending decision of the Board.

ferences were established in 1953, and also included Canadian Great Lakes and seaboard ports, which were deleted in 1957. Between 1946 and 1949, these conferences were in competition in the trade between Canadian seaboard ports and Bordeaux/Hamburg range ports with Canadian seaboard-continental eastbound and westbound conferences, among the members of which were some of the respondents. During this period of competition between differently constituted conferences, rate cutting resulted in substantial disruption of the trade. Ultimately, the members of the conferences established under Agreements Nos. 7820 and 7830 joined the competing Canadian seaboard-continental conferences, which ended the conflict. Present membership of the latter conferences includes complainants Fjell Line and Oranje Line and respondents Cunard and Canadian Pacific Railway.

Complainants and respondents agree that the existence of competing conferences in a particular trade, with differently constituted memberships, will ultimately result in rate wars and complete disruption of that trade, and that such disruption will be more severe than in the case of a single conference faced with the competition of several individual carriers. The reason given is that under a conference the members can offer coverage of broad ranges of ports whereas the port coverage of the lines individually would be much more limited.

There are several other conferences in existence or proposed which have some bearing on the issues here. Those of the complainants whose vessels make calls at Bordeaux/Hamburg range ports are members of the Canadian Great Lakes-Bordeaux/Hamburg Range eastbound and westbound conferences, covering the trade indicated by the titles. Respondent Canadian Pacific Railway at one time made inquiry about membership in the eastbound conference, but submitted no formal membership application. Complainants state that Canadian Pacific Railway would have been admitted to membership had it applied.

Fjell Line and Swedish Chicago Line are members of the U.S. Great Lakes, Scandinavian and Baltic Eastbound Conference, established under approved Agreement No. 8180, covering the trade between United States Great Lakes ports and Icelandic, Scandinavian, and Baltic Sea ports.

Tables I and II show the cargo in revenue tons carried by complainants' vessels in the westbound and eastbound Great Lakes-United Kingdom services. They do not include any statistics relating to the separate Great Lakes-Bordeaux/Hamburg range services.

TABLE I. *Complainants' westbound cargo, United Kingdom-Great Lakes service*

Year	U.K. to U S. Lakes	U.K. to Canada		Continent to U S. Lakes	Continent to Canada	
		Lakes	Seaboard		Lakes	Seaboard
1953	24, 580	3, 024	2, 446	49, 061	5, 452	7, 198
1954	32, 836	3, 440	426	36, 058	5, 991	10, 819
1955	36, 480	5, 035	3, 716	43, 279	4, 760	7, 361
1956	44, 565	6, 277	1, 477	25, 853	3, 906	9, 819
1957	49, 316	7, 846	2, 324	16, 390	3, 208	13, 657
1958[1]	26, 628	4, 125	2, 127	17, 559	4, 861	9, 119

[1] To August 1, 1958.

TABLE II. *Complainants' eastbound cargo, Great Lakes-United Kingdom service*

Year	U.S Lakes to U.K.	Canada to U.K		U.S. Lakes to Continent	Canada to Continent	
		Lakes	Seaboard		Lakes	Seaboard
1953	14, 134	9, 868	12, 236	39, 170	6, 238	8, 936
1954	25, 474	14, 592	19, 753	38, 005	5, 665	14, 053
1955	36, 984	3, 471	9, 739	21, 807	4, 211	10, 829
1956	43, 133	4, 207	19, 391	17, 893	1, 192	9, 428
1957	39, 428	13, 143	16, 065	15, 310	992	16, 441
1958[1]	18, 235	5, 561	6, 781	9, 674	2, 448	8, 133

[1] To August 1, 1958.

Tables III and IV show the cargo in revenue tons carried by those respondents which conducted operations to and from United States Great Lakes ports in 1957 and 1958. No data were presented showing the amount of Canadian seaboard cargo carried.

TABLE III. *Respondents' westbound Great Lakes traffic*

Line	1957		1958 to Aug. 1	
	U.K. to U S. Lakes	U K. to Canadian Lakes	U.K. to U.S. Lakes	U K. to Canadian Lakes
Bristol City Line			1, 470	544
Canadian Pacific Railway	412	1, 021	2, 709	8, 112
Cunard	826	4, 647	1, 408	5, 680
Furness, Withy	3, 167	7, 383	875	5, 096
Head & Lord Line	6, 570	1, 049	5, 501	1, 426
Manchester Liners	4, 696	18, 420	2, 488	11, 387
Totals	15, 671	32, 520	14, 451	32, 245

TABLE IV. *Respondents' eastbound Great Lakes traffic*

Line	1957		1958 to Aug. 1	
	U.S. Lakes to U.K.	Canadian Lakes to U.K.	U.S. Lakes to U.K.	Canadian Lakes to U.K.
Bristol City Line			564	468
Canadian Pacific Railway	338	1, 965	845	2, 201
Cunard	1, 582	7, 049	824	3, 441
Furness, Withy	5, 152	2, 546	1, 899	1, 333
Head & Lord Line	4, 186	4, 325	2, 487	3, 387
Manchester Liners	10, 586	5, 062	4, 027	4, 682
Totals	21, 844	20, 947	10, 646	15, 512

Tables I and II show that complainants have been able, as the trade between the United States Great Lakes ports and the United Kingdom has developed, to concentrate primarily upon the Great Lakes-United Kindom service with progressively less reliance upon traffic to and from the Continent. Westbound traffic originating at continental and Scandinavian ports declined from 67 percent in 1953 to 37 percent in 1957, and eastbound traffic destined to continental and Scandinavian ports declined from 60 percent in 1953 to 32 percent in 1957, of the total carryings in that service.

Tables III and IV demonstrate that respondents, on the whole, have devoted their efforts more to the trade between the United Kingdom and Canada rather than that between United States Great Lakes ports and the United Kingdom, although there are variations as between the individual respondents.

The statistics demonstrate, together with data concerning the number of sailings made, the effectiveness of the exclusive-patronage contract systems employed by the Canadian conferences. In 1957 and to August 1, 1958, respondents had 76 westbound and 68 eastbound sailings between the United Kingdom and Canadian Great Lakes ports, averaging 852 and 536 tons, respectively, per sailing. In the same period, complainants had 72 westbound and 58 eastbound sailings between the same areas, averaging 166 and 324 tons, respectively, per sailing. Complainants' eastbound average carryings from Canadian Great Lakes ports are somewhat distorted by reason of the 1957 figures shown in table II. Average carryings eastbound in 1958 for 23 voyages was 241.8 tons per voyage. It appears, therefore, that the exclusive-patronage contract systems of the Canadian conferences are somewhat more effective westbound than eastbound.

The statistics also show that, from an economic standpoint, complainants and respondents alike have found it necessary to serve all

Great Lakes ports, Canadian and United States, in sailings to and from the United Kingdom.

In their preliminary meetings leading up to the organization of the British westbound conference, respondents nominated conference secretaries to draft the conference agreement, to make representations to the Board leading up to approval of the agreement, and to proceed with the compilation of a draft conference tariff. A draft of tariff was prepared by the conference secretaries and was circulated to the members of the proposed conference. At least 79 copies of this draft tariff were prepared. Revisions of particular items also were circulated by the secretaries, at the suggestion of the member lines. The only revisions of record were issued February 7, 1958, before the secretaries received notice from the Board that complainants' protest against approval of Agreement No. 8400 had been filed. There is no direct evidence that joint action has been taken by respondents to adopt the draft tariff, or that respondents have agreed to be bound thereby. The conference secretary testified that the members of the proposed British westbound conference were free to use the draft tariff as a basis for their rate quotations if they so desired, that to his knowledge the individual respondents did not like the tariff in many instances, and that the tariff was not binding on them.

There are shown of record a number of instances in which respondents other than Anchor Line and Ellerman's Wilson Line have quoted identical rates in soliciting westbound traffic, and in many of these instances the rates were the same as those shown in the draft tariff.[4] For example, Canadian Pacific Railway, Bristol City Line, Furness, Withy, and Manchester Liners all quoted rates at about the same time of 252 shillings sixpence per ton, weight or measurement, on needles up to a value of £125 per ton from United Kingdom ports to Cleveland and Detroit; and Cunard, Canadian Pacific Railway, and Manchester Liners all quoted rates of 125 shillings per ton, weight or measurement, on chocolate confectionery over 70 cubic feet per 20 hundredweight to and from the same ports, all of which rates were the same as shown in the draft tariff. The rate quotations of the five respondents first mentioned above on linoleum tiles, while differing from the rate shown in the draft tariff, were the same.

It is the general practice in the shipping industry for one line to meet exactly the rates of its competitors to the extent they can be ascertained, unless a policy of rate cutting is embarked upon. Numerous

[4] The record also shows rate quotations by Anchor Line, which, except in one instance, were the same as those given by the other respondents, but which are not further considered in view of our conclusion *infra* that Anchor Line cannot be found to have operated as a common carrier to and from United States Great Lakes ports.

instances are cited wherein complainants rates are the same as those quoted by respondents and the same as those shown in the draft tariff. On the other hand, some of the rates in the draft tariff, and in some instances those quoted by respondents, were lower than those established by complainants in their tariff on file with the Board.

Discussion and Conclusions.

The issues for determination are (1) whether the Board has jurisdiction to approve Agreements Nos. 8140 and 8130; (2) whether the operations of the approved westbound and eastbound conferences are in contravention of section 15 of the Act; (3) whether the operations of the proposed British westbound and eastbound conferences would be detrimental to the commerce of the United States, or otherwise in contravention of section 15; and (4) whether respondents have violated sections 14 Second and 15 of the Act.

The examiner found that our jurisdiction over Agreements Nos. 8140 and 8130 is not defeated by reason of the fact that they embrace the trade between Canada and the United Kingdom in addition to foreign commerce of the United States; that operations under the approved westbound and eastbound conference agreements are not detrimental to the commerce of the United States or otherwise in contravention of section 15 of the Act, and that there is no justification for withdrawal of the existing approval of those agreements; that approval of proposed Agreements Nos. 8400 and 8440 would be detrimental to the commerce of the United States, in that it would permit the operation of competing conferences with resulting rate instability and rate wars, and approval should therefore be withheld; and that the complaint in No. 833 should be dismissed on findings that no violations of the Act had been shown.

Jurisdiction. Respondents contend that Agreements Nos. 8140 and 8130 inseparably embrace Canadian trade with the United States Great Lakes trade, that the Board cannot lawfully regulate the commerce between Canada and the United Kingdom under the Act, and that we therefore have no jurisdiction to approve those agreements and must withdraw our prior approval. Section 1 of the Act provides, so far as is pertinent:

> The term "common carrier by water in foreign commerce" means a common carrier * * * engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade * * *.
>
> * * * * * * *
>
> The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce * * *.

Section 15 of the Act provides, so far as is pertinent:

> That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
>
> The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

We need not here determine whether, under section 15, we have or do not have jurisdiction over agreements between common carriers by water in foreign commerce, as defined in the Act, which relate solely to the foreign commerce of foreign nations. Although Agreements Nos. 8140 and 8130 embrace trade between Canada and the United Kingdom, they also cover the foreign commerce of the United States. It is clear that in this case, where the agreements cover both the foreign commerce of the United States and also the intimately related foreign commerce of Canada, our jurisdiction under section 15 exists.

By vesting in us power to disapprove any agreement that we find to be unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors, section 15 recognizes that a single agreement may embrace the foreign commerce of the United States and the foreign commerce of other nations. Thus, it is clear that we are not, and were not, precluded by the statute from taking action with respect to Agreements Nos. 8140 and 8130.

In exercising jurisdiction under section 15 with respect to agreements embracing the foreign commerce of other nations as well as that of the United States, we do not thereby assert regulatory power over the foreign commerce of any other nation. We are required by the Act to approve agreements submitted for approval, in the absence of findings that they are unjustly discriminatory or unfair, or detri-

mental to the commerce of the United States, or are otherwise in contravention of the Act. Approval by us of any agreement carries with it, by the terms of section 15, exemption from the antitrust laws of the *United States*, and actions taken pursuant to the approved agreement are exempt from such laws.

The impact upon the foreign commerce of nations other than the United States which may result from approval of any agreement which embraces the foreign commerce of such nations as well as that of the United States, stems from the actions of the carriers parties to the agreement. There is nothing in the Act, nor in our actions thereunder with respect to any particular agreement, which in any way purports to regulate the foreign commerce of other nations. Our approval does not affect the authority of a foreign country over its commerce. It does, however, pursuant to the specific terms of section 15, exempt the approved agreements from the provisions of the antitrust laws. It is axiomatic that any sovereign nation is free to take any action which it deems necessary or prudent for the furtherance or protection of its own foreign commerce.

Our conclusion that we have jurisdiction over Agreements Nos. 8140 and 8130 finds support in decisions of the Supreme Court concerning the jurisdiction of the Interstate Commerce Commission. The Interstate Commerce Act, in section 1, 49 U.S.C. 1, vests in that agency jurisdiction over railroad rates in foreign commerce only insofar as the transportation takes place within the United States, but it was held in *News Syndicate Co.* v. *N.Y.C.R.R.*, 275 U.S. 179 (1927), and *Lewis, Etc. Co.* v. *Southern Pac. Co.*, 283 U.S. 654 (1931), that the Interstate Commerce Commission has jurisdiction to determine the reasonableness of joint through rates applicable on international shipments from points in Canada to points in the United States.

Agreements Nos. 8140 and 8130. Respondents argue that Agreements Nos. 8140 and 8130 are unjustly discriminatory and unfair as between carriers, since in order to become members they would be compelled to withdraw from the Canadian conferences and thus break faith with Cairn Line and Donaldson Line, with which companies they have been in association over a long period of time in a trade over which the Board has no jurisdiction, and that the agreements are detrimental to the commerce of the United States in that respondents are compelled to operate as independents in the United States Great Lakes trade should they elect to remain with the Canadian conferences and the Board fails to approve the British eastbound and westbound conference agreements. Respondents also urge that the unanimous

vote procedures maintained by the approved eastbound and westbound conferences are discriminatory.[5]

Respondents have made no effort to join the approved eastbound and westbound conferences. Their arguments concerning the voting procedures maintained by those conferences are therefore entirely speculative. In the absence of evidence concerning the actual results of operations under the voting rules, no findings concerning them may be made. In *Pacific Coast European Conference*, 3 U.S.M.C. 11 (1948), it is stated at p. 20:

> There are conferences which have the unanimous, two-thirds, three-fourths, or majority voting rules. No one of these can be disapproved as an organizational procedure, but the lawfulness of any of them must be based upon evidence as to their working in practice as introduced in a public hearing. Tests of lawfulness are found in actions or courses of conduct, not in organizational procedure.

With respect to respondents' arguments concerning Agreements Nos. 8140 and 8130, we recognize, as did the examiner, that underlying these proceedings is the conflict between complainants and respondents over the trade between the United Kingdom and Canada. Respondents appear determined to preserve their dominant position in that trade. It is obvious that their refusal to admit complainants to membership in the Canadian conferences underlies their effort to establish the proposed British eastbound and westbound conferences and their refusal to join with complainants in the approved eastbound and westbound conferences. This impasse, however, is extraneous to the issue presented here, that is, the lawfulness of the existing conference agreements.

The statutory standards set forth in section 15 relate only to the foreign commerce of the United States and the actions of carriers operating in that commerce, and the issue here must be determined in the light of the effect of the approved eastbound and westbound conferences upon the foreign commerce of the United States. The inclusion in those conferences agreements of the trade between Canada and the United Kingdom has not been shown to be detrimental to the commerce of the United States. To the contrary, it seems clear from the data presented that from an economic standpoint vessel operation between the Great Lakes and the United Kingdom, under the conditions shown of record, requires the lifting of cargo to and from

[5] Respondents made reference during the argument to provisions of these agreements, not mentioned at the hearing, that arbitration procedures set up to resolve disputes between parties to the agreements must be governed by Dutch law, but the record is devoid of any evidence showing that such provisions would be discriminatory as between carriers or otherwise in violation of the Act. Nor can any such provision affect the rights of any person or limit our jurisdiction under the Act.

ports on both borders of the Great Lakes. Complainants are denied admission to the Canadian conferences and in self-defense must maintain their own conference organization in the Canada-United Kingdom trade.

The claimed discrimination between carriers does not stem from the actions of the parties to the existing approved agreements, since they are willing to and have offered to admit respondents to membership. The discrimination, if any exists, stems from the refusal of respondents to admit complainants to membership in the Canadian conferences. It lies in respondents' discretion to eliminate any discrimination. Subsequent to the examiner's decision, in the exceptions and during the argument, the suggestion was made that complainants be required to admit respondents to membership in the approved eastbound and westbound conferences on a limited basis, with respect to operations between United States Great Lakes ports and the United Kingdom only. As provided in section 15, we may order modification of any existing agreements only upon findings that they are in contravention of the Act. No such findings can here be made. As a whole, the record fails to show that Agreements Nos. 8140 and 8130 are unjustly discriminatory or unfair as between carriers, or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States, or are otherwise in violation of the Act. There is consequently no justification for withdrawal by us of the existing approval of those agreements.

Agreements Nos. 8400 and 8440. Complainants contend that the approval of more than one conference in a particular trade is illegal *per se.* This contention is not supported by the language of the Act nor by its legislative history.

Complainants and Public Counsel also argue that the approval of competing conferences in a single trade would be detrimental to the commerce of the United States, and that Agreements Nos. 8400 and 8440 should therefore be disapproved. Complainants and respondents agree that the existence of competing conferences in a particular trade, with differently constituted memberships, ultimately will result in rate wars and complete disruption of that trade, and that such disruption will be more severe than in the case of a single conference faced with the competition of several individual carriers.

We and our predecessors consistently have based approval of agreements at least partly on the anticipated rate stability which would result therefrom. *Secretary of Agriculture* v. *N. Atlantic Cont'l Frt. Conf.*, 5 F. M. B. 20, 37 (1956), and *Contract Rates—North Atlantic*

Cont'l Frt. Conf., 4 F.M.B. 355, 372 (1954). In the face of evidence that approval of Agreements Nos. 8400 and 8440 in all likelihood would result in rate instability and rate wars, since the opposing parties are in some respects the same as were involved in the conflict detailed above in the Canadian seaboard-continental trades, we find that the approval of Agreements Nos. 8400 and 8440 would be detrimental to the commerce of the United States.

We are constrained to state that our conclusions here and with respect to the existing agreements do not result in a completely satisfactory solution of the problems presented, although they find justification in the record and the statute. They will require, as respondents urge, that the respondent carriers, if they persist in refusing to reach some understanding with complainants resolving the conflict between them over the Canadian-United Kingdom trade, will be forced to operate as independents in competition with the approved eastbound and westbound conferences in the United States Great Lakes-United Kingdom trade. We can only express the hope that some reasonable accommodation can be achieved by complainants and respondents which will redound to the benefit of the commerce of our nation and of Canada, particularly since, through cooperation between these governments, the ports of the Great Lakes have been opened to the world by completion of the St. Lawrence Seaway.

Alleged Violations. Complainants contend that respondents are parties to arrangements, understandings, or agreements which provide for a system of territorial divisions, port assignments, combinations, and restrictions whereby respondents allocate ports or ranges of ports among themselves in the United Kingdom and Eire as well as those on the United States Great Lakes.[6] The basis for this contention rests upon a study made by complainants of the advertising of sailings by respondents, and not upon the evidence presented herein, which details the actual ports served by respondents. For example, complainants assert that respondents have agreed among themselves that Bristol City Line should serve only Avonmouth and Bristol Channel ports in the United Kingdom, and that Head & Lord Line alone should serve Belfast and Dublin, whereas the record discloses service by Bristol City Line at Avonmouth, Glasgow, Liverpool, and Belfast. The contentions are without merit. The evidence concerning the issuance of joint advertisements, of itself, does not justify a finding that the action was taken pursuant to agreement. See *Los Angeles*

[6] Similar contentions are made with regard to asserted allocation of Canadian ports and the entire range of North American Atlantic ports, which relate to matters not within the scope of these proceedings nor supported by the record, and which need not be given further consideration.

By-Products Co. v. *Barber S.S. Lines, Inc.*, 2 U.S.M.C. 106, 108 (1939).

Complainants and Public Counsel urge that the record supports a finding that respondents have engaged in concerted rate action. The contentions rest largely upon the preparation, in advance of the approval by the Board of Agreement No. 8400, of the draft tariff introduced into evidence, and the somewhat consistent policy, as shown in the record, of respondents to quote uniformly the rates named in that draft of tariff or other uniform rates. Bearing in mind the chronology of events leading up to the inception of these proceedings, however, and the lengthy and complex tasks involved in the preparation of a comprehensive tariff, there is no justification for a conclusion that the mere preparation of the draft tariff of itself is evidence that respondents agreed to be bound thereby. As stated, there is evidence of record on this point to the contrary.

The evidence concerning the quotation of uniform rates by respondents is subject to two inconsistent inferences, i.e., that respondents followed the normal practice of quoting rates to meet exactly those of their competitors, or that respondents agreed among themselves to quote uniform rates. In view of the fact that there are here involved violations of the Act alleged by complainants and that the burden is upon complainants to prove such violations, the inference properly to be drawn is that most favorable to respondents. We conclude that complainants have failed to sustain their burden with respect to this issue. Cf. *Dipson Theatres* v. *Buffalo Theatres*, 86 F. Supp. 716 (1949), cert. den. 342 U.S. 926 (1952).

Complainants further contend, with respect to the alleged violations of section 14 Second of the Act, that respondents have deliberately conceived Agreement No. 8400 so as to force a dichotomy of service as between United States and Canadian Great Lakes ports, with the aim of driving complainants from the Canadian Great Lakes trade and thus eliminating them from service at United States Great Lakes ports, since it is economically impossible to serve only United States Great Lakes ports under present circumstances. Whether service is conducted by a particular vessel at ports on both borders of the Great Lakes does not depend upon the territorial coverage of particular conference agreements. This is clearly demonstrated by the number of separate conferences which have been established in the trade between Canada and the Great Lakes, on the one hand, and the Bordeaux/Hamburg range, on the other hand, all of which are served by vessels of complainants which also serve in the Great Lakes-United Kingdom trade. Our conclusions above indicate our understanding of the reasons for the organization of the British westbound conference

and the presentation of Agreement No. 8400 for approval, and the record does not support complainants' allegations. No violations by respondents of section 14 Second of the Act have been shown.

Requested findings and conclusions not embraced herein are not justified by the record, or are unnecessary for determination of the issues.

FINDINGS

We find:

1. In No. 833, that respondents have not been shown to have engaged in concerted rate action, cooperative pooling and sailing arrangements, or a conspiracy to drive complainants from the United States Great Lakes-United Kingdom trade, in violation of sections 14 Second and 15 of the Act. The complaint also seeks disapproval of Agreement No. 8400. This will follow as a result of our findings in No. 834, and the complaint will accordingly be dismissed.

2. In No. 840, that with respect to Agreements Nos. 8140 and 8130, the Board has power to act thereon notwithstanding that the agreements embrace also the foreign commerce of other nations; and that Agreements Nos. 8140 and 8130 have not been shown to be detrimental to the commerce of the United States or otherwise in contravention of the Act. Respondents' petition will be denied.

3. In Nos. 834 and 843, that the approval of Agreements Nos. 8400 and 8440 would be detrimental to the commerce of the United States, and should therefore not be granted. These proceedings will be discontinued.

An appropriate order will be entered.

Board Member STAKEM, dissenting in part:

I agree with the majority that we have power to act under the Act with respect to Agreements Nos. 8140 and 8130, covering the trades between United States and Canadian Great Lakes ports and ports on the St. Lawrence River, in Nova Scotia, Newfoundland, and New Brunswick, on the one hand, and ports of the United Kingdom, on the other hand, notwithstanding that the agreements embrace also the foreign commerce of nations other than the United States.

I further agree that the above agreements have not been shown to be detrimental to the commerce of the United States or otherwise to be in contravention of the Act, and that the petition in No. 840 should be denied.

I agree also that the approval of Agreements Nos. 8400 and 8440 would be detrimental to the commerce of the United States and that approval should be denied and that the proceeding should be discontinued.

I would find, however, that respondents Bristol City Line of Steamships Ltd. and Ulster Steamship Company Limited, between themselves, and respondents Canadian Pacific Railway Company, The Cunard Steamship Company Limited, and Furness, Withy & Company, Limited, among themselves, have entered into agreements, understandings, or arrangements for the provision of joint service or the allocation of sailings between ports in the United Kingdom and ports in the United States on the Great Lakes, and that such respondents and Manchester Liners Limited have entered into agreements, understandings, or arrangements for the maintenance of uniform rates in the trade between the United Kingdom and United States Great Lakes ports, and that such agreements, understandings, or arrangements have been carried out without the prior approval of the Board, in violation of the Act.

The majority of the Board concludes that the evidence concerning the issuance of joint advertisements, of itself, does not justify a finding that the action was taken pursuant to agreement, and cities *Los Angeles By-Products Co.* v. *Barber S. S. Lines, Inc.*, 2 U.S.M.C. 106, 108 (1939). While I agree with the principle, I am of the opinion that the evidence here discloses the existence of close working arrangements which could only result from understandings reached between parties thereto. With respect to the Anchor Line-Bristol City Line-Head & Lord Line services, it is true that after the commencement of these proceedings the advertisement of the two carriers was changed to indicate some sort of agency arrangements, but I do not feel that the absence of such designation in the first instance occurred through inadvertance. Further, the record is devoid of evidence from the principals involved to rebut the clear inference that some cooperative action was taken.

Insofar as the Cunard-Canadian Pacific Railway-Furness, Withy services are concerned, the record, in my opinion, shows a consistent pattern of joint advertising and invitations through these joint advertisements to interested shippers to apply for rates or other information through any one of the carriers or their offices or agencies.

Further, there appears a consistent sailing pattern under which no more than one vessel of any of the carriers was on berth at London at the same time. For example, the record discloses Cunard's vessels having sailed from London on April 17, May 22, and July 12; those of Furness, Withy on March 28, April 30, June 23, and July 3; and those of Canadian Pacific Railway on April 8 and 23, May 31, June 14, and July 18 and 31. In view of the length of time over which the last mentioned situation was maintained, I do not believe that it occurred solely through coincidence, and the only reasonable conclusion

I may arrive at is that these circumstances are the outward manifestation of an agreement or understanding between the parties involved. Again, I consider it significant that the principals involved failed to present any substantial countervailing evidence.

It has been found that Ellerman's Wilson Line had not up to the date of the hearing operated in the trade involved and that, on this record, Anchor Line could not be found to have operated as a common carrier. As to the remaining respondents, the Board concludes that the evidence concerning the quotation of uniform rates by them is subject to inconsistent inferences, namely, that they followed the normal practice of quoting rates to meet exactly those of their competitors, or that respondents agreed among themselves to quote uniform rates; that the burden is upon complainants to prove the alleged violations of the Act; and that the inference properly to be drawn is that most favorable to respondents. I do not agree. In my opinion, the circumstances of the conference secretaries preparing a large number of copies of a draft tariff and circulating it among the respondents; the circulation of suggested rate revisions; the following of the draft tariff by the operating carriers; and the fact that when rates of competitors were undercut, the rates applied by the operating respondents were identical, leads me to the conclusion that there existed among these respondents an arrangement, agreement, or understanding to maintain uniform rates, which has been carried out without our prior approval, in violation of section 15 of the Act.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 14th day of December A.D. 1959.

No. 833

MAATSCHAPPIJ "ZEETRANSPORT" N. V. (ORANJE LINE) ET AL.

v.

ANCHOR LINE LIMITED ET AL.

No. 834

AGREEMENT No. 8400, BETWEEN ANCHOR LINE LIMITED, THE BRISTOL CITY LINE OF STEAMSHIPS LTD. ET AL.

No. 840

PETITION OF ANCHOR LINE LTD. ET AL., PARTIES TO AGREEMENT No. 8400

No. 843

IN THE MATTER OF AGREEMENT No. 8440, BETWEEN ANCHOR LINE LIMITED, THE BRISTOL CITY LINE OF STEAMSHIPS LTD. ET AL., AND THE PROTEST OF ORANJE LINE ET AL. AGAINST APPROVAL THEREOF

These proceedings presenting related issues having been consolidated 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 conclusions, decision, and findings therein, which report is hereby referred to and made a part hereof:

It is ordered, That the complaint in No. 833 be, and it is hereby, dismissed; and

It is further ordered, That the petition in No. 840 be, and it is hereby, denied; and

It is further ordered, That Agreements Nos. 8400 and 8440 be, and they are hereby, disapproved; and

It is further ordered, That the proceedings in Nos. 834 and 843 be, and they are hereby, discontinued.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. S–57

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

Submitted April 10, 1959. Decided December 14, 1959

Report of the Board, 5 F.M.B. 537, modified in certain respects.

SUPPLEMENTAL REPORT OF THE BOARD

Clarence G. Morse, *Chairman*, Ben H. Guill, *Vice Chairman*, Thos. E. Stakem, Jr., *Member*

BY THE BOARD:

Petitions for reconsideration of our report herein served February 18, 1959 (5 F.M.B. 537, which contains the appearances), have been filed by Pacific Far East Line, Inc. (PFEL), United States Lines Company (USL), American President Lines, Ltd. (APL), Lykes Bros. Steamship Co., Inc. (Lykes), and the Commission of Public Docks of the City of Portland, Oregon (Portland Docks). States Marine Corporation and States Marine Corporation of Delaware (both as SML), joint subsidy applicants herein, have filed a reply.

USL's contentions are dealt with first. It complains that the Board has failed to define North Atlantic "top-offs", and argues that the finding of inadequacy on the North Atlantic routes and the finding that in the accomplishment of the purposes and policy of the Merchant Marine Act, 1936 (the Act), additional vessels should be operated thereon, is insufficient, and that we should have limited or defined the number of sailings or the amount or type of cargo to be carried. Where a particular trade or trades are found to be inadequately

served, however, and it is also found that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon, the requirements of section 605(c) thereof are satisfied, and the provisions of that section do not interpose a bar to the award of subsidy to the applicant in relation to such trade or trades. Those requisite findings were made in our report. But as the report pointed out, whether a definite contract, if one is awarded, will permit North Atlantic top-offs or will restrict the top-off operation, are matters which the Board will consider and determine in the exercise of its discretion under other sections of the Act. It is well settled that a favorable section 605(c) determination, without more, does not result in the award of subsidy. *Matson Orient Line, Inc.—Subsidy, Route 12*, 5 F.M.B. 410 (1958).

Next, USL contends that the Board, in concluding that section 605(c) does not interpose a bar to the North Atlantic top-offs, neglected to consider the harmful effects of such top-offs on Trade Routes Nos. 26 A and B, which, under the purposes and policy clause of that section, would interpose a bar to them. Not offering a service from the Pacific coast to Europe, USL cannot be heard [1] as to what constitutes "harmful effects" on Nos. 26 A and B. As our report indicated, applicant provides the only United States-flag liner service between the Pacific coast and Europe. Hence, without the carryings of SML in the trade, the route manifestly would be inadequately served, and in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon. But, as indicated in the paragraph next above, under other sections of the Act the Board may permit, deny altogether, or otherwise restrict, such top-offs.

USL next argues that the Board erred in concluding that section 605(c) interposed no bar to SML's proposed topping-off operations on Trade Route No. 11 in conjunction with its Trade Routes Nos. 26 A and B sailings. Since the Atlantic termini of Trade Route No. 11 do not encompass North Atlantic ports, and since the application does not contemplate a topping-off service on Trade Route No. 11, the issues under section 605(c) with respect thereto were not before us, and the findings required to be made under that section prior to the award of subsidy cannot be made. We will therefore delete any reference to topping off on Trade Route No. 11 made in the report.

[1] If SML's application contemplated a direct service on Trade Routes Nos. 26 A and B, i.e., from the Pacific coast to Europe without North Atlantic top-offs, USL would not have an interest therein. Hence, the extent of its intervention in the premises is the North Atlantic top-offs.

USL also contends that the Board erred in finding that the outbound North Atlantic/Europe trades (the trades on which SML proposes a top-off service in conjunction with Trade Routes Nos. 26 A and B) are inadequately served, in that the Board applied an arbitrary statistical standard and did not weigh factors relating to the special conditions attendant on each of the routes. We disagree. The report does not rely solely upon statistical data to support the findings (1) of inadequacy and (2) that in the accomplishment of the purposes and policy of the Act additional vessels should be operated in the trades between the North Atlantic and Europe. Consideration also was given the facts (1) that North Atlantic trades involve the largest movement of outbound liner commercial traffic, and (2) that United States-flag vessels in the trades enjoy a comparatively high utilization ratio. See *Bloomfield S.S. Co.—Subsidy, Routes 13(1) and 21(5)*, 4 F.M.B. 349 (1953).

USL also claims the Board erred in concluding that *inbound* sailings by SML from Europe to North Atlantic ports are not barred by section 605(c). We found, on the record presented, that the North Atlantic trades are inadequately served, and that in the accomplishment of the purposes and policy of the Act additional sailings should be operated thereon. Our report is specific in this regard: "As the routes in their entirety are inadequately served, section 605(c) is not a bar to either the inbound or outbound movement" (5 F.M.B. 546).

Lykes argues, first, that the tricontinent service is not an "essential" service, and that the Board has failed to decide its "essentiality". It is to be noted at the outset, however, that the Board, in its report, considered the component trade routes comprising the tricontinent service and found them to be inadequately served by United States-flag vessels. The tricontinent service has been determined to be an essential trade route by the Maritime Administrator, pursuant to section 211 of the Act. Determination of "essentiality" is a quasi-legislative function, exercised by the Administrator, and is independent of the Board's actions under section 605(c). *States Marine Corp.—Subsidy, Tri-continent Service*, 5 F.M.B. 60 (1956). A favorable section 605(c) determination, followed by other favorable determinations under other sections of the Act, cannot result in the award of a subsidy contract unless and until the Administrator, pursuant to section 211 of the Act, determines the route to be essential. *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F.M.B. 304 (1957). It is not necessary for the Board, in a section 605(c) proceeding, to determine the essentiality of a particular trade route.

Lykes also cites as error the Board's failure to make specific findings as to whether applicant conducted "existing services" within the meaning of section 605(c). In view of our findings that United States-flag service on each of the component essential trade routes comprising the tricontinent service, as well as the over-all service on the tricontinent service as a unit, are inadequately served and that in the accomplishment of the purposes and policy of the Act additional United States-flag vessels should be operated thereon, the determination of whether applicant's service was "existing" is largely academic. The record establishes, and we find, that it is necessary to enter into a contract covering the tricontinent trades to provide adequate service by vessels of United States registry and to accomplish the purposes and policy of the Act.

We reject, on grounds stated in our report, the claim of Lykes that an alleged unlawful agreement between Bloomfield Steamship Company is properly before the Board in a section 605(c) proceeding. It has no relevance to the provisions of that section. Likewise, Lykes' contention that we erred in failing to determine section 605(a) issues in this proceeding is without merit.

The contention that the Board erred in reserving such matters as vessel interchange, sailing spreads, foreign-flag relationships, and applicant's proposed flexibility of operations, is not well taken. Such matters were properly excluded from our decision under section 605(c). We reiterate, however, that SML's proposed flexibility of operations, including vessel interchange and minima-maxima sailing spreads, together with other facets of its application, will be scrutinized under other sections of the Act.

Lykes complains that the Board did not find that the award of subsidy to SML for services on Trade Routes Nos. 13 and 22 would not result in undue prejudice to Lykes and in undue advantage to SML, asserting such a finding could not be supported by the record. Since those trades, without the carryings of SML, clearly are inadequate, and since we find that additional United States-flag vessels should be operated thereon in the accomplishment of the purposes and policy of the Act, the issue of undue advantage and prejudice was not before us. Although it is unnecessary for a determination of the issues raised under section 605(c), the record establishes, and we so find, that the granting of subsidy to SML for the operation of its vessels on Trade Routes Nos. 13 and 22 would not result in undue advantage to SML or in undue prejudice to Lykes.

Lykes also seeks reconsideration of the finding that its claim of undue prejudice resulting from SML top-offs in California in con-

junction with its Trade Route No. 22 service is not supported by the record. Lykes sails directly to the Far East on Trade Route No. 22 and it has not requested California top-off privileges in conjunction with the service. In topping off in California, SML will not be offering a direct or as fast a Far East service to Gulf shippers as does Lykes, and SML will not have the full reach of its vessel on berth in the Gulf. We reiterate that the claim of undue prejudice is not supported by the record.

The petitions include prayers for clarification of our disposition of requests on the application for calls at privilege ports. At the outset we find that the application does not include a request for the privilege of moving cargoes from Atlantic or Gulf ports to Canal Zone and Mexican ports. Nor did the notice of hearing in the Federal Register reflect that such service would be in issue. Since neither the application nor the notice included the request for the privilege of moving cargo from Atlantic and Gulf ports *to* Canal Zone and Mexican ports on westbound tricontinent sailings, the issue was not before us and we cannot, in this proceeding, make the requisite findings under section 605(c), which are antecedent to the entering of a contract providing for such service.

The noticed privilege calls are (1) ports in Mexico, the Canal Zone, and Okinawa in conjunction with the proposed westbound tricontinent service; (2) Hawaii (inbound from the Far East on Trade Route No. 30 and outbound to Europe on Trade Routes Nos. 26 A and B), British Columbia (inbound on Trade Route No. 30), the Canal Zone and west coast of Mexico (on Trade Routes Nos. 26 A and B), and Iceland (outbound on North Atlantic trade routes), all in conjunction with the proposed eastbound tricontinent sailings; (3) the east coast of Mexico, West Indies, and the Azores, Casablanca, and Spanish Morocco in conjunction with the proposed eastbound or outbound Trade Route No. 13 service; (4) Mexico and Okinawa in conjunction with the proposed Trade Route No. 29 service; and (5) British Columbia and Okinawa in conjunction with the proposed Trade Route No. 30 service.

We found, in our earlier report, that: (a) the proposed inbound service to Hawaii from the Far East was barred by the provisions of section 605(c) (see *Matson Orient Line, Inc.—Subsidy, Route 12, supra*), (b) the proposed service to the Azores was also barred by the provisions of that section (see *Isbrandtsen Co., Inc.—Subsidy, E/B Round The World*, 5 F.M.B. 448 (1958)), (c) service from Hawaii to Europe was not barred by the provisions of that section. We reaffirm those findings.

While we found, in our previous report, that inbound service to British Columbia from the Far East was barred by the provisions of

section 605(c), with respect to tricontinent sailings, and that such service was not barred with respect to outbound sailings from the United States Northwest, i.e., the Trade Route No. 30 service, upon further consideration we conclude that the provisions of section 605(c) are not specifically applicable to foreign sailings. This does not mean, however, that the rights of United States-flag operators conducting services between foreign points will be ignored. It means that in framing the service description of an operating-differential subsidy contract the section 605(c) tests will be considered as a guide to, as distinguished from a control on, the Board, and hence no hearing is required under section 605(c). That, in addition to other provisions of the statute, will be considered by the Board in determining whether permission to carry foreign-to-foreign offerings will be granted. One of the chief purposes of the Act, as set forth in section 101, is to develop and maintain a merchant marine sufficient to carry "a substantial portion of the water-borne export and import foreign commerce of the United States," and the provisions of title VI of the Act assist in the attainment of that purpose through the medium of operating-differential subsidies.

Within the sound discretion of the Board, and consonant with the principles just announced, the Board in fixing the service description of an operator in a given operating-differential subsidy contract, will take into consideration, in keeping with the purposes and policy of the Act, data relating to (1) the financial support afforded the essential service of the applicant by the foreign-to-foreign or way-port calls, (2) the ability of the applicant to accommodate such way-port cargo without imparing the needs of United States importers and exporters, and (3) the manner and type of competition of competing carriers in the trade.

Applying the above tests to the instant application, we have no hesitancy in denying SML the privilege of moving Far East cargoes to British Columbia on tricontinent sailings. The remaining foreign-to-foreign privileges requested by SML, including the privilege of carrying eastbound cargo from the Far East to British Columbia on sailings originating in the United States Northwest, will be considered in the light of the foregoing antecedent to the execution of a contract, if any, with SML.

The remaining requested privileges involving the foreign commerce of the United States, which privileges do fall within the purview of the provisions of section 605(c), are dealt with next. We note that Casablanca and Spanish Morocco are specifically designated as integral parts of essential Trade Route No. 13, and since we specifically

found that United States-flag service on the route is inadequate and that in the accomplishment of the purposes and policy of the Act additional United States-flag vessels should be operated thereon, the privilege of serving Casablanca and Spanish Morocco is not barred by the provisions of section 605(c).

Okinawa constitutes an integral part of our essential foreign trade routes to the Far East. Since we found that United States-flag service on Trade Routes Nos. 12 and 22 (SML's proposed westbound tricontinent service) is inadequate and that in the accomplishment of the purposes and policy of the Act additional United States-flag vessels should be operated thereon, and since we found SML's transpacific service to be "existing" within the meaning of section 605(c), and that the award of subsidy therefore would not be to give undue advantage to SML or be unduly prejudicial to its United States-flag competitors, the privilege of serving Okinawa is not barred by the provisions of section 605(c), nor is the privilege of serving Iceland on eastbound tricontinent sailings barred by the provisions of section 605(c). We found in our prior report that the provisions of that section did not bar SML's proposed topping-off operation on its Trade Routes Nos. 26 A and B sailings. Since Iceland constitutes an essential part of Trade Route No. 6—one of the tricontinent components—the proposed calls are included within the scope of our prior determination.

We emphasize, however, that our conclusion that 605(c) does not interpose a bar to privilege ports is not tantamount to granting a subsidy contract containing such privileges. Those privileges which involve trade between the United States and foreign ports, i.e., the foreign commerce of the United States, *may* be included in any contract resulting from the instant application, except those specifically found to be barred by the provisions of section 605(c).

The claims of APL and PFEL, which differ from those of other interveners above considered, and not specifically referred to herein, have been considered, and are found, as are other contentions raised by the petitions not explicitly referred to, not justified by the facts or not related to material issues.

Portland Docks does not raise any issues cognizable under section 605(c).

An order consistent herewith is attached.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 14th day of December A.D. 1959.

No. S-57

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

Petitions for reconsideration of our report herein served February 18, 1959, having been filed by Pacific Far East Line, Inc., United States Lines Company, American President Lines, Ltd., Lykes Bros. Steamship Co., Inc., and the Commission of Public Docks of the City of Portland, Oregon, and States Marine Corporation and States Marine Corporation of Delaware, joint applicants for subsidy herein, having replied thereto, and the Board, on the date hereof, having entered of record a supplemental report, which report is hereby referred to and made a part hereof:

It is ordered, That, to the extent not hereinabove granted, the petitions be, and they are hereby, denied.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. S-83

GULF & SOUTH AMERICAN STEAMSHIP CO., INC.—EXTENSION OF SERVICE ON TRADE ROUTE NO. 31 (U.S. GULF/WEST COAST SOUTH AMERICA)

Submitted September 9, 1959. Decided December 16, 1959

Gulf & South American Steamship Co., Inc., is not operating an existing service between United States Gulf ports and the Panama Canal Zone, within the meaning of section 605(c) of the Merchant Marine Act, 1936.

The service already provided by vessels of United States registry in the service between Gulf Ports other than New Orleans, on the one hand, and the Panama Canal Zone, on the other hand, and in the service from the Panama Canal Zone to New Orleans, is inadequate. In the accomplishment of the purposes and policy of the Merchant Marine Act, 1936, the additional service proposed by Gulf & South American Steamship Co., Inc., in these services should be permitted. Section 605(c) of the Act does not interpose a bar to the grant of the permission requested by Gulf & South American Steamship Co., Inc., for such services.

The service already provided by vessels of United States registry in the service from New Orleans to the Panama Canal Zone, except for cargoes which United Fruit Co. refuses to carry in its refrigerated vessels, is adequately served, and in the accomplishment of the purposes and policy of the Merchant Marine Act, 1936, the additional service proposed in this service by Gulf & South American Steamship Co., Inc., should not be permitted. Section 605(c) of the Act does interpose a bar to the grant of permission requested by Gulf & South American Steamship Co., Inc., for such service.

Section 605(c) of the Merchant Marine Act, 1936, does not interpose a bar to the carriage by Gulf & South American Steamship Co., Inc., of cargoes which United Fruit Co. refuses to carry in its refrigerated vessels from New Orleans to the Panama Canal Zone, provided that special permission for such carriage is granted by the Maritime Administrator.

Odell Kominers and *J. Alton Boyer* for applicant.
Francis T. Greene for United Fruit Company, intervener.
Robert E. Mitchell, *Edward Aptaker*, and *Robert B. Hood, Jr.*, as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, Jr., *Member*

BY THE BOARD:

Gulf & South American Steamship Company, Inc. (G. & S.A. or applicant), seeks permission to lift cargo on its five subsidized C–2 cargo vessels, on a privilege basis, between United States Gulf ports and the Panama Canal Zone in connection with its subsidized service on Trade Route No. 31 (U.S. Gulf/west coast of South America), and requests the Board to make the findings required under section 605(c) of the Merchant Marine Act, 1936, as amended ("the Act").[1] By notice published in the Federal Register on January 28, 1959, the matter was set down for public hearing. United Fruit Company (United Fruit) intervened in opposition to the application. Hearing was held before an examiner, and in his recommended decision he concluded and found:

1. That G. & S.A. is not operating an existing service between United States Gulf ports and the Panama Canal Zone, and that its proposed service would be in addition to the existing services;

2. That the service already provided by vessels of United States registry in such service is inadequate within the meaning of section 605(c) of the Act, and that in the accomplishment of the purposes and policy of the Act the additional service proposed by G. & S.A. should be permitted; and

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

Exceptions to the recommended decision and replies thereto were filed, and oral argument has been held before the Board. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in the proceeding.

THE FACTS

Applicant, a Louisiana corporation owned in equal proportions by W. R. Grace and Co. and Lykes Bros. Steamship Co., Inc. (Lykes), began the operation in 1947 of a common-carrier freight, mail, and limited passenger steamship service between United States Gulf ports and the west coast of South America, by way of the Panama Canal. Effective April 1, 1954, it entered into an operating-differential sub-

[1] See appendix.

sidy contract with the Board (No. FMB–28), to expire December 31, 1963, providing for service on Trade Route No. 31 between Houston and Galveston, Texas, and New Orleans, Louisiana (other United States Gulf ports as traffic offers), and west coast of South America ports in Chile, Peru, Ecuador, and Colombia. Addendum No. 3 to the contract, dated August 16, 1955, amended the service description to read:

> Between Houston, Galveston, New Orleans (other United States Gulf Ports as traffic offers) and West Coast of South America ports in Chile, Peru, Ecuador and Colombia, with the privilege, subject to cancellation upon ninety (90) days' notice, of carrying cargo, as traffic offers, between ports in the Panama Canal Zone and West Coast of South America ports in Chile, Peru, Ecuador and Colombia.

Applicant never carried any cargo from Gulf ports to Panama Canal Zone ports, i.e., Cristobal and Balboa.[2] While it had made no survey of the traffic moving or which potentially might move, officials of the company had knowledge that two foreign-flag competitive lines to the west coast of South America were carrying good quantities, and believed that the company could get its share of that cargo. Accordingly, applicant requested expansion of the trade route description, and in a new subsidy contract (No. FMB–75), dated December 23, 1958, superseding No. FMB–28 effective January 1, 1959, the service description was amended to read:

> Trade Route No. 31—United States Gulf/West Coast South America.
> *Required:* Between United States Gulf ports (Key West to Mexican border) and ports on the West Coast of South America (Colombia, Ecuador, Peru, Chile).
> *Privilege:* Between a port or ports on the required service and a port or ports in the Panama Canal Zone.

A subparagraph provides that the privilege calls shall be subject to cancellation by the United States for good cause and after due notice to the operator and after the operator has had an opportunity to be heard.

Following the execution of contract FMB–75, applicant, on January 5, 1959, announced simultaneously in Panamanian and United States newspapers and otherwise that it was inaugurating a new service be-

[2] Its only northbound carryings from the Canal Zone have been two lots of MSTS household goods transported to Gulf ports in 1955 under special permission from the Maritime Administration.

tween Gulf ports of the United States and ports in the Canal Zone, and solicited cargo for its ship scheduled to sail from New Orleans on January 13, 1959, the first sailing in the new service. Some 50 or 60 tons of cargo were booked to Cristobal but were not lifted. As a result of objections on behalf of United Fruit, the Board telegraphed applicant on January 8, 1959, instructing it not to exercise the privilege of giving service between the Gulf and Panama until further advice from the Board. The bookings then were cancelled.

In 1958 G. & S.A. stepped up its sailing frequency from fortnightly to every eleven days, this pattern of operation presently being maintained. On a typical voyage, and as scheduled at the time of hearing, a vessel will call at Houston, Galveston, Mobile, Alabama, and New Orleans, and proceed from New Orleans through the Panama Canal to Colombia, Ecuador, Peru, and Chile. Two or more other Gulf ports also are served as traffic demands require, an offering of 200 tons of cargo to the entire range of South American ports being sufficient to induce a call. Approximately 50 percent of applicant's cargo originates at New Orleans and the balance at the other Gulf ports. Deadweight free space on sailing from New Orleans averaged 24 percent in 1957 and 44 percent in 1958. On the return voyage, calls are made at the same range of ports, and the deadweight free space on arrival at the first United States port averaged 40 percent in 1957 and 61 percent in 1958. If the requested permission be granted, calls at the Canal Zone ports can and will be made without in any way disturbing the present service.

Lykes, one of applicant's coowners, operates about seven United States-flag sailings a month in its Gulf/Caribbean berth service, with an approximately monthly sailing to Cristobal. The route traversed is from Gulf ports to Puerto Rico or Cuba, Venezuela, north coast of Colombia, Cristobal, and return to United States Gulf ports. During the period January–June 1958, Lykes had 43 sailings, eight of which had cargo for Cristobal but only two actually discharged at the Canal Zone.

The only other United States-flag service is that provided by United Fruit with its fully refrigerated vessels. This is a scheduled weekly service maintained since construction of the Panama Canal, a vessel sailing every Saturday from New Orleans, the only Gulf port served, for Havana, Cristobal, Balboa, Guayaquil and Bolivar, Ecuador, returning to New Orleans by way of the Panama Canal. Transit time from New Orleans to Cristobal is seven days. As all vessels in this service carry full cargoes of United Fruit's bananas on the return trip, they are not put on any general cargo berth homebound. The 52 sailings in 1958 carried a total of 26,492 long tons of cargo for dis-

charge at Cristobal and Balboa, or an average of 509 tons per sailing, and had unused capacity available for 116,715 additional long tons of cargo, or an average free space of 2,245 tons per sailing. Operations in 1957 and 1956 are fairly comparable.

In order to maintain a rounded service, United Fruit necessarily employs an additional number of dry cargo type vessels to supplement its fruit service and for the purpose of being in position to accommodate shippers of rough or obnoxious cargo.[3] Cargo of this nature, some of which is proprietary cargo for intervener's own divisions, cannot be handled in the refrigerated ships without damaging the insulation. All of the extra vessels so used are under foreign registry and none carry any of the company's fruit. They usually call at various Gulf ports before loading at New Orleans, and sail from this last loading port at intervals of from one to 21 days. The following itinerary is considered by intervener to be fairly representative of the voyages: Houston, Port Arthur, Texas, New Orleans, Cartagena and Barranquilla, Colombia, Limon, Costa Rica, Cristobal, Golfito, Costa Rica, Acajutla, La Libertad, and Cutuco, Salvador, Balboa, Cristobal, Houston, New Orleans. During the period 1956–1958 these foreign-flag vessels handled an average of 5,109 tons of cargo from Gulf ports to Cristobal.

Two of the principal competitors of G. & S. A. are West Coast Line and Coldemar Line. West Coast Line, operating Danish-flag vessels, maintains a regular fortnightly service from Houston, Galveston, Mobile, and New Orleans, and from other ports as cargo offers, to Cristobal, west coast of Colombia, Ecuador, Peru, and Chile, returning via Chile and the Canal Zone to United States Gulf ports. Transit time from New Orleans to Cristobal is five days. Carryings to the Canal Zone ports amounted to 11,610 weight tons in 1957 and 9,028 tons in 1958. With chartered German- or Liberian-flag vessels, Coldemar Line operates two sailings a month to the Canal Zone and the north and west coasts of Colombia from the same United States Gulf ports served by West Coast Line. From its last loading port, which varies, transit time to Cristobal is six days. This line discharged 3,742 weight tons of cargo at Canal Zone ports in 1957 and 3,401 tons in 1958. Other foreign-flag lines operating between United States Gulf ports and the west coast of South America, with occasional calls at Canal Zone ports, are Chilean Line, Grancolombiana, Ltd., and Mamenic Line.

[3] Identified by intervener as creosoted materials, essential oils, hides, hoofs and horns, pimento, odorous fertilizers, gasoline, kerosene and other similar items having flash point between 80 and 150 degrees Fahrenheit, tetraethyl lead and similar Class B poisons, cement, copper sulphate, ammonium nitrate, Christmas trees, and certain types of dust-forming commodities that might be injurious to the refrigeration equipment.

Table I shows the total liner commercial cargo, in long tons, moving between United States Gulf ports and Cristobal-Balboa from 1954 through the first six months of 1958, and the participation therein by United States-flag vessels. Outbound and inbound volume is shown since applicant proposes to serve the trade in each direction.

TABLE I

	Outbound			Inbound		
	Total	U.S. flag	Percent U.S.	Total	U.S. flag	Percent U.S.
1954	40,672	26,509	65	15,528	6,738	43
1955	41,611	29,346	71	13,325	3,044	23
1956	44,782	28,658	64	12,043	3,346	28
1957	53,730	31,559	59	11,347	2,190	19
January-June 1958	22,737	13,829	61	5,664	41	0.7

Table II shows the volume of liner commercial cargo moving from and to New Orleans and from and to the other Gulf ports, collectively:

TABLE II

Total Gulf	Total New Orleans	Percent New Orleans	New Orleans			Other Gulf		
			U.S.	Foreign	Percent U.S.	U.S.	Foreign	Percent U.S.
1958 [1]								
Outbound 22,737	16,350	72	*13,624	2,726	83	204	6,183	3
Inbound 5,664	4,206	74		4,206	0	41	1,417	3
1957								
Outbound 53,730	42,474	79	*30,748	11,726	72	811	10,445	7
Inbound 11,347	6,719	59		6,719	0	2,190	2,438	47
1956								
Outbound 44,782	35,575	79	*25,965	9,610	73	2,693	6,514	29
Inbound 12,043	5,521	46	110	5,411	2	3,236	3,286	50
1955								
Outbound 41,611	34,896	84	*27,838	7,058	80	1,508	5,207	22
Inbound 13,325	9,316	70	540	8,776	6	2,504	1,505	62
1954								
Outbound 40,672	32,957	81	*25,136	7,821	76	1,373	6,342	18
Inbound 15,528	7,893	51	1,511	6,382	19	5,227	2,408	68

*All by United Fruit. [1] 1st 6 months.

DISCUSSION

It is apparent from the record that G. & S.A. is not operating an "existing service" within the meaning of section 605(c) of the Act, and under the requirements of the first clause of that section subsidy may not be awarded for a service which would be in addition to existing service unless the Board shall find "that the service already provided by vessels of United States registry in such service * * * is

inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon * * *."

Based primarily on the fact that United Fruit's United States-flag service from New Orleans is provided with refrigerated vessels which have certain limitations with respect to carriage of rough or obnoxious cargoes, the examiner concluded that the service both inbound and outbound between the whole Gulf, including New Orleans, and the Canal Zone is inadequately served by vessels of United States registry. We think a careful consideration of the record leads to a different conclusion with respect to the New Orleans southbound service.

The record indicates that the predominant movement of cargo in this trade is through New Orleans: over three-fourths of the liner commercial outbound cargo and only slightly less than three-fourths of the inbound cargo. As compared to the other Gulf ports, New Orleans so dominates the service that we consider it realistic to consider separately the adequacy of United States-flag service for New Orleans and for the other Gulf ports. In the past, the Board has indicated that normally it will consider adequacy of United States-flag service for a trade route as a whole and not for particular ports or segments within the route description. Where, however, the applicant seeks the privilege of extending service on its subsidized route to ports not within the route description; where one port (New Orleans in this instance) is by far the dominant port for the movement of outbound cargo as compared with the other Gulf ports; and where United States-flag participation through the dominant port of New Orleans is extremely high as compared with United States-flag participation outbound from the other secondary Gulf ports, we consider it realistic to look to adequacy of United States-flag service separately for New Orleans and for the other Gulf ports.

It is apparent from table II, *supra*, that United States-flag participation between Gulf ports, other than New Orleans, and the Canal Zone has amounted to only 3 percent in the most recent period of record, and the conclusion reasonably follows that such participation is inadequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated in that service. Similarly, service from the Canal Zone to New Orleans by United States-flag vessels is almost nonexistent, and the record supports the conclusion that such service is inadequately served by vessels of United States registry, and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

As to the service from New Orleans, however, the record indicates there is a high percentage of United States-flag participation, reaching 83 percent for the most recent period of record. Furthermore,

the United Fruit refrigerated vessels which provide this southbound service have had substantial free space and offer sufficient capacity to carry virtually all the New Orleans-to-Canal Zone traffic. The obnoxious or undesirable cargoes which United Fruit will not carry in its refrigerated vessels make up a relatively minor portion of the cargo moving from New Orleans to the Canal Zone, and should not affect our findings as to adequacy of United States-flag service as to the service as a whole.

From the foregoing it follows that the present service offered by vessels of United States registry in the trade from New Orleans to the Canal Zone is adequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should not be operated thereon. This finding does not apply, however, to such cargoes as United Fruit refuses to carry in its reefer vessels, and G. & S.A. should be permitted to carry such cargoes on special permission from the Maritime Administrator.

Conclusions

1. G. & S.A. is not operating an eixsting service between United States Gulf ports and the Canal Zone, and its proposed service would be in addition to the existing services;

2. The service already provided by vessels of United States registry in the service between Gulf ports other than New Orleans and the Canal Zone, and in the service from the Canal Zone to New Orleans, is inadequate, and in the accomplishment of the purposes and policy of the Act the additional service proposed by G. & S.A. should be permitted;

3. Section 605(c) of the Act is not a bar to the grant of permission to G. & S.A. to provide the service set forth in paragraph (2), above;

4. The service already provided by vessels of United States registry in the service from New Orleans to the Canal Zone, except for cargoes which United Fruit refuses to carry on its refrigerated vessels, is adequately served, and in the accomplishment of the purposes and policy of the Act the additional service proposed by G. & S.A. should not be permitted;

5. Section 605(c) of the Act does interpose a bar to the granting of permission for G. & S.A. to provide service from New Orleans to the Canal Zone, except as to cargoes which United Fruit refuses to carry on its refrigerated vessels; and

6. Section 605(c) of the Act does not interpose a bar to the carriage by G. & S.A. of cargoes which United Fruit refuses to carry on its refrigerated vessels from New Orleans to the Canal Zone, provided, special permission as to such cargo movement is granted by the Maritime Administrator.

APPENDIX

Section 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, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–102

FARRELL LINES INCORPORATED—APPLICATION UNDER SECTION 805(a)

Submitted December 21, 1959. Decided December 21, 1959

Farrell Lines Incorporated granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for its owned vessel, the SS *African Patriot*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage carrying lumber or lumber products from one Pacific port to North Atlantic ports, commencing on or about December 26, 1959, since granting of the permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, and (2) not to be prejudicial to the objects and policy of the Act.

Ronald A. Capone for applicant.

Robert E. Mitchell, *Edward Aptaker*, and *Robert B. Hood, Jr.*, as Public Counsel.

REPORT OF THE ACTING MARITIME ADMINISTRATOR

BY THE ACTING MARITIME ADMINISTRATOR:

Farrell Lines Incorporated (Farrell) filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1223) (the Act), for its owned vessel, the SS *African Patriot*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage commencing at a Pacific port on or about December 22, 1959, carrying a full load of lumber or lumber products to Atlantic ports north of Cape Hatteras. Notice of hearing was published in the Federal Register of December 17, 1959 (24 F.R. 10234). No one appeared in opposition to the application.

States Marine Lines, Inc., the charterer of the *African Patriot*, conducts as part of its regular steamship operations an eastbound intercoastal lumber service. The evidence indicates that the company has cargo bookings of approximately six million feet of lumber and lumber products, that it has been unable, for the late December sailing, to ob-

tain an appropriate vessel of the type required for the service, and that the *African Patriot* is required to meet the needs of the lumber shippers. No exclusively domestic operators in the trade have objected to the use by Farrell of the vessel for the December sailing.

It is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise and intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

FEDERAL MARITIME BOARD

No. S–81

PRUDENTIAL STEAMSHIP CORPORATION—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 10

Submitted November 16, 1959. Decided December 28, 1959

The present service on Trade Route No. 10 by vessels of United States registry is inadequate, within the meaning of section 605(c) of the Merchant Marine Act, 1936, as amended, and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon.

Section 605(c) of the Merchant Marine Act, 1936, as amended, does not interpose a bar to the granting of an operating-differential subsidy contract to Prudential Steamship Corporation for the operation of vessels on Trade Route No. 10 betwen North Atlantic ports and ports in the Mediterranean Sea, Black Sea, Portugal, Spain south of Portugal, and Spanish and French Morocco.

Francis T. Greene for applicant.

Carl S. Rowe and *James D. Simpson* for American Export Lines, Inc., and *Warner W. Gardner* for American President Lines, Ltd., interveners.

Robert B. Hood, Jr., as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, Jr., *Member*

BY THE BOARD:

By application dated November 26, 1958, as amended February 25, 1959, Prudential Steamship Corporation (Prudential or applicant) seeks an operating-differential subsidy for a minimum of 20 and a maximum of 32 sailings a year on Trade Route No. 10 (North Atlantic ports/ports in the Mediterranean Sea, Black Sea, Portugal, Spain south of Portugal, and Spanish and French Morocco). Pursuant to section 605(c) of the Merchant Marine Act, 1936 (the Act), hearing on the application was held by an examiner. American Export

Lines, Inc. (Export), and American President Lines, Ltd. (APL), intervened.[1]

The examiner found that (1) Prudential is operating an existing service on Trade Route No. 10 (the route), (2) the present service on the route by vessels of United States registry is inadequate, and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon, and (3) section 605(c) of the Act does not interpose a bar to the granting of an operating-differential subsidy to Prudential. Exceptions were filed by Export and replies thereto were filed by applicant and by APL. There was no oral argument. Our conclusions agree in general with the recommendations of the examiner.

Incorporated in New York in 1933, Prudential engaged in world-wide shipping, principally in the tramp trades, until World War II, utilizing United States-flag vessels. Following the termination of the war, Prudential inaugurated a regular liner service on the route, which has continued to the present. Its fleet is composed of five AP–2 vessels, three owned and two chartered. Two vessels of similar type have been purchased recently to replace the chartered units. In the main, applicant has offered fortnightly sailings with a turnaround of approximately 63 days.[2]

Service on the Route

Applicant had 18 sailings in 1954, 19 in 1955, 23 in 1956, 30 in 1957, and 23 in 1958, or a yearly average of 22.3 sailings. Deducting two sailings in 1956 and one in 1957, which lifted full bulk or military cargo, the average was 22 sailings a year. One of the sailings for 1958, departing from New York on December 31, called at Norfolk on January 2, 1959.

During 1958 there were eight United States-flag operators regularly serving the route, either exclusively or as part of other services. Export, the predominant carrier, accounted for 130 outbound sailings, distributed among its various services, out of a total of 325 outbound sailings by United States-flag vessels during 1958. Foreign-flag vessels made 439 outbound sailings in that year, which was 95 over the total for 1957. The liner commercial cargo, in long tons, moving outbound and inbound on the route between 1954 and 1958, the percentage thereof handled by United States-flag vessels, and the percentage thereof handled by Prudential, are set out in table I.

[1] Export serves the area with four of its services. APL serves the area inbound only, with its round-the-world vessels.

[2] Includes repair days.

TABLE I

	Percent U.S. in and out	Outbound			Inbound		
		Tons	Percent U.S.	Percent Prudential	Tons	Percent U.S.	Percent Prudential
1954	42	1, 385, 654	40. 1	2. 6	774, 949	45. 6	1. 4
1955	46	1, 608, 230	43. 8	3. 0	833, 022	50. 5	2. 0
1956	49	1, 681, 093	48. 2	3. 7	884, 152	51. 1	6. 5
1957	44	1, 572, 289	42. 0	3. 8	868, 430	49. 5	7. 7
1958	40	1, 405, 436	34. 6	4. 7	882, 534	49. 2	12. 8

Between 1954 and 1958 a total of 3,836,837 long tons of defense cargo moved outbound on United States-flag liner vessels, which was 16.1 percent of their total carryings. Prudential handled 367,155 tons of defense cargo during the period, or 26 percent of its outbound carryings.

Table II shows clearly that a large volume of commercial cargo moved on the route on other than liner vessels between 1954 and 1958.

TABLE II

	Outbound		Inbound	
	Tons	Percent U.S.	Tons	Percent U.S.
1954	5, 760, 089	14. 8	359, 739	----------
1955	9, 008, 167	9. 5	515, 090	17. 4
1956	11, 508, 089	6. 4	531, 265	16
1957	13, 400, 779	8. 8	366, 134	5. 5
1958	9, 283, 751	5	420, 644	6. 5

Vessel-space utilization on the route during 1958, outbound and/or inbound, of applicant, of Export's Mediterranean freight and Alexandria express services, and of APL appears in table III. The figures for the other United States-flag operators are not shown in the record.

TABLE III

	Outbound		Inbound	
	Bale cubic capacity	Free space	Bale cubic capacity	Free space
Prudential	10, 591, 964	8. 5	11, 499, 047	41. 6
Export	49, 209, 140	9. 7	50, 052, 696	33. 3
APL	----------	----------	17, 206, 952	14. 3

DISCUSSION AND CONCLUSIONS

Existing service. Prudential's average of 22 sailings a year between 1954 and 1958, which continued on the same general level up to the time of hearing, constitutes an existing service under section 605(c) of the Act. Prudential maintains, however, that the requested

maximum of 32 sailings a year would reasonably accord with its present operation. In view of our findings with respect to inadequacy, *infra*, we need not discuss this contention further. *States Marine Corp.—Subsidy, Tricontinent, Etc., Services*, 5 F.M.B. 537 (1959). We are therefore not concerned with the issue of undue advantage or undue prejudice. *American President Lines—Calls, Round-the-World Service*, 4 F.M.B. 681 (1955); *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F.M.B. 304 (1957).

While not objecting to the subsidization of applicant to the extent of its existing service, Export opposes a subsidy to the full geographical area requested, contending that applicant has not been serving the entire range of ports on the route, which it could not do with five vessels. Having itself filed an application for operating-differential subsidy on the route (Docket No. S-98), APL considers that it is neither proper nor feasible to confine the theory of existing service to the particular ports at which an applicant has called with some frequency during a given period. In view of our findings with respect to adequacy, no further discussion of these positions is necessary.

Adequacy of service. Prudential's share of the outbound traffic on the route has increased respectably since 1954; it has increased more noticeably in the inbound trade. Applicant thus has improved its position while United States-flag participation as a whole has declined. United States-flag participation in the outbound carryings has decreased from a high of 48.2 percent in 1956 to 34.6 percent in 1958. Participation in the inbound movement remains at about 50 percent. United States-flag participation as a whole on the route has been consistently below 50 percent. It has declined since 1956, when it reached 49 percent, the highest during the years of record, to 40 percent in 1958, a drop of almost nine percent. In that year Prudential had its highest participation—4.7 percent outbound and 12.8 percent inbound. In the heavy movement of commercial cargo outbound on other than liner vessels, United States-flag participation decreased from a high of 14.8 percent in 1954 to a low of 5 percent in 1958, whereas the participation inbound decreased from a high of 17.4 percent in 1955 to 5.5 percent in 1957 and 6.5 percent in 1958. During 1958, an unfavorable year in the foreign trade, Export had free space outbound of only 9.7 percent; for Prudential it was only 8.5 percent. Exports states, however, that some of its tonnage was laid up in 1958 because of the decline in business.

Although Export contends that consideration should be given to nationalistic pressures, currency problems, and nonconference foreign-flag competition on the route, which effectively prevent United States-

flag vessels from obtaining a larger share of the available cargo, these are insufficient reasons to block the efforts of United States-flag operators to improve their position. Moreover, the record does not justify the conclusion that any additional cargo which Prudential might secure would be taken solely from the other United States-flag operators.

The record fully supports the conclusion that United States-flag service on the route is inadequate. The result would be even more true if Prudential's participation be excluded. We find that the route is not adequately served by vessels of United States registry and that in furtherance of the purposes and policy of the Act additional United States-flag vessels should be operated thereon. We conclude, therefore, that section 605(c) does not interpose a bar to the award of an operating-differential subsidy to Prudential for service on the route.

It is noted that Prudential has applied for a maximum of 32 annual sailings. We have stated many times that the favorable section 605(c) determination does not in itself result in the award of subsidy. *Matson Orient Line, Inc.—Subsidy, Route 12*, 5 F.M.B. 410 (1958). In *States Marine Corp.—Subsidy, Tricontinent, Etc., Services*, 5 F.M.B. 739, 742 (1959), we specifically stated that "minima-maxima sailing spreads [requested in the application] * * * will be scrutinized under other sections of the Act." Thus, in the instant case, despite a finding of inadequacy and the conclusion that the provisions of section 605(c) of the Act do not interpose a bar to the award of the subsidy here requested, any contract offered Prudential shall reflect the provisions of the remainder of the statute, due regard being had for applicant's ability to provide the service with its present and/or future vessels.

FEDERAL MARITIME BOARD

No. S–57 (Sub. No. 4)

States Marine Lines, Inc.—Application Under Section 805(a)

*Submitted January 4, 1960. Decided February 4, 1960**

States Marine Lines, Inc. granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, permitting continuance, in the event an operating-differential subsidy is awarded States Marine Lines, Inc., of the operation of the SS *Texan*, a tanker owned by Oil Transport, Incorporated, an affiliate of States Marine Lines, Inc., in the transportation of chemicals, petro-chemicals and lubricating oil in domestic commerce between U.S. Pacific ports on the one hand and U.S. Gulf and Atlantic ports on the other, since granting of the permission found (1) not to result in unfair competition to any person, firm or corporation operating exclusively in the coastwise or intercoastal service, and (2) not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Elkan Turk, *George F. Galland* and *Robert N. Kharasch* for applicant.

Robert J. Blackwell as Public Counsel.

Initial Decision of C. B. Gray, Examiner

By application dated November 6, 1959, States Marine Lines, Inc., seeks written permission of the Federal Maritime Board under Section 805 of the Merchant Marine Act, 1936, as amended,[1] to permit the continuance, in the event the Board awards an operating-differential subsidy to States Marine Lines, Inc.,[2] of the operation of the SS *Texan*, a tanker owned by Oil Transport, Incorporated, an affiliate of States Marine Lines, Inc., in the transportation of chemicals, petro-chemicals and lubricating oil in domestic commerce between U.S. Pacific ports

*In the absence of exceptions thereto by the parties, and upon notice by the Board, the initial decision became the decision of the Board on the date shown (section 8(a) of the Administrative Procedure Act and Rules 13(d) and 13(h) of the Board's Rules of Practice and Procedure).

[1] Section 805(a) is set forth in Appendix "A" hereto.

[2] For which applications are pending in Dockets No. S–57, S–57 (Sub. No. 1) and No. S–57 (Sub. No. 2).

on the one hand and U.S. Gulf and Atlantic ports on the other. Notice of hearing was published in the Federal Register of December 18, 1959, and hearing was held before an examiner on January 13, 1960. There were no petitions to intervene and no one appeared in opposition to the application.

Global Bulk Transport Corporation, owner of one-half of the stock of States Marine Lines, Inc. also owns one-half of the outstanding capital stock of Oil Transport, Incorporated, a Delaware corporation which owns the SS *Texan*. This is a steel tanker which was converted from a C–4 type dry cargo vessel and subsequently purchased by Oil Transport, Incorporated in 1956. After further conversion for the carriage of bulk liquids in special compartments, it was chartered in February 1957, to Joshua Hendy Corporation, owner of 50% of the stock of Oil Transport, Incorporated, under a 10-year bareboat charter. With its numerous tank compartments of various sizes and capacities and special piping and pumping arrangements it is equipped to and continuously since February 1957, has been carrying various liquid commodities [3] shipped in bulk between all U.S. Pacific ports and U.S. Gulf and Atlantic ports.

As a subsidized carrier States Marine Lines Inc., could not divert cargo from this intercoastal operation because its vessels are not equipped for the carriage of liquid commodities in bulk. Furthermore, U.S. Coast Guard regulations prohibit standard dry cargo ships carrying such inflammable commodities in bulk. No exclusively domestic operator in the intercoastal trade has objected to continuation of the *Texan's* operation.

On this record it is found that granting of the requested permission will not result in unfair competition to any person, firm or corporation operating exclusively in the coastwise or intercoastal service, or be prejudicial to the objects and policy of the Act.

This report shall serve as such written permission in the event an operating differential subsidy is awarded States Marine Lines, Inc.

---

[3] Xylene and paraxylene, toluene, various alkylates, propylene, methyl isobutyl ketone, isopropanol acetate, butyl acetate and vinyl acetate, acetone, isopropanol, methanol, benzene, methyl amyl acetate, ethylene glycol, lubricating oil, and similar commodities.

APPENDIX "A"

Section 805(a):

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: Provided, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–107

MOORE-MCCORMACK LINES, INC.—APPLICATION UNDER SECTION 805(a)

Submitted April 1, 1960. Decided April 1, 1960

Moore-McCormack Lines, Inc., granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for its vessel, the SS *Mormacguide*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage carrying a full cargo of lumber and/or lumber products from North Pacific ports to North Atlantic ports, commencing on or about April 9, 1960, since granting of the permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, and (2) not to be prejudicial to the objects and policy of the Act.

Ira L. Ewers for applicant.

Robert E. Mitchell, *Edward Aptaker*, and *Robert B. Hood, Jr.*, as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE MARITIME ADMINISTRATOR:

Moore-McCormack Lines, Inc., filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1223) (the Act), for its vessel, the SS *Mormacguide*, presently under time charter to States Marine Lines, Inc. (States Marine), to engage in one intercoastal voyage carrying a full cargo of lumber and/or lumber products, commencing at North Pacific ports on or about April 9, 1960, for discharge at North Atlantic ports. Notice of hearing was published in the Federal Register of March 26, 1960 (25 F.R. 2603). No one appeared in opposition to the granting of the application.

States Marine, as charterer of the *Mormacguide*, conducts an eastbound intercoastal lumber service. It has bookings of approximately six to seven million feet of lumber and lumber products but has been unable to obtain any other suitable vessel for this April sailing. Furthermore, the sailing of the *Mormacguide* would not increase the normal pattern of scheduling in States Marine's eastbound intercoastal service.

It is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 7th day of April A.D. 1960

No. S-73

WATERMAN STEAMSHIP CORPORATION—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY

RULING ON APPEAL FROM EXAMINER'S RULING DENYING INTERVENER'S MOTION TO DISQUALIFY PUBLIC COUNSEL

On June 16, 1959, interveners Alcoa Steamship Company, Inc., and Bull-Insular Line, Inc., moved (1) to strike that portion beginning with the second paragraph on page 1 through the end of the second full paragraph on page 3 of Public Counsel's reply of June 3, 1959, which opposed their motion to dismiss Waterman's application for section 805(a) permission for Pan-Atlantic Steamship Corporation to operate in the domestic Puerto Rican trade; and (2) to disqualify Public Counsel from further participation in the section 805(a) proceeding as Public Counsel.

As grounds for their motion interveners assert that during the course of hearings they subpoenaed the Comptroller of the Federal Maritime Board and Maritime Administration (Mr. Nichols) to elicit certain information, and that Public Counsel objected to Mr. Nichols testifying, not as Public Counsel, but as attorney for Mr. Nichols. They contend that this representation by Public Counsel of the Administration's Comptroller makes him an advocate for a particular partisan interest and that thereafter in this same proceeding he cannot represent the public interest because of this alleged conflict of interest.

Public Counsel did not object to the issuance of a subpoena; Mr. Nichols appeared and was duly sworn by the examiner; counsel for interveners asked the Comptroller a question and Public Counsel objected thereto on the grounds that it was outside the scope of the

proceeding, was speculative, and counsel for interveners had no standing to ask the question; counsel for Waterman also objected to the Comptroller answering the question; the examiner ruled that the question proposed "appears to be outside the scope of the hearing and not relevant"; and on August 4, 1959, the examiner denied interveners' motion to disqualify Public Counsel, assigning reasons therefor.

On August 7, 1959, interveners appealed from the examiner's ruling denying the motion to disqualify Public Counsel, alleging that the examiner did not decide or even mention the issue, which they stated is "whether Public Counsel can properly appear as an advocate for a particular partisan interest and thereafter in the same proceeding seek again to represent the public interest".

By order dated September 8, 1959, the Board rejected the appeal, stating that since the appeal related to that portion of the proceeding which is still in the hearing stage before an examiner, and that since the examiner had not referred the matter to the Board for determination, the appeal was not properly before the Board and its "merits cannot now be considered".

By letter dated April 4, 1960, interveners' attorney requested that the Board, prior to oral argument on exceptions to the examiner's recommended decision on the merits, pass on their motion to disqualify Public Counsel.

It is clear that Public Counsel objected to the questioning of the Comptroller on the grounds that the questions propounded, and those to be propounded, to Mr. Nichols were outside the scope of the proceedings and were speculative and that counsel for interveners had no standing to ask them.

Certainly it is the proper function of an attorney to object, in a proceeding such as this, to questions on the ground of irrelevancy. As we understand the argument of interveners, they contend that if a witness is an employee of the Maritime Administration the activities of Public Counsel in objecting to questions indicate partisanship, and that thereafter Public Counsel may not in the same proceeding seek again to represent the public interest, asserting that "Parties in proceedings such as these have a right to be free from the possibility that Public Counsel's analysis or conclusions *qua* Public Counsel may even subconsciously reflect the position he took as an advocate". We assume that interveners would not object to Public Counsel objecting to testimony by a witness other than a member of the Maritime Administration or Federal Maritime Board staff. We are unable to see how Public Counsel's objection to testimony by a member of the Board's staff makes him an advocate of a position any more than if

he objected to the testimony of someone other than a member of the Board's staff. If the position of counsel for interveners is that any time Public Counsel objects to a person testifying on the grounds of relevancy he becomes an advocate and therefore must be disqualified, we disagree. Moreover, Mr. Nichols has no personal interest in this proceeding, and even if Public Counsel raised objections on his behalf, there could be no conflict of interest on the part of Public Counsel.[1]

Now, therefore, For the foregoing reasons, among others, and upon consideration of the motion and the memorandum in support thereof and the reply thereto:

It is ordered, That the motion be, and it is hereby, denied.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

[1] In addition, the General Counsel of the Federal Maritime Board/Maritime Administration was present as the attorney for Mr. Nichols when the question of Mr. Nichols testifying was considered and ruled on by the examiner.

FEDERAL MARITIME BOARD

No. S-73

WATERMAN STEAMSHIP CORPORATION—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY

Submitted December 1, 1959. Decided April 11, 1960

Waterman Steamship Corporation is operating an existing service on Trade Route No. 21 to the extent of 20 sailings annually, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of subsidy to it for this service.

The present service provided by vessels of United States registry on Trade Route No. 21 is inadequate within the meaning of section 605(c) of the Merchant Marine Act, 1936, as amended, and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon.

Section 605(c) of the Merchant Marine Act, 1936, as amended, does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman Steamship Corporation for its proposed service on Trade Route No. 21, including monthly top-off calls at North Atlantic ports.

Waterman Steamship Corporation is operating an existing service on Trade Route No. 22 to the extent of 23 annual sailings, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of subsidy to it for this service.

The present service provided by vessels of United States registry on Trade Route No. 22 is inadequate within the meaning of section 605(c) of the Merchant Marine Act, 1936, as amended, and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon.

Section 605(c) of the Merchant Marine Act, 1936, as amended, does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman Steamship Corporation for its proposed service on Trade Route No. 22, including twelve California top-off calls annually.

Waterman Steamship Corporation is not operating an existing service between the Far East to the North Atlantic within the meaning of section 605(c) of the Merchant Marine Act, 1936, as amended. The present service provided by vessels of United States Registry on Trade Route No. 12 inbound is inadequate, and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon.

Section 605(c) of the Merchant Marine Act, 1936, as amended, does not interpose a bar to the granting of an operating-differential subsidy contract to Water-

man Steamship Corporation for the operation of vessels on the service described in the paragraph next above.

Waterman Steamship Corporation is operating an existing service on Trade Routes Nos. 29 and 30 (now Trade Route No. 29) to the extent of 24 sailings annually, and section 605(c) of the Merchant Marine Act, 1936, as amended, is not a bar to the award of subsidy to it for this service.

The service provided by vessels of United States registry on Trade Routes Nos. 29 and 30 (now Trade Route No. 29) is adequate, and section 605(c) of the Merchant Marine Act, 1936, as amended, is a bar to the award of subsidy for the operation of vessels on such service in excess of the existing service set forth in the paragraph next above.

Waterman Steamship Corporation is not operating an existing service on the U.S. North Atlantic/Continent service (Trade Routes Nos. 7, 8, and 9) within the meaning of section 605(c) of the Merchant Marine Act, 1936, as amended. The present service by vessels of United States registry on Trade Routes Nos. 7, 8, and 9 is inadequate within the meaning of section 605(c), and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon.

Section 605(c) of the Merchant Marine Act, 1936, as amended, does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman Steamship Corporation for the operation of additional vessels on Trade Routes Nos. 7, 8, and 9.

Sterling F. Stoudenmire, Jr., *Donald Macleay*, *Harold E. Mesirow*, and *Warren Price, Jr.*, for applicant.

Russell T. Weil, *Robert E. Kline*, *Ronald A. Capone* for United States Lines Company, *Odell Kominers* and *J. Alton Boyer* for Lykes Bros. Steamship Co., Inc., and Pacific Far East Line, Inc., *Vern Countryman* and *Warner W. Gardner* for American Mail Line Ltd. and American President Lines, Ltd., *George F. Galland* and *Herman Goldman* for States Marine Corporation, States Marine Corporation of Delaware, and Isthmian Lines, Inc., *Thomas J. White* and *Alan Wohlstetter* for City of Portland, Commission of Public Docks, *Willis R. Deming* and *Alvin J. Rockwell* for Matson Orient Line, Inc., *John Mason* for Bloomfield Steamship Company, and *Vincent F. Kilborn* for Alabama State Docks Department, interveners.

Edward Schmeltzer, *Edward Aptaker*, and *Robert E. Mitchell* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, and THOS. E. STAKEM, Jr., *Vice Chairman*

BY THE BOARD:

Waterman Steamship Corporation (Waterman or applicant) filed on January 30, 1957, an application for operating-differential subsidy covering the following four services:[1]

[1] Waterman also filed an application on April 2, 1957, for permission to continue by related companies various services in the domestic trade. The present report deals only with the application for operating-differential subsidy.

1. U.S. Gulf/U.K. and Continent: between U.S. ports (Key West to Mexican border) and ports in the United Kingdom, Eire, and continental Europe north of Portugal, with the privilege of calling approximately one sailing per month outbound only at North Atlantic ports for cargo destined to continental Europe north of Portugal (but not including Baltic and Scandinavian ports)—30 to 42 sailings per year.

2. Gulf-California/Far East—westbound: from U.S. ports (Key West/Mexican border) via Panama Canal, completing at California ports, to Far East (Japan, Formosa, the Philippines, and the Continent of Asia from Union of Soviet Socialist Republics to Siam, inclusive); eastbound: from Far East to U.S. Atlantic and Gulf ports—18 to 30 sailings per year.

3. Pacific coast/Far East: between California, Washington, and Oregon ports and ports in the Far East, with approximately one sailing per month last from California ports and one sailing per month last from Washington and Oregon ports, the third monthly sailing usually calling at both California, Washington, and Oregon ports, alternating each month the last call at such areas—30 to 42 sailings per year.

4. U.S. North Atlantic/Continent: between U.S. ports (Maine-Virginia inclusive) and ports in continental Europe north of Portugal (but not including Baltic and Scandinavian ports)—18 to 30 sailings per year.

These services involve many essential trade routes. The Gulf/United Kingdom-Continent service plies Trade Route No. 21, and the proposed North Atlantic top-off in connection therewith serves Trade Routes Nos. 7, 8, and 9. Nos. 7, 8, and 9 also are involved in the proposed North Atlantic/Continent service. The Gulf/Far East service traverses Trade Route No. 22, and the California top-off of that service involves Trade Route No. 29.[2] The inbound Far East/North Atlantic segment of the Gulf/Far East service involves Trade Route No. 12. Finally, the Pacific coast/Far East service falls within Trade Routes Nos. 29 and 30 (now TR 29).

The following parties intervened: Lykes Bros. Steamship Company, Inc. (Lykes), operating on Trade Routes (TR) Nos. 21 and 22; Pacific Far East Line, Inc. (PFEL), operating on TR No. 29; American President Lines, Ltd. (APL), and American Mail Line Ltd. (AML), respectively operating on TR Nos. 29 and 30; United States

[2] Prior to April 9, 1959, California ports were on Trade Route No. 29 and Pacific Northwest ports were on Trade Route No. 30. By notice dated April 9, 1959, the Maritime Administrator redefined Trade Route No. 29 to include U.S. Pacific Northwest ports.

Lines Company (USL), operating on TR Nos. 7, 8, 9, and 12. Some interveners withdrew;[3] others presented no evidence.[4]

Hearings were held before an examiner between October 28, 1958, and April 9, 1959. In his recommended decision the examiner concluded and found:

1. On Trade Route No. 21 Waterman is operating an existing service on the U.S. Gulf/U.K. and Continent service within the meaning of section 605(c) of the Merchant Marine Act, 1936 (the Act), as amended, to the extent of twenty sailings annually, and section 605(c) of the Act is not a bar to the award.

2. The effect of the granting of an operating-differential subsidy contract to Waterman for the service referred to in paragraph No. 1, above, including monthly top-off calls at North Atlantic ports, would not 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.

3. The present service provided by vessels of United States registry on the services, routes, or lines encompassed in paragraph 1, above, is inadequate within the meaning of section 605(c), and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon.

4. Section 605(c) does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman for its proposed operation of vessels in the U.S. Gulf/U.K. Continent service, including the monthly top-off calls at North Atlantic ports.

5. On Trade Route No. 22 Waterman is operating an existing service on the U.S. Gulf-California/Far East service, as defined by the Maritime Administrator, within the meaning of section 605(c).

6. The effect of the granting of an operating-differential subsidy contract to Waterman for the service described in paragraph No. 5, above, including the California top-off calls to the full extent of the service provided, would not 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.

[3] Isthmian Lines, Inc., States Marine Corporation and States Marine Corporation of Delaware.

[4] Matson Orient Line, Inc., Alabama State Docks Department, and Bloomfield Steamship Company intervened and appeared at the prehearing conference but thereafter made no further appearance and submitted no traffic data or testimony. It may therefore be assumed that Bloomfield does not oppose the application. PFEL failed to furnish any of the material agreed to at the prehearing conference or required by the prehearing order.

7. The present service provided by vessels of United States registry on the services, routes, or lines encompassed in paragraph No. 5, above, is inadequate within the meaning of section 605(c), and in the accomplishment of the purposes and policy of the Act, additional vessels of United States registry should be operated thereon.

8. Section 605(c) does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman for its proposed operation of vessels in the U.S. Gulf-California/Far East service, including its California top-off calls to the full extent of the service provided.

9. On Trade Route No. 12 Waterman is not operating an existing service between the Far East and the North Atlantic, within the meaning of section 605(c).

10. The present service by vessels of United States registry between the Far East and the North Atlantic is inadequate, and in the accomplishment of the purposes and policy of the Act the additional service proposed by Waterman should be permitted.

11. Section 605(c) does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman for the operation of vessels on the service described in paragraph No. 9, above.

12. On Trade Routes Nos. 29 and 30 (now TR 29) Waterman is operating an existing service on the Pacific coast/Far East service within the meaning of section 605(c).

13. The effect of the granting of an operating-differential subsidy contract to Waterman for the service described in paragraph No. 12, above, would not be to give undue advantage to applicant or be unduly prejudicial to any intervener.

14. The present service provided by vessels of United States registry on the services, routes, or lines encompassed in paragraph No. 12, above, is adequate.

15. Section 605(c) does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman covering its existing service described in paragraph No. 12, above. Applicant's proposed additional service is barred, however, by section 605(c).

16. On Trade Routes Nos. 7, 8, and 9, Waterman is not operating an existing service on the U.S. North Atlantic/Continent service within the meaning of section 605(c).

17. The present service by vessels of United States registry is inadequate for the routes described in paragraph No. 16, above,

within the meaning of section 605(c), and in the accomplishment of the purposes and policy of the Act additional vessels of United States registry should be operated thereon.

18. Section 605(c) does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman for the operation of additional vessels on the routes described in paragraph No. 16, above.

Exceptions to the recommended decision and replies thereto were filed, and oral argument was heard. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in this proceeding.

APPLICANT'S OPERATIONS

Waterman, organized in 1919, with its principal headquarters in Mobile, Alabama, has operated United States-flag vessels in the foreign commerce of the United States during the past 40 years. It has no operating-differential subsidy contract. It owns 27 C–2 vessels, all acquired prior to 1950, 25 of which are operated in foreign commerce and two in the Gulf/Puerto Rico trade by a subsidiary.

Except during World War II, applicant's Gulf/Far East service has been operated since 1939, its Gulf/United Kingdom-Continent service since 1919, and its Pacific coast/Far East service since 1949. A direct Atlantic coast/Continent service was operated from 1946 to late 1953, when the carryings were limited to military cargoes as a top-off operation in conjunction with the Gulf/United Kingdom-Continent service. Top-off calls have been made each year at California ports in connection with the Gulf/Far East service.

With the exception of the Far East/Atlantic service on Trade Route No. 12,[5] proposed in conjunction with the Gulf/Far East service, applicant's operations over all of its services have been predominantly outbound. Under subsidy, unless otherwise required by the Board, applicant desires to continue to operate its outbound services in reasonable conformity with its past operations except for possibly more frequent calls at certain loading and discharging ports. Inbound service also would be provided on all the routes.

In the Gulf/Far East service, applicant would continue to load at Gulf ports, stop off at a single California port, and proceed to the Far East; it prefers to limit calls to ports in the northern half

[5] Not commenced until 1958, after the filing of the present application.

of the Far East. On return voyages, as has been the case since 1958, applicant's vessels would return to Atlantic ports over Trade Route No. 12 with cargo for the Atlantic and thence to the Gulf.

In the Gulf/U.K.-Continent service, the vessel would load at Gulf ports, and, except for the privilege of calling one sailing per month for top-offs at North Atlantic ports, would proceed directly to Atlantic Continent and U.K. ports. A regular inbound service also would be furnished.

The Pacific coast/Far East service would continue to serve both California and Pacific Northwest ports. Calls would be made at each area last on every other voyage and the third sailing would alternate between such areas. Unless otherwise required, calls in the Far East would be confined to the northern half. An inbound service would be provided, but applicant has stated it would return in ballast if required to do so.

The Atlantic/Continent service would operate on approximately a fortnightly basis between U.S. Atlantic ports and Atlantic Continent ports, such service to be supplemented by the Atlantic top-off service on a privilege basis once a month in connection with the Gulf/Continent service.

This report is limited to the application for operating-differential subsidy as it relates to section 605(c) of the Act.[6] If the proposed service is not an "existing" one within the meaning of that section, we must determine under the first part that the existing service by United States-flag vessels is inadequate, in order to enter into a subsidy contract. If, however, the proposed service is an "existing" one, then the second part of the section is controlling, and a finding of inadequacy of United States-flag service is not a requirement unless we find that the effect of awarding a subsidy contract would be to give undue advantage or be unduly prejudicial as between citizens of the United States.

Gulf/U.K. and Continent service (*Trade Route No. 21*). Applicant claims an existing service over this route to the extent of at least 26 sailings per year. Table I sets forth the sailings on which at least four tons of general cargo were carried for the four-year period prior to the filing of the application, a period which the Board heretofore has held to be a reasonable one in which to measure an existing service. *Lykes Bros. S.S. Co., Inc.—Increased Sailings, Route 22*, 4 F.M.B. 455, 461 (1954).

[6] See appendix.

TABLE I.—*Applicant's existing service on TR 21 outbound (Gulf/U.K. and Continent)*

Loading calls at	1953	1954	1955	1956	Average
Gulf	19	29	11	21	20

Set forth in table II is applicant's existing service on Trade Route No. 21 inbound for the four-year period 1953 through 1956.

TABLE II.—*Applicant's existing service on TR 21 inbound*

Discharge calls at	1953	1954	1955	1956	Average
Gulf	19	28	7	1	13.7

As may be seen from the above tables, applicant's service inbound has been less frequent than outbound. Trade Route No. 21, however, is predominantly an export trade. In 1957, 2,983,100 tons of liner commercial cargo moved outbound as compared with only 686,700 tons inbound. Under such circumstances, we will judge applicant's existing operation on the basis of its outbound service. *States Marine Corp.—Subsidy, Tricontinent, Etc., Services*, 5 F.M.B. 537, 548 (1959).

In order to qualify as an existing service an operation must have been in "reasonable general accord" with the proposed subsidized service. *Isbrandtsen Co., Inc.—Subsidy, E/B Round the World*, 5 F.M.B. 448 (1958).

The proposed North Atlantic top-offs are not in reasonable general accord with applicant's operation on this route for the period of record. Sailings from the Gulf of Europe usually topped off at North Atlantic ports but lifted military cargo exclusively. A service confined to military cargo to the complete exclusion of all commercial cargo will not be considered as a part of an existing service. *States Marine Corp., supra.*

While Waterman contends that the examiner erred in his conclusion with respect to its existing service on Trade Route No. 21, insofar as ports in the Gulf west of New Orleans and ports in France are concerned, we believe that such conclusions are supported by the record. Waterman made four calls in 1956 and one in 1957 to but one port in the area; this is not sufficient to justify a finding of existing service. Nor does it appear that the service to France is in reasonable general accord with the type of berth commercial service required of a subsidized operator. Until May 1955, applicant called at LeHavre regularly and at the other French ports sporadically. Its last call at LeHavre was in June 1955, when it appears to have discontinued all

service to France from that date until March 1956, when it called at Saint Nazaire. During the remainder of 1956 Waterman served France only infrequently, and such service was largely confined to the military ports of Saint Nazaire and La Palice. Since 1956, service to France has been restricted almost exclusively to the two military ports.

We find that applicant had an existing service, within the meaning of section 605(c), of 20 sailings annually between ports in the east Gulf (including and east of New Orleans) and ports in Germany, Belgium, and the Netherlands, that the effect of granting an operating-differential subsidy to Waterman for such service will not 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, and that section 605(c) does not interpose a bar to the award of subsidy to Waterman for such existing Trade Route No. 21 service.

Subsidy is requested up to a maximum of 42 sailings per year on Trade Route No. 21 between U.S. ports on the Gulf (Key West to Mexican border) and ports in the United Kingdom, Eire, and continental Europe (Atlantic Spain to North Sea coast of Germany), with the privilege of topping off at North Atlantic ports in the United States on approximately one sailing per month. In order to determine that section 605(c) does not interpose a bar to the award of subsidy for sailings in excess of the 20 existing sailings per year, we must determine under the first part of that section that the present service by United States-flag vessels is inadequate and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

Table III shows that commercial liner traffic on Trade Route No. 21 has substantially increased since 1953. Nonliner cargo has increased three-fold since that date. Defense cargo constitutes only a small part of the total traffic in this trade.

TABLE III.—*Gulf/U.K. and Continent, Trade Route 21—level of traffic, total outbound traffic*

[In thousands of long tons]

Year	Liner traffic		Nonliner traffic		Both	
	Commercial	Defense	Commercial	Defense	Commercial	Defense
1953	2,480	161	1,613	0	3,093	161
1954	3,072	109	1,696	0	4,768	109
1955	2,764	99	3,382	0	5,858	99
1956	2,828	121	4,378	0	7,206	121
1957	2,983	110	4,590	0	7,573	110

Table IV shows participation in commercial liner traffic on Trade Route No. 21 of all United States-flag carriers and of Waterman separately.

TABLE IV.—*Participation of U.S./flag carriers in liner commercial traffic on trade route 21*

(In thousands of long tons)

	Total	United States	Percent participation	Waterman	Percent participation
1953	2,480	999	40	116	5
1954	3,072	1,127	37	169	6
1955	2,764	939	34	66	2
1956	2,828	963	34	134	6
1957	2,983	1,167	39	203	7

Witnesses for applicant and for Lykes, the only intervener opposing the award of subsidy on Trade Route No. 21, agreed that the increasing traffic trend came to a halt in 1958 when the amount of sulphur and phosphate offered for shipment decreased. They differed as to whether liner traffic will improve. Applicant's witness Childe forecast a traffic annual increase of 4 percent on the routes to Europe covered by the application, including No. 21. His forecast is based upon rapid world population increases, accompanied by corresponding increases in world commerce, larger foreign markets for agricultural products, United Kingdom, Eire, and western Europe demands for American grains and fats, increases in American foreign investments and tourist expenditures abroad, decreased trade restrictions, resulting in increased trade of the United States and the development of the European common market, which eventually will provide an increase in trade between the United States and western Europe. Mr. Cocke of Lykes testified that the movement of general cargo on Trade Route No. 21 will decrease considerably unless the United States continues its foreign aid programs in European countries, that carbon black plants and synthetic rubber plants have been built recently in England and France, thus reducing the export of these commodities, that the export of automobiles has decreased, that the St. Lawrence Seaway will divert cargo from the Gulf, that during 1958–1959 cotton exports were reduced, and that tankers have begun to carry an increasing volume of grain out of the Gulf at reduced prices.

From the foregoing it appears that the level of future liner traffic can be fixed at a point not less than the average for the five years of record, or approximately 2,825,000 tons annually. This is somewhat lower than the 1957 level of 2,983,000 tons annually, yet it should be observed that commercial liner traffic has increased 21 percent on this

service since 1953, and that nonliner cargo has trebled during that time. The average annual outbound liner movement for the five years of record, 1953–1957, was 2,825,000 tons, approximately 5½ percent less than in 1957. As shown above, United States-flag participation in outbound liner traffic on Trade Route No. 21 has ranged between 34 percent and 40 percent. It was 40 percent in 1953, 34 percent in 1955 and 1956, and 39 percent in 1957. There were 170 United States-flag liner sailings in 1957 compared with 339 foreign flag. Interveners competing with applicant on the route had free cubic space in 1956 in the aggregate of 2 percent; in 1957, 8 percent. The outbound carryings of applicant in 1956 and 1957 could not have been handled by its United States-flag competitors.

American-flag participation on Trade Route No. 21 has been 40 percent or less in every year of record. Without the services of Waterman it would have been 35 percent in 1953, 31 percent in 1954, 32 percent in 1955, 28 percent in 1956, and 32 percent in 1957. Other American-flag carriers did not have the excess capacity in 1956 and 1957 to carry the cargo carried by Waterman.

In discussing adequacy of service on Trade Route No. 21, in *Bloomfield S. S. Co.—Subsidy, Routes 13(1) and 21(5)*, 4 F.M.B. 305, 318 (1953), the Board said that "United States-flag service must be deemed inadequate unless dependable United States-flag liner sailings are available sufficient to carry at least one-half of the outbound commercial cargo that may be expected to move in liner service." The record discloses no reasons to indicate that United States-flag participation on the route should be less than the standard of participation set in 1953 after a careful study of the trade. United States-flag participation has been and continues to be inadequate. United States-flag liners had good utilization in 1956, when 98 percent of the aggregate cubic space was occupied, and in 1957, when 92 percent of the aggregate cubic space was utilized. In 1956 there was capacity of only one million cubic feet to carry the 11.5 million cubic feet moved by Waterman, and in 1957 there was capacity of only 5 million cubic feet to move 16.9 million cubic feet handled by Waterman. Applicant's participation in commercial cargo on the route, for all practical purposes, would have been forfeited to foreign lines if applicant had not been serving the trade. There is no significant source of additional United States-flag capacity forthcoming in the foreseeable future on the route, other than the subsidized sailings Waterman proposes to make in addition to the number actually provided by it in 1957. Waterman asks for a maximum of 42 annual sailings, or nine more than were made in 1957. Assuming that the proposed additional sailings will

have the same capacity per vessel as its 33 sailings had in 1957, the additional nine proposed sailings would have a capacity to carry 71,800 tons of cargo. Making all of this capacity available for commercial cargo, United States-flag projected capacity, including the 42 Waterman sailings, becomes 1,346,000 tons, and this in turn represents 48 percent of the projected liner commercial traffic, which is short of bringing future American-flag participation to 50 percent of liner commercial cargo.

We find and determine that service on Trade Route No. 21 is inadequate and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.

Lykes excepts to the examiner's finding of no undue prejudice to it, contending that it will be prejudiced by the dilution of available general cargo and by the top-off calls in the North Atlantic. In view of our finding that additional United States-flag vessels should be operated on this route in order to accomplish the purposes and policy of the Act—the carriage of a substantial portion of our foreign commerce—a route found to be inadequately served by United States-flag vessels, we see no merit to Lykes' exception. Obviously Lykes, receiving a subsidy, cannot object to competition from another subsidized operator on a route inadequately served by United States-flag vessels. With respect to top-offs, Lykes calls direct from the Gulf on both Trade Routes Nos. 21 and 22, and since Waterman in topping off will not be offering as direct or fast a service to Gulf shippers, and the full reach of Waterman's vessels will not be available on berth in the Gulf, we fail to see that there would be undue prejudice to Lykes, or that the top-offs would result in undue advantage to Waterman. If Lykes feels that the service descriptions in its contract "do not provide for efficient service, their relief is to petition for modification of [its] contract." *States Marine Corp., supra.* The record does not support a claim of undue prejudice to Lykes or undue advantage to Waterman.

Lykes further contends, as to Trade Routes Nos. 21 and 22, that the Act requires a finding that it is necessary to enter into "the proposed contract", inferring that the actual contract to be consummated must be subject to examination in a public hearing both as to the undue prejudice issue and as to the issue of whether "it is necessary to enter into such contract in order to provide adequate service."

In view of our finding of inadequacy and the need for the operation of additional vessels to overcome this inadequacy, the precise terms of the contract are immaterial. Any contract entered into, after a finding of inadequacy under section 605(c), necessarily will aid in the accomplishment of the purposes and policy of the Act, and we so

find on this record. This is true whether the contract merely requires the service proposed by the applicant, or whether the Board requires, under other sections of the Act, a service on the route at variance with that proposed by the applicant.

We find as to the proposed U.S. Gulf/U.K. and Continent service (Trade Route No. 21) that Waterman has an existing service of 20 sailings annually between ports in the east Gulf (including and east of New Orleans) and ports in Germany, Belgium, and the Netherlands, and that the award of subsidy covering such service would not result in undue advantage to applicant or in undue prejudice to any intervener.

We further find that Trade Route No. 21 is inadequately served by vessels of United States registry, that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon, and that the award of a subsidy contract covering applicant's proposed U.S. Gulf/U.K. and Continent service is not barred by the provisions of section 605(c).

The question of U.S. North Atlantic top-offs will be dealt with hereinafter.

Gulf-California/Far East service (Trade Route No. 22) outbound and Trade Route No. 12 inbound. Applicant proposes a subsidized service of 18 to 30 annual sailings from the Gulf, with top-off at ports in California, to ports in the Far East (Japan, Formosa, Philippines, and the Continent of Asia from the Union of Socialist Republics to Siam), and returning on Trade Route No. 12 to North Atlantic ports and thence to the Gulf. It claims an existing service of 18 to 30 sailings outbound, including the California top-offs, on the basis of 26 annual berth sailings from 1952 to 1956.

Table V shows applicant's existing service on Trade Route No. 22 outbound.

TABLE V.—*Applicant's existing service on TR 22 outbound (Gulf/Far East)*

Loading calls at—	1953	1954	1955	1956	1st half 1957	Last half 1957 [3]	1st half 1958 [3]
Gulf	22	24	20	25	10	14	10
California top-off	10	24	19	21	10	14	10
General	10	[1] 15	[1] 8	[1] 7	4	----------	----------
Military only	0	9	[2] 11	14	5	----------	----------

[1] In addition to the sailings counted, there was one call by a vessel which did not load general cargo in the Gulf.
[2] In addition to the sailings counted, there were 3 military top-offs on vessels which did not load general cargo in the Gulf.
[3] Because of the limitations in the underlying data for this period, it cannot be determined in which of the ranges the general cargo on board was loaded, or whether it was loaded on both ranges.

During the period 1953–1956, applicant made a total of 91 Gulf/Far East voyages, each of which carried at least four tons of general cargo from the Gulf, for an average of 23 annual sailings. There was a minimum of 20 sailings in 1955 and a maximum of 25 in 1956, with the frequency of outbound sailings remaining about the same. The preponderance of traffic on Trade Route No. 22 is outbound. In 1957, 1,818,000 tons of liner commercial cargo moved outbound as compared with 175,000 tons inbound. We find existing service to the extent of 23 average annual sailings calling regularly at the Gulf, Japan, and Korea, and occasionally at Formosa and Okinawa, since only infrequent calls were made to these areas in the past. See *Isbrandtsen, supra.* Applicant has not served the Philippine Islands since 1953, and has served Thailand once during the period of record. We find no existing service to those countries.

Applicant contends that it has an existing service for all of its California top-offs, and the examiner, in agreeing, included all of the sailings which carried general cargo from the Gulf and topped off at California with military or general cargo. We disagree. A service loading exclusively military cargo does not, in our opinion, qualify as an existing service. Since about half of applicant's top-off calls at California on its Trade Route No. 22 service during the period 1953–1956 loaded at least four tons of general cargo at California, only those sailings, in our opinion, qualify in determining existing service under section 605(c).

We find that Waterman has an existing service for its California top-off calls to the extent of 12 top-offs annually in connection with its Gulf/Far East service, separate and distinct from its Trade Route No. 29 service.

Applicant proposes to lift outbound cargo in the Gulf, top off in California, discharge in the Far East, and there load inbound cargo on Trade Route No. 12 for discharge first in the North Atlantic and then in the Gulf. This service traverses, outbound, Trade Route No. 22 (Gulf to the Far East) and Trade Route No. 29 (California to Far East), and inbound, Trade Route No. 12 (Far East to the North Atlantic). We will now consider adequacy of service on Trade Routes Nos. 22 and 12 in view of applicant's request for 18 to 30 subsidized sailings.

As will be seen from table VI, there has been an increase in both liner and nonliner outbound commercial traffic on Trade Route No. 22 during the years of record, with commercial traffic about equally distributed between liners and nonliners.

TABLE VI.—*Trade route 22—level of traffic, total outbound traffic*[1]

[In thousands of long tons]

Year	Liner traffic		Nonliner traffic		Both	
	Commercial	Defense	Commercial	Defense	Commercial	Defense
1953	950	385	870	4	1,820	389
1954	1,116	144	1,028	0	2,145	144
1955	1,451	108	1,666	3	3,117	111
1956	1,713	178	1,774	0	3,488	178
1957	1,818	166	2,276	0	4,094	166

[1] Predominantly an export trade route—outbound leg only will be considered here.

Total traffic on Trade Route No. 22 increased from 1,820,000 tons in 1953 to 4,094,000 tons in 1957. Liner commercial traffic increased from 950,000 tons in 1953 to 1,818,000 tons in 1957. Bulk cargoes, which account for a substantial portion of the liner and nonliner movement, although the rates are currently depressed, continue to hold up well. The average annual liner movement for 1955–1957 was 1,661,000 tons, some 157,000 tons under the 1957 movement. There is a large proportion of general cargo moving over this trade route, and its availability did not noticeably decrease in 1958. The principal general commodities moving included cotton, carbon black, chemicals, flour, rice, metals, and miscellaneous grain products. The decrease in liner movement in 1958 is not significant, and some of it is accounted for by the slow-up in the movement of pig iron to the Far East to meet the shipbuilding needs of Japan. The record discloses no reasons to indicate that traffic for the years 1955, 1956, 1957 were affected by any abnormal short-run conditions. It is therefore concluded that future commercial liner traffic will move on the route at the level or slightly above the average rate for the 1955–1957 period, or approximately 1,675,000 tons annually.

TABLE VII.—*Participation of U.S.-flag carriers in liner commercial traffic on trade route 22*

[In thousands of long tons]

	Total	United States	Percent participation	Waterman	Percent participation
1953	950	500	53	17	2
1954	1,115	550	49	82	7
1955	1,451	826	57	129	9
1956	1,713	935	54	104	6
1957	1,818	865	48	98	5
Total	7,048	3,676	52	430	6

As shown in table VII, participation by United States-flag liners in the outbound service ranged from a low of 48 percent in 1957 to a high of 57 percent in 1955, and was 52 percent for the period 1953–1957. Without the service of Waterman, American-flag participation would have averaged only 46 percent for the full period. In *States Marine Corp., supra*, largely on the basis of traffic figures up to 1955, the Board held that Trade Route No. 22 outbound would have been inadequately served without the contribution of States Marine. United States-flag participation has fallen from 57 percent in 1955 to 48 percent in 1957. United States-flag liner cubic free space was 5 percent in 1956 and 6 percent in 1957. Excluding applicant's vessels, the cubic utilization of the fleet was 97 percent in each year. In 1956 there was unused capacity of only 2.5 million cubic feet to handle the 12.9 million cubic feet occupied by applicant's cargoes, and in 1957 there was only 1.7 million feet available compared to 10 million cubic feet actually utilized by Waterman cargo. Lykes, a competitor and intervener, turned down cargo in both years.

We find that Waterman has an existing service of 23 annual sailings calling regularly in the Gulf, Japan, and Korea, and occasionally in Formosa and Okinawa, with 12 top-offs at California ports, and that the award of subsidy covering this service, including 12 California top-offs, will not result in undue advantage to applicant or undue prejudice to any intervener, and is not barred by section 605(c).

We further find that Trade Route No. 22 outbound is inadequately served by vessels of United States registry, and in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon to the extent contemplated in Waterman's application.

We will next discuss Waterman's application dealing with service inbound on Trade Route No. 12. Waterman entered this trade in 1958 and makes no claim of existing service. It does contend, however, that the route is not adequately served. Intervener USL takes the position that the route is adequately served.

Table VIII shows the level of commercial liner traffic and United States-flag participation, both outbound and inbound, on Trade Route No. 12.

TABLE VIII.—*Trade route 12, liner traffic and U.S.-flag participation*

[In thousands of long tons]

Year	Commercial liner traffic		Percent participation		Inbound defense [1] liner traffic
	Inbound	Outbound	Inbound	Outbound	
1953	1,547.5	1,672.3	20	12	1
1954	1,598.3	1,625.7	14	12	11.5
1955	1,739.7	1,731.8	16	16	23.0
1956	1,938.9	1,982.0	20	22	20.0
1957	1,592.4	2,482.9	21	24	14.7

[1] All defense cargo moved on U.S. vessels.

This trade is fairly evenly balanced between inbound and outbound liner traffic. Inbound carriage fell from 1,938,000 tons in 1956 to 1,592,000 tons in 1957, the latter being the lowest inbound movement of any of the years 1954 through 1957. The liner commercial cargo inbound has increased each year except 1957. The annual 5-year average movement has been approximately 1,700,000 tons, and the Board recently has found that the inbound movement for the foreseeable future would equal the 1956 movement of approximately 1,935,000 long tons of liner commercial cargo.[7] American-flag participation has been very low in both directions, and the 1957 inbound participation of 21 percent is approximately the same participation as the 1953 inbound figure of 20 percent. In the outbound trade, however, there has been an increase from 12 percent in 1953 to 24 percent in 1957. The past level of participation has been inadequate in both directions. In 1957 United States-flag liner sailings totalled 29 [8] compared with 295 foreign-liner sailings.

The principal United States-flag operator on this route is USL, which provides the only direct United States-flag service inbound, and was the only intervener who participated in the proceeding and furnished testimony. USL's capacity on this entire route is estimated at about 343,000 tons in 1957, or sufficient, if fully utilized, to accommodate some 20 percent of the total five-year average commercial liner inbound movement of 1,700,000. Public Counsel points out that

[7] *Matson Orient Line, Inc.—Subsidy, Route 12*, 5 F.M.B. 410, 414 (1958).

[8] Excludes States Marine and Waterman sailings, which were either military or in ballast.

the Board approved for USL, under section 605(c), an increase in its maximum sailings from 24 to 36 annually, and that similarly Matson Orient was granted section 605(c) approval for a minimum of 18 and a maximum of 24 sailings annually, and that in so doing United States-flag capacity would be increased to 941,000 tons. *Matson Orient, supra.* These section 605(c) determinations, based upon the low 1957 inbound commercial liner cargo figure of 1,592,000 (the lowest inbound movement of any of the years 1954 through 1957), would put into the trade enough United States-flag vessel capacity to carry 59 percent of the liner commercial cargo. As of now, however, Matson Orient has no tonnage on the route and has not signed a subsidy contract. We agree with the examiner that the total annual average commercial liner movement in the foreseeable future will approximate 1,700,000 tons, the recent annual 5-year average inbound movement. Waterman has demonstrated its ability, since beginning in 1958 a homebound service from the Far East to the North Atlantic, to attract cargo on this route and to contribute to United States-flag participation thereon.[9] USL and Public Counsel contend that there is no need for more United States-flag capacity than that already available—enough to carry 59 percent (55 percent if the average annual commercial liner movement of the 5 years 1953–1957 of 1,700,000 tons is used) of the 1957 inbound commercial movement if the USL increase in sailings and the proposed Matson Orient service is included. This contention overlooks the fact that the *Matson Orient* decision was handed down in May 1958, that Matson Orient owns no vessels for operation on the route, and that Matson Orient has not yet executed a contract and it is not known whether it will ever operate in this service. As we said in *Matson Orient:* * * * unless a subsidy contract, if offered, is executed and operations have commenced within a reasonable time, we shall review our determinations here in light of conditions as they then exist.

Adequacy or inadequacy should be determined on the basis of present requirements and not necessarily on the basis of earlier favorable section 605(c) determinations for other applicants which have indicated no immediate intention of commencing a service and which have not participated in this proceeding and made their intentions known.

We find that Waterman does not have an existing service between the Far East and the North Atlantic (inbound on Trade Route No. 12), and that its proposed service would be in addition to the existing

[9] In eleven months of 1958, part of the first year it entered the inbound trade, on some ten voyages it carried a total of approximately 15,000 long tons.

service. We further find that Trade Route No. 12, inbound, is inadequately served by vessels of United States registry, within the meaning of section 605(c), that in the accomplishment of the purposes and policy of the Act the additional service proposed by applicant should be permitted, and that section 605(c) is not a bar to the granting of a subsidy therefor.

Pacific coast/Far East service (Trade Routes Nos. 29 and 30—now Trade Route No. 29).[10] Waterman is seeking subsidy for 30–42 sailings annually, serving both California (Trade Route No. 29) and Oregon–Washington (Trade Route No. 30) on each voyage, half the sailings clearing from the California range and the other half from the Oregon-Washington range. In addition, as previously shown, applicant proposes to top off in California on each of the 18–30 sailings in its Gulf-California/Far East service. In the following table (No. IX) voyages will be credited to the different port ranges which lifted at least four tons of commercial general cargo in the particular port range. Voyages loading only bulk cargo in the Oregon-Washington range will be treated the same as voyages which load general cargo and included as part of applicant's existing service from that range.[11] For the period 1953–1956, applicant had 98 regular liner sailings outbound [12] from the Pacific coast to the Far East carrying general, bulk, and military cargo, averaging 24.5 annual sailings with a maximum of 36 in 1953 and a minimum of 10 sailings in 1954. There were 35 sailings in 1957. In 1953, general cargo was loaded on one sailing in the Northwest and 35 in California, while in 1956 general cargo was loaded on 19 sailings from each range. Applicant's sailing frequency has not diminished since the filing of the application, and its existing port coverage is in reasonably general accord with its proposed service in that the existing service includes regular calls at San Francisco, occasional calls in the Los Angeles-Long Branch area, and regular calls in the Pacific Northwest. Past coverage of foreign ports indicates that applicant has an existing service of regular calls in Japan and Korea and occasional calls in Formosa and Okinawa.[13] Applicant's past transpacific operation justifies a finding that applicant has

[10] See footnote 2.

[11] This is in accordance with the decision in *States Marine Corp., supra,* where the Board counted sailings which carried exclusively MSTS and bulk cargo "in recognition of the nature of the trade on TR 30", since on Trade Route No. 30 the overwhelming preponderance of cargo is bulk.

[12] Includes California and Northwest sailings carrying more than four tons of general cargo and Northwest sailings carrying full bulk and full bulk and military cargoes.

[13] Since the "transpacific foreign commerce of the United States is overwhelmingly export trade * * * it is on this basis that applicant's operations" should be judged. *States Steamship Co.—Subsidy, Pacific Coast/Far East,* 5 F.M.B. 304, 309 (1957).

an existing service of 24.5 sailings annually providing regular calls to the aforementioned ports.

TABLE IX.—*Applicant's existing service on trade routes 29 and 30 outbound (now TR 29) (West coast/Far East)*

Commercial loading calls at—	1953	1954	1955	1956	1st half 1957	Last half 1957	1st half 1958
Northwest only	1	[2] 1	[4] 9	[6] 11	[8] 7	2	2
California only	[1] 35	[3] 8	[5] 11	[7] 11	[9] 6	1	0
Both ranges	0	1	2	8	9	10	5
Total	36	10	22	30	22	13	7
Sailed Northwest	0	0	0	1	0	0	4
Sailed California	0	1	2	7	9	10	1

[1] 12 of these voyages loaded military cargo in the Northwest before loading in California; the other 23 loaded cargo only in California.
[2] Loaded military cargo in California before loading in the Northwest.
[3] 3 of these voyages loaded military cargo in the Northwest before loading in California; 2 topped off in the Northwest for military; and 3 did not load cargo in the Northwest.
[4] 5 of these voyages loaded military cargo in California before loading in the Northwest; the other 4 topped off in California for military cargo.
[5] 4 of these voyages loaded general cargo in the Northwest before loading in California, and the other 7 topped off in the Northwest for military cargo.
[6] 6 of these voyages topped off in California for military cargo; 4 loaded military in California before loading in the Northwest; and 1 loaded only in the Northwest.
[7] 3 of these voyages topped off in the Northwest for military cargo; 4 loaded military in the Northwest before loading in California; and 4 loaded only in California.
[8] 5 of these voyages loaded military cargo in California before loading in the Northwest, and 2 loaded only in the Northwest.
[9] 4 of these voyages loaded military cargo in the Northwest before loading in California, and 2 loaded only in California.

Table X shows that both liner and nonliner commercial traffic on Trade Route No. 29 have increased steadily each year, the nonliner from 593,000 tons in 1953 to 2,103,000 tons in 1957.

TABLE X.—*Trade route No. 29 (California/Far East) level of traffic—total outbound traffic*

[In thousands of long tons]

Year	Liner traffic		Nonliner traffic		Both	
	Commercial	Defense	Commercial	Defense	Commercial	Defense
1953	1,026	1,109	593	40	1,619	1,149
1954	1,265	585	470	70	1,735	654
1955	1,360	485	894	43	2,254	528
1956	1,663	573	1,899	44	3,561	617
1957	1,851	526	2,103	48	3,954	574

The sizeable increase in commercial liner traffic from 1,026,000 tons in 1953 to 1,851,000 tons in 1957 is largely attributable to the movement of grain, coal, and iron ore, the three principal commodities carried; only American iron ore to Japan fell off at the end of 1957 as new Indian ore production became available to meet Japan's requirements. Because of the shipping recession during the past two years and the elimination of the iron ore movement on the route, it is concluded that commercial liner traffic, for the immediate foresee-

able future, will remain at a level somewhat below that reached in 1957, and this movement can hardly be expected to exceed 1.5 million tons in the next few years.

As shown below in table XI, and excluding applicant, United States-flag participation has stood at about 70 percent on Trade Route No. 29, and there is very little chance of increasing American-flag participation to more than 75 percent, including Waterman's service. We find on this record that the route is adequately served and that it is not, in the accomplishment of the objects and policy of the Act, necessary to operate additional vessels thereon.

TABLE XI.—*Participation of U.S.-flag carriers in liner commercial traffic on trade route No. 29*

[In thousands of long tons]

Year	Total	United States	Percent participation	Waterman	Percent participation
1953	1,026	770	74	32	3
1954	1,265	932	74	34	3
1955	1,360	1,039	76	32	2
1956	1,663	1,229	74	127	7
1957	1,851	1,377	75	76	4

As noted from table XII, traffic on Trade Route No. 30 has shown continuing growth.

TABLE XII.—*Trade route No. 30 (Pacific Northwest/Far East)—level of traffic, total outbound traffic*

[In thousands of long tons]

Year	Liner traffic		Nonliner traffic		Both	
	Commercial	Defense	Commercial	Defense	Commercial	Defense
1953	454	249	1,068	4	1,522	253
1954	511	258	1,322	28	1,833	286
1955	627	237	1,533	16	2,160	253
1956	748	339	2,113	44	2,861	345
1957	787	251	3,019	52	3,806	302

Liner traffic increased from 454,000 tons in 1953 to 787,000 tons in 1957. Nonliner traffic trebled during the same period. As we observed in discussing Trade Route No. 21, the general shipping recession of 1957 and 1958, coupled with the loss of the iron ore business to Japan, had an adverse effect on the Oregon-Washington range, as it did on California ports, with the result that traffic on Trade Route No. 30 fell off at the end of the 1957–1958 period. In line with the reasons set forth in our discussion relating to Trade Route No. 29, the evidence indicates that commercial liner traffic on Trade Route No. 30

will not exceed approximately 725,000 tons annually in the foreseeable future, a figure somewhat less than the commercial liner traffic outbound for both 1956 and 1957.

As shown by table XIII, American-flag participation has been high during the period 1953–1957, ranging from 53 percent to 76 percent, with even higher participation in 1955 of 79 percent and in 1956 of 84 percent. United States-flag liner sailings on former Trade Route No. 29 in 1957 were 467 as compared with 493 foreign-flag sailings. On former Trade Route No. 30, United States-flag sailings were 206 compared with 343 foreign-flag sailings.

TABLE XIII.—*Participation of U.S.-flag carriers for liner commercial traffic on trade route No. 30*

(In thousands of long tons)

Year	Total	United States	Percent participation	Waterman	Percent participation
1953	454	241	53	1	----------
1954	511	301	59	1	----------
1955	627	495	79	69	11
1956	748	627	84	83	11
1957	787	597	76	107	14

As shown in table XIII, American-flag participation was 76 percent in 1957, and even during that year, when liner cargo was at an all-time high, the lines which serve the Northwest exclusively had significant quantities of free space available.[14] In view of the amount of free space on United States-flag vessels during 1957 and the high level United States-flag participation in the liner movement, we find on this record that service provided on Trade Route No. 30 is adequate and that it is not in the accomplishment of the purposes and policy of the Act to operate additional vessels thereon.

We find that Waterman has an existing service of 24 sailings annually, calling regularly at San Francisco, occasionally at the Los Angeles-Long Beach area, regularly in the Pacific Northwest, regularly in Japan and Korea, and occasionally in Formosa and Okinawa, and that the award of subsidy covering such service will not result in undue advantage to Waterman or undue prejudice to any intervener.

We further find that former Trade Routes Nos. 29 and 30 (now TR 29) are adequately served by vessels of United States registry.

[14] Vessel utilization for all U.S.-flag liners serving this route taken together averaged 90 percent of deadweight capacity and 84 percent of cubic capacity. American Mail Line's subsidized Pacific Northwest/Far East service with 30 sailings in 1957 filled an average of 87 percent of deadweight capacity and 75 percent of cubic capacity. Its unsubsidized bulk cargo service, consisting of 10 sailings, averaged 81 percent of deadweight capacity and 70 percent of cubic capacity, and States Steamship Company's Pacific Northwest/Japan line, which provided five sailings, averaged 88 percent utilization of deadweight capacity and 73 percent of cubic capacity.

We further find that section 605(c) does not interpose a bar to the granting of an operating-differential subsidy contract to Waterman for its existing Pacific coast/Far East service but that it is a bar to the award of subsidy to applicant for any service in addition to its existing service, including top-offs in its Trade Route No. 22 service in excess of the 12 top-offs found to be existing.

We will limit the carriage of inbound cargoes to the Pacific Northwest to vessels in the Pacific coast/Far East service which cleared the Northwest outbound. See *States Marine Corp., supra.*

U.S. North Atlantic/Continent service (Trade Routes Nos. 7, 8, 9). Waterman seeks subsidy on 18 to 30 sailings between North Atlantic ports and European ports on Trade Routes Nos. 7, 8, and 9, supplemented by a top-off service on a privilege basis of 12 sailings a year to be provided in connection with its Gulf/U.K.-Continent service on Trade Route No. 21. It claims an existing service to the extent of 18 to 30 sailings on an asserted average of 50 annual sailings during the period 1946 to 1956. This service was discontinued in late 1953. During the period 1954–1956 Waterman carried only military cargo outbound in this service. While applicant carried 2,313,000 tons of general, bulk, and military cargo outbound during the period 1946–1956, an average of approximately 210,000 tons per year, with sailings from North Atlantic ports to continental ports, the evidence is insufficient to show an existing service at the time the application was filed on January 31, 1957. An applicant for subsidy must demonstrate an existing service at the time the application is filed, the service performed must have been in "reasonably general accord" with the proposed subsidized service, and "regardless of the wisdom of [an operator's] decision to interrupt service" or "its intention to resume service * * * at some later date", an interruption of service negates any claim to an existing service. *Isbrandtsen, supra.*

We find that Waterman cannot qualify under section 605(c) as an existing operator on Trade Routes Nos. 7, 8, 9.

TABLE XIV.—*Past participation of U.S.-flag carriers in outbound liner commercial traffic on trade routes Nos. 7, 8, and 9*

[In thousands of long tons]

Year	TR 7	TR 8	TR 9	Total	Percent U.S.-flag participation			
					TR 7	TR 8	TR 9	Total
1953	552	1,486	244	2,282	32	15	29	21
1954	546	1,583	248	2,377	29	15	25	19
1955	534	1,742	309	2,585	34	16	38	22
1956	561	1,768	482	2,811	33	17	38	24
1957	637	1,529	335	2,501	25	14	22	18

TABLE XV.—*Outbound commercial nonliner traffic*
[In thousands of long tons]

Year	TR 7	TR 8	TR 9	Total
1953	1,636	2,514	422	4,572
1954	1,045	2,591	387	4,023
1955	3,933	10,327	1,038	15,298
1956	5,899	16,584	5,090	27,573
1957	9,348	18,082	5,804	33,234

Commercial liner traffic on Trade Routes Nos. 7, 8, 9 increased from 2,282,000 to 2,811,000 long tons, or 23 percent, from 1953 to 1957, with a drop-off to 2,501,000 tons in 1957. Combined liner and nonliner traffic has more than doubled during the same period. From 1953 to 1957, the routes showed a growth for all outbound commercial cargo, excluding defense cargo, from 6,853,000 tons in 1953 to 35,744,000 tons in 1957. Over the period, United States-flag participation in the commercial liner movement remained relatively static, and in 1957, its lowest point, declined about 18 percent. Commercial liner and nonliner traffic moves in substantial amounts outbound on the routes. Liner traffic for the aggregate of the three routes increased each year from 1953 until 1957, when it dropped off to the 1955 level. It dropped in 1957 on Trade Routes Nos. 8 and 9 but increased from 561,000 tons in 1956 to 637,000 tons in 1957 on No. 7. Nonliner traffic increased eight times in 1957 over the 1953 level, the total movement in the latter year being 33,234,000 tons. The average annual outbound commercial liner movement, 1953–1957, was 2,500,000 tons, about the same as 1955 and 1957. Public Counsel contends that the future level of commercial liner traffic on the routes will not exceed 2,500,000 tons in the foreseeable future.

USL, the only carrier competing with applicant on these routes, contends that they are adequately served. Nevertheless, table XIV shows that American-flag participation on the combined routes did not exceed 24 percent in the period of record, and fell to about 18.0 percent in 1957. USL takes the position that a 50-percent participation on the routes is an unrealistically high goal which cannot be achieved by American-flag liners because of intense foreign-flag competition, nationalistic preferences, nonconference carriers, third-flag carriers, and gross overtonnaging. The conditions however existed during 1955 and 1956, when USL's vessels sailed substantially full. Without doubt additional sailings could have improved United States-flag participation. USL's free space on the two services operated by it on the routes was 11 percent in 1956 and 19 percent in 1957. A sizeable portion of the 33,000,000 tons of nonliner cargo moving out-

bound over the routes is available and could be carried by United States-flag liners. USL has a total available capacity of 605,000 tons, or capacity for 24 percent of the average annual liner movement of an estimated 2,500,000 tons, Isbrandtsen has 136,000 tons, and States Marine has 35,000 tons. This total capacity, if used, would move only 30 percent of the outbound projection, assuming that the latter two lines will fill their full capacity devoted to the routes. With the addition of some 24 direct sailings per year in Waterman's Atlantic/Continent service, this additional capacity would provide, along with other existing and prospective United States-flag sailings, sufficient capacity to move 38 percent of the projected liner movement of 2,500,000 tons. If Waterman's top-off service of one sailing a month is included, thus adding approximately 30,000 tons per year, United States-flag capacity would amount to only 39 percent of a 2,500,000 ton movement.

These routes constitute the very heart of the North Atlantic trade, involving "the largest movement of U.S. outbound liner" cargo in the world. *States Marine Corp., supra.* In the past, American-flag participation in commercial liner traffic on the routes has been notoriously poor as compared to other routes in this proceeding,[15] and will, in our opinion, be improved by an increase in United States-flag capacity.[16] Indeed, we found recently that the North Atlantic trade routes, including Nos. 7, 8, and 9, have been inadequately served. *States Marine Corp., supra.*[17]

USL argues that the shipping recession of 1957 and the first half of 1958 resulted in a decrease in the level of commercial liner traffic on these routes, in a decrease of American-flag participation, and in substantial free space on USL's vessels. It contends that the record does not portend a foreseeable end to the recession. We reject the contention that conclusive weight must be given to the last year of record, and we will, as in the past, consider a number of recent years. The level of commercial liner traffic on these routes rose steadily from 2.2

[15] On Trade Routes Nos. 7, 8, and 9 combined, U.S.-flag participation in commercial liner traffic was only 21 percent in 1953, 19 percent in 1954, 22 percent in 1955, 24 percent in 1956, and 18 percent in 1957.

[16] USL, substantially the only carrier of U.S. commercial liner cargo on these routes, had a comparatively high utilization ratio in 1955 and 1956. *States Marine Corp., supra; Isbrandtsen Co., Inc.—Subsidy, Trade Route 32,* 5 F.M.B. 525 (1959).

[17] Even if the successful applicants in these two section 605(c) proceedings eventually are awarded subsidy contracts to operate vessels on Trade Routes Nos. 7, 8, and 9, they will supply only a relatively small amount of capacity compared to the total commercial liner cargo moving on the routes. If subsidized, Isbrandtsen would make, at the most, 30 annual sailings on Trade Routes Nos. 5, 7, 8, and 9, sufficient to carry about 240,000 tons of outbound cargo, and States Marine would lift about 70,000 tons on Trade Routes Nos. 5, 6, 7, 8, 9, and 11. Even if no military cargo were loaded and all of the space were available for commercial cargo on Nos. 7, 8, and 9, it would be sufficient to handle only 12 percent of the 2,501,000 tons which moved outbound on the routes in 1957, during which year U.S.-flag participation reached its lowest percentage—18 percent.

million tons in 1953 to 2.8 million tons in 1956, and then fell off to 2.5 million tons in the world-wide recession year of 1957. We feel that conditions will improve and that additional vessels should be operated on these routes.

USL excepts to the examiner's decision on the following grounds:

(1) That he failed to determine the appropriate level of United States-flag participation reasonably to be sought on the North Atlantic;

(2) That he based his ultimate determination of inadequacy upon the return at some indefinite future date of more normal conditions and not upon conditions existing at the time of the hearing;

(3) That his finding as to the level of future liner cargoes on the North Atlantic was erroneous and failed to consider and to properly evaluate the historic decline of North Atlantic cargoes and changes accelerating that decline;

(4) That he erred in finding that conditions on the North Atlantic do not limit the levels of participation and do not preclude an increase beyond the present capacity of United States-flag vessels on the North Atlantic routes.

We do not believe that, if we are to have the type of merchant marine envisioned by the Act, United States-flag capacity should be limited to an amount sufficient to carry only 30 percent of the average annual outbound commercial liner movement during the period 1953 through 1957. Without deciding the exact level of United States-flag participation, we find that capacity sufficient to carry 39 percent of the outbound commercial liner movement over the 1953–1957 period certainly is not in excess of that which is needed to accomplish the purposes and policy of the Act.

We base our finding of inadequacy on the North Atlantic routes on an estimate of a movement of 2,500,000 tons—the annual average of the five year period 1953 through 1957—and in the firm belief that in the future at least this much cargo will be moving on the routes. The present capacity of the USL vessels, plus those of States Marine and Isbrandtsen, is, in our opinion, insufficient to provide adequate United States service on the routes.

We find that Waterman is not operating an existing service on Trade Routes Nos. 7, 8, and 9, between North Atlantic ports and ports in continental Europe north of Portugal, and that its proposed service would be in addition to the existing services; that the service already provided by vessels of United States registry in such services is inadequate within the meaning of section 605(c), and that in the ac-

complishment of the purposes and policy of the Act the additional service proposed by Waterman should be permitted; and that section 605(c) is not a bar to the granting of an operating-differential subsidy contract to Waterman for the operation of additional vessels on these routes, including the proposed 12 top-offs in connection with its operations on Trade Route No. 21.

APPENDIX

Section 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, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper.

DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

No. S–108

MOORE-MCCORMACK LINES, INC.—APPLICATION UNDER SECTION 805(a)

Submitted April 15, 1960. Decided April 15, 1960

Moore-McCormack Lines, Inc., granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for its vessel, the SS *Robin Mowbray*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage carrying a cargo of lumber and/or lumber products from North Pacific ports to Atlantic ports, commencing on or about April 24, 1960, since granting of the permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, and (2) not to be prejudicial to the objects and policy of the Act.

Ira L. Ewers for applicant.

Robert E. Mitchell, *Edward Aptaker*, and *Robert B. Hood, Jr.*, as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE MARITIME ADMINISTRATOR:

Moore-McCormack Lines, Inc., filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1223) (the Act), for its vessel, the SS *Robin Mowbray*, presently under time charter to States Marine Lines, Inc., to engage in one intercoastal voyage carrying a cargo of lumber and/or lumber products commencing at North Pacific ports on or about April 19, 1960, for discharge at Atlantic ports. Notice of hearing was published in the Federal Register of April 5, 1960 (25 F.R. 2869). No one appeared in opposition to the application.

States Marine has cargo bookings of approximately six million feet of lumber and lumber products, and has been unable to obtain

any other suitable vessel for an April sailing which, according to the witness, is now scheduled to commence on or about April 24 rather than April 19. The sailing of the *Robin Mowbray* would not increase the normal pattern of scheduling in States Marine's eastbound intercoastal service.

It is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

TABLE OF COMMODITIES

Bananas. Ecuador to Atlantic ports. 278, 615, 633.
Fruit. Loading and unloading at New York. 565.
Glass Tumblers. Misclassification. 515.
Glassware. Misclassification. 509.
Houses, Prefabricated. Portland, Ore., to Kodiak, Alaska. 602.
Iron. Loading and unloading at New York. 565.
Mahogany Logs. Philippines to Atlantic and Gulf ports. 467.
Mineral Wool. Long Beach, Calif., to Seward, Alaska. 661.
Peat Moss. Loading and unloading at New York. 565.
Pineapple, Canned. Hawaii to Pacific Coast. 347.
Pineapple Juice, Canned. Hawaii to Pacific Coast. 347.
Seed Beans. New York, N.Y., to Piraeus, Greece. 597.
Steel. Loading and unloading at New York. 565.
Tinplate. Loading and unloading at New York. 565.
Vegetables. Loading and unloading at New York. 565.

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

ADMINISTRATIVE PROCEDURE ACT. See Agreements under Section 15; Charter of War-Built Vessels; Evidence; Jurisdiction; Practice and Procedure.

ADMISSION TO CONFERENCES. See Agreements under Section 15.

ADVERTISEMENTS. See Common Carriers; Evidence.

AGREEMENTS UNDER SECTION 15. See also Contract Rates; Jurisdiction; Ports, Tariffs.

—In general

Considerations of whether an agreement to impose condition on applicant for conference membership is "just and reasonable" under basic approved agreement, or is "unjustly discriminatory or unfair as between carriers," or "operates to the detriment of the commerce of the United States," or is in "violation of this Act," are factors for Board consideration in determining whether such an agreement shall be approved or disapproved, but are not factors in determining whether the agreement is one which must be filed with and approved by the Board. Pacific Coast European Conference-Limitation on Membership, 247 (269, 270).

Neither the language nor the legislative history of the Shipping Act of 1916 support contention that approval of more than one conference in a particular trade is illegal per se. Oranje Line *v.* Anchor Line Ltd., 714 (731).

—Agreements required to be filed

Board's decision to hold rule-making proceeding to guide conferences in meeting the burden of filing copies or memoranda of agreements, which has been imposed on them by section 15 of the Shipping Act, is not inconsistent with its decision, made as a matter of law, that agreement relating to boycotting of broker in certain circumstances was not encompassed within approval of conference agreement permitting the making of uniform rules and regulations concerning brokerage. Pacific Coast European Conference—Payment of Brokerage, 65 (71).

More than an agreement by conference members to file a complaint with the Board is necessary to prove an allegation that there exists an unfiled, unapproved agreement among conference lines to take action to deprive carrier of cargo to force it out of the trade. Members of conference had to "agree" to file the complaint, but since the conference is a "person" under the Shipping Act, which pursuant to section 22 thereof, may file a complaint, it would be absurd to hold that approval under section 15 is necessary before the "person" could exercise the right granted by section 22. United States Atlantic and Gulf-Puerto Rico Conference *v.* American Union Transport, Inc., 171 (176).

Where basic approved agreement authorized conference members to consider and pass upon brokerage matters, and tariff rule permitted members to pay

brokerage when earned, at their discretion, but historically brokerage was paid to forwarder-brokers who were merely "identified with the cargo," conference action denying payment to complainant as forwarder because it had competed as carrier for the business of carrying locomotives to Brazil, amounted to a new course of conduct in relation to payment of brokerage, i.e., it prohibited payment regarding specified shipments. Thus there was a modification of an existing agreement which, because it was calculated to control, regulate, prevent, or destroy competition, and provided for an exclusive, preferential, or cooperative working arrangement, was required to be filed under section 15 for Board approval prior to its effectuation. American Union Transport *v.* River Plate & Brazil Conferences. 216 (221).

Conference agreement to condition admission of new member upon its withdrawal from proceedings before the Board in which it had taken positions opposite to the conference, is an agreement or modification of an agreement between carriers, controlling, regulating, preventing, or destroying competition, and is a preferential or cooperative working arrangement within the meaning of section 15 which requires approval by the Board prior to effectuation. To the extent the applicant for membership might be precluded by the condition from joining the conference, the condition clearly controlled and regulated competition in the trade. To the extent it forced the applicant to withdraw from pending proceedings and deprived the applicant of its right under section 22 to continue as a party in such proceedings in which it had argued that certain competitive practices of the conference were unlawful, the condition was calculated to have an effect upon competitive practices in the trade. Furthermore, conference members themselves recognized that the condition was calculated to affect competitive conditions and was part of an effort to meet nonconference competition. Pacific Coast European Conference—Limitation on Membership, 247 (262).

The Board and its predecessors have consistently treated conditions affecting admission to conference membership as agreements or modifications to agreements, which require approval or disapproval under the provisions of section 15 of the Act. Id. (260).

An agreement among member lines of a conference to impose condition on application for membership that applicant withdraw from proceedings before the Board in which it had taken positions opposite to the conference, cannot be considered a routine action within the cover of authority of the approved basic agreement. It clearly creates an entirely new scheme of membership requirements not embodied in the basic agreement. It must be filed with the Board. Id. (269).

Agreement among conference members to impose condition on applicant for membership that it withdraw from proceedings before the Board in which it had taken position opposite to the conference, is an agreement or modification to an agreement, within the purview of section 15, which has not been approved by the Board, and which may not be lawfully effectuated without prior approval. Id. (269).

Lease agreement between State respondents, owners and operators of terminal facilities, and operator of a terminal facility used in the grain trade at the port involved, may be within the purview of section 15, and if so, its effectuation prior to Board approval would be violative of that section. D. J. Roach, Inc. *v.* Albany Port District, 333 (335).

Section 15 does not require that parties adopt and file for approval at one and the same time an agreement which encompasses all possible areas of activity within the purview of that section. There must be room for subsequent

expansion and retraction. However, all agreements and understandings covered by section 15 which exist at the time of filing must be included in the agreement filed for approval, and all such agreements and understandings, subsequently entered into by the parties, must be filed for separate approval. Associated-Banning Co. *v.* Matson Navigation Co., 336 (342).

Agreement between port and terminal company (performing, inter alia, stevedoring services) for lease of a pier, owned and previously operated by the port, to the terminal company will be approved. The pier license is not unlike others which the Board has approved and operation of the pier by the licensee was not opposed by competing stevedores. The agreement provides for the assignment of rights by the license to a subsidiary with the approval of the licensor. Any such assignment is subject to the Board's prior approval under section 15. Id. (343, 344).

Neither the Board nor any of its predecessors has ever held that an agreement between persons subject to the Act, relating to stevedoring activities, is not subject to the filing and approval requirements of section 15. While is was not necessary to determine whether stevedores are "other persons," within the meaning of section 1, an agreement between persons subject to the Act to establish a stevedoring operation does constitute an agreement within the purview of section 15. Associated-Banning Co. *v.* Matson Navigation Co., 432 (434).

Issuance of tariffs, including rules and regulations covering their application, has uniformly been held to be a routine matter authorized by an approved basic conference agreement, not requiring separate section 15 approval. Empire State Highway Transportation Assn. *v.* American Export Lines, Inc., 565 (585).

Agreement for lease of grain elevator and wharf from Port, which provides for preference by the lessee of the elevator over others in the area, maintenance of rates competitive with but not greater than rates at other ports in the area, exclusive right to operate the terminal for up to 40 years, and preference to the lessee to lease any additional grain facilities which might be constructed by the lessor, requires approval of the Board under section 15 of the Act. Agreements Nos. 8225 and 8225–1, Between Greater Baton Rouge Port Commission and Cargill, Inc., 648 (654).

Agreement between persons subject to the Shipping Act of 1916 providing for the rendering of stevedoring services exclusively by the lessee at the grain terminal under lease from the Port, controls and regulates competition, and requires approval by the Board under section 15 of the Act before it may be carried out. Id. (655).

—Approval of agreements

Agreement between port and terminal company (performing, inter alia, stevedoring services) for lease of a pier, owned and previously operated by the port, to the terminal company will be approved. The pier license is not unlike others which the Board has approved and operation of the pier by the licensee was not opposed by competing stevedores. The agreement provides for the assignment of rights by the licensee to a subsidiary with the approval of the licensor. Any such assignment is subject to the Board's prior approval under section 15. Associated-Banning Co. *v.* Matson Navigation Co., 336 (343, 344).

Agreement for lease of grain elevator and wharf from Port, which provides for preference by the lessee of the elevator over others in the area, maintenance of rates competitive with but not greater than rates at other ports in the area, exclusive right to operate the terminal for up to 40 years, and preference to the lessee to lease any additional grain facilities which might be constructed by the lessor, is not, on the record, unjustly discriminatory or unfair, detrimental to the commerce of the United States, or in violation of the Shipping Act of 1916.

Agreements Nos. 8225 and 8225–1, Between Greater Baton Rouge Port Commission and Cargill, Inc., 648 (654, 655).

—Conference membership

Where concerted action under conference agreement is approved by the Board, it is apparent that the degree to which common carriers operating in the trade are free to enter the conference and operate under the conference system, vitally affects the extent to which conference agreements control and regulate competition. The Board has consistently recognized that admission or nonadmission of an applicant to conference membership directly affects the competitive conditions in a particular trade. Pacific Coast European Conference—Limitation on Membership, 247 (260).

In recognition of the fact that restrictions on conference membership will have a real effect on competition in a trade, the Board and its predecessors have repeatedly refused to approve conditions and restrictions on membership other than a requirement of operating, or giving intention to operate, regularly in the trade. Id. (261).

If a member line, in connection with its transportation activities, refuses or is unable to abide by any provision of the conference agreement, tariff rates, or rules and regulations, it may be expelled from the conference, and, likewise, an applicant for conference membership who refuses or is unable to abide by the agreement and the uniform tariff rates, rules and regulations, may be properly denied admission to the conference. Such actions by conferences are proper and within the scope of approved basic agreements. Id. (263).

The Board would not approve an agreement between carriers, which would interfere with the statutory right of "any person" to complain to the Board of activities which may be violative of the Shipping Act of 1916, and which might interfere with the Board's carrying out of its regulatory functions. Thus the imposition on applicant for membership in a conference of a condition that it withdraw from Board proceedings in which it had taken position opposite to the conference, was not required to place the applicant on equal terms with other conference members, by reason of the fact that other members could not file a complaint before the Board. Id. (266).

Cover of authority theory that conference may impose condition on conference membership requiring applicant to withdraw from proceedings before the Board, under provision of agreement that "no eligible applicant shall be denied membership except for just and reasonable cause," and await Board's final determination as to whether the agreement to impose the condition was "just and reasonable," is inconsistent with the regulatory powers vested in the Board and is not contemplated by section 15. Id. (266, 267).

Board's past approval of conference article, including its reference to "just and reasonable cause" for denial of conference membership, is not a continuing pre-approval of any new or modified condition on membership which may thereafter be found to be "just and reasonable." Nor is past approval of another article, including its provision that all members shall be bound by conference rules and regulations which "in the opinion of the conference, are necessary or desirable to further the ends of the conference," a continuing pre-approval of any condition on admission to membership later found to be "necessary or desirable to further the ends of the conference." Id. (269).

Conference agreements are not unjustly discriminatory and unfair as between carriers merely because certain carriers in order to join such agreements would be compelled to withdraw from Canadian conferences and business associations thereunder which they desire to maintain. The Board cannot order modification of the agreements to require that the carriers be admitted on a limited basis,

with respect to operations between United States Great Lakes ports and the United Kingdom only. The Board may order modification only upon findings that existing agreements are in contravention of the Act. Oranje Line *v.* Anchor Line Ltd., 714 (731).

—Detriment to commerce of the United States

The inclusion in conference agreements of trade between foreign countries is not detrimental to the commerce of the United States where it is clear that from an economic standpoint vessel operation between the Great Lakes and the United Kingdom, under conditions shown of record, requires the lifting of cargo to and from ports on both borders of the Great Lakes. Complainants are denied admission to the Canadian conferences and in self-defense must maintain their own conference organization in the Canada-United Kingdom trade. Oranje Line *v.* Anchor Line Ltd., 714 (730, 731).

Approval of more than one conference in a particular trade would be detrimental to the commerce of the United States where in all likelihood such approval would result in rate instability and rate wars. Id. (731, 732).

—Disapproval of agreements

Approval of an agreement between a carrier and a terminal operator which provided for creation of a corporation to engage in the business of furnishing wharfage, stevedoring, dock, warehouse, and for other terminal facilities, and which did not disclose, nor could it be inferred from reading the agreement, (1) that the creators would transfer to the new corporation part or all of their similar businesses, or (2) that they would seek business for the new entity rather than for their existing and continuing separate enterprises, will be withdrawn since it did not reflect the true and complete agreement between the parties. Associated-Banning Co. *v.* Matson Navigation Co., 336 (342) ; Id. 432 (433).

—Effectuation of agreement prior to approval

An agreement between carriers was effectuated prior to Board approval, in violation of section 15, where conference by agreement required applicant for membership to withdraw from Board proceedings as a condition for approval of its application; new member informed Board that it was withdrawing; member was then admitted to conference; conference later "suspended" the condition, but as a practical matter conference considered that new member would take no further part in Board proceedings; conference again insisted that member withdraw from proceedings when it later appeared before the Board for limited purpose and not to participate activity in the proceedings; and member finally refiled motion to withdraw and discontinue its participation in the proceedings wherein its position was opposed to that of the conference. Pacific Coast European Conference—Limitation on Membership, 247 (271, 272).

Section 15 was violated where the parties, without seeking formal Board approval, operated pursuant to a license agreement between a stevedoring company and a port, under the terms of which a pier previously owned and operated by the port would be operated by the stevedoring company as licensee. Such an agreement is an agreement between "other persons" subject to the Act, and in that it provides for "the fixing or regulating of transportation rates and fares" and the "apportioning of earnings" resulting from the operation of the pier, falls within the meaning of section 15. Associated-Banning Co. *v.* Matson Navigation Co., 336 (343) ; Id. 432 (433).

The mere preparation of a draft tariff is not evidence that carriers had agreed to be bound thereby. Oranje Line *v.* Anchor Line Ltd., 714 (733).

—Modification of 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. Pacific Coast European Conference—Payment of Brokerage, 65 (67).

—Penalties

Action aimed at collection of section 15 civil penalties is one between the Government and the offending parties. 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. Pacific Coast European Conference—Payment of Brokerage, 65 (72).

—Rates and tariffs

Issuance of tariffs, including rules and regulations covering their application, has uniformly been held to be a routine matter authorized by an approved basic conference agreement, and not to require separate section 15 approval. While most of the Board's activities with respect to concerted tariff activities have involved carrier conferences, and tariffs issued thereunder, the regulatory provisions of the act thus applied, also apply to concerted activities and tariffs of terminal operators, who are "other persons subject to the Act." Empire State Highway Transportation Assn. *v.* American Export Lines, Inc., 565 (585).

No prior section 15 approval is required for the issuance of tariffs by terminal operators, including changes in the level of rates, elimination of the availability of partial service in truck loading, and the promulgation of other rules and regulations governing the loading and unloading of trucks at terminals, since no new scheme of competition or "prima facie" discrimination was being introduced, as is the case in the institution of a dual-rate system. Such tariffs were no more than implementations of the authority granted to the terminal operators by approval of the basic agreement to establish and maintain uniformly applicable tariffs, "containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to such (truck loading and unloading) services." Id. (586).

—Stay or suspension of agreements

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. None of these powers is specified in the 1916 Shipping Act, yet each has been vested implicitly in the Board as necessary to effective Government supervision contemplated by the Act. Section 22, in permitting the Board to make such an order as it deems proper, gives the Board that authority. Pacific Coast European Conference—Payment of Brokerage, 65 (68).

In view of the explicit prerequisites to disapproval under section 15, and since a stay of an approved agreement is tantamount to a disapproval for the duration of the stay, it is clear that the Board has no power to suspend or stay an approved agreement. Id. (69).

The Board has the power to issue cease and desist orders, or the equivalent, to stay an unapproved agreement between carriers in view of the Supreme Court's equation of section 15 with other sections of the Shipping Act, in relation to the

Board's power under section 22 to make such orders as it may deem proper upon complaint, or on its own motion, alleging violations of the Act. Id. (69).

The Board has the power to issue cease and desist orders in the event of violation of section 15 of the Shipping Act, and power to issue declarations of unlawfulness of agreements under section 15. 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 Administrative Procedure Act. Accordingly the Board will modify its prior report so as to reverse its decision that it has no authority to suspend or stay unapproved section 15 agreements. Id. (70).

AGREEMENTS WITH SHIPPERS. See Contract Rates.

ANTITRUST LAWS. See Agreements under Section 15; Brokerage; Charter of War-Built Vessels.

BANANAS. See Common Carriers.

BOOKING. See Common Carriers.

BROKERAGE. See also Agreements under Section 15; Rebates.

Brokerage, which is securing cargo for the ship, cannot be recovered from a carrier unless earned. Where transportation of locomotives was sold directly by conference to consignee which reserved right to select individual carrier and the services performed by complaintant were ordinary freight forwarder services, except for preparing bills of lading which is the carrier's duty arising only after the shipper supplies a complete description of the goods, brokerage was not earned by complainant. American Union Transport *v.* River Plate & Brazil Conferences, 216 (223).

Brokerage fee is earned only as compensation for securing cargo for the ship. Brokerage may be paid to the same persons who act as freight forwarders, and while forwarding services rendered for the shipper are of benefit to the carrier, such benefit is incidental, and the only real service rendered for the carrier is securing cargo for the ship. Pacific Coast European Conference—Payment of Brokerage, 225 (234).

Brokerage practices of long standing, prohibiting payment with respect to some commodities and limiting payment to less than 1¼ percent with respect to others, which practices have not been shown to be, by themselves, detrimental to commerce, should not be disrupted pending an investigation by the Board to reconsider and finally determine the lawfulness of concerted conference prohibitions and limitations on brokerage payments. Id. (237, 238).

With respect to a conference brokerage rule which appears only to prohibit members from paying brokerage to any broker who solicits for or receives brokerage from a nonconference line competitor, but which as applied and implemented prohibits payment to a forwarder-broker who has neither solicited for nor received brokerage from a nonconference line, but merely delivered cargo to such line solely in carrying out forwarding duties at the direction of the shipper, the Board must consider the rule, not as written, but as applied. Id. (238).

A conference brokerage rule, which prohibits payment by members of brokerage to a forwarder-broker who delivers cargo to a nonconference competitor in carrying out forwarding duties only, and which would by practical necessity foreclose a nonconference line from obtaining cargoes through forwarders in the trade and deprive shippers who desire to ship nonconference of the services of freight forwarders, is prima facie discriminatory as between carriers and shippers. Furthermore, the rule involves black-listing of forwarders-brokers for their independent activities as fowarding agents for shippers, and embodies some of the characteristics of a secondary boycott. Nothing in the record justifies such

prima facie discrimination and apparent invasion of the prohibitions of the antitrust laws and, therefore, the brokerage rule must be considered as unjustly discriminatory and unfair and as detrimental to the foreign commerce of the United States, within the meaning of section 15 of the Shipping Act. Id. (239–241).

A conference rule which would merely prohibit payment of brokerage to a broker who actually solicits for or receives brokerage payments from a competing nonconference line, might under certain circumstances be shown to be proper and might be approved under section 15. Id. (241).

Collection of brokerage by freight forwarder on shipments of companies which he fully owned and controlled, which collection was willful and knowing, is a violation of the first paragraph of section 16 of the Shipping Act, section 16-Second, and General Order 72. Samuel Kaye—Collection of Brokerage/Misclassification, 385 (386).

Collection of brokerage by freight forwarder on shipments of companies which he fully owned and controlled was willful and knowing violation where, on applications for issuance of a forwarder registration number, he twice filed false statements with the Board to hide his true business as an exporter and shipper; he gave false answers to questions in an application he signed and filed with a conference, in order to collect brokerage as a forwarder; he was repeatedly put on notice by the Board, the Conference, and by endorsement on brokerage checks that collection, under conditions whereby any part of such brokerage reverted to the shipper or consignee, would violate section 16 and General Order 72; and he continued to receive and accept such brokerage even after advising the Board that he would desist. Id. (395).

Fact that illegal brokerage collections were finally repaid to the carrier is irrelevant to the determination of whether such collections, when made, were violations of the Act or of Board orders. Id. (396).

BROKERS. See Brokerage.

BURDEN OF PROOF. See Evidence.

CARLOADING AND UNLOADING. See Terminal Facilities.

CEASE AND DESIST ORDERS. See Agreements under Section 15; Contract Rates.

CHARTER OF WAR-BUILT VESSELS—P. L. 591, 81st CONGRESS

—In general

Public Law 591 does not require the Board to make a finding of emergency as a prerequisite to granting charter of Government-owned vessels. Lykes Bros. S.S. Co., Inc., 105 (107).

Section 211(h) of the 1936 Act authorizing the Administrator to determine the advisability of enacting legislation to aid coal producers, inter alia, in exporting their products "in an economic or commercial emergency" does not apply where an applicant desires to charter Government-owned vessels to carry coal to foreign ports and the applicant admitted that the market for coal in Europe would not disappear if the application were denied. Moreover the procedure for chartering vessels under section 5 of the Merchant Ship Sales Act is not dependent upon any findings or determinations under section 211(h). American Coal Shipping, Inc., 154 (163).

A commitment by a shipper for carriage of cargo, contingent upon the granting of a charter of Government-owned vessels, may be an indication of special qualifications by an applicant under section 5(e); it does not, however, entitle the

applicant ipso facto to a grant. Other factors should not be ignored. Isbrandtsen Co., Inc., 196 (200, 201).

In proceedings under section 5(e) of the 1946 Act for charter of vessels for use in regular berth services, and not for services in bulk carriage, applicant will not be restricted to the carriage of commercial bulk, because another competing line, in its present operation of privately owned nonsubsidized vessels is so restricted, where no other valid reason for such restrictions appears in the record. Restrictions on operations of nonsubsidized vessels which do not arise out of any proceeding under the 1946 Act are irrelevant to the issues in charter proceedings under section 5(e). Lykes Bros. S.S. Co., Inc., 205 (207).

—Allocation of charters

In considering the various factors which will determine the allocation of chartered Government-owned vessels to particular applicants, the mere fact that a particular applicant has obtained a commitment for carriage of Government-sponsored cargoes conditioned upon the granting of a charter of Government-owned vessels, should not be a conclusive factor in granting or denying particular applications. American Export Lines, Inc., 188 (192).

It was error for a hearing examiner to refuse to recommend under section 5(e) that—consistent with the policy of the Act—preference be given to applicants who use predominantly American-flag vessels, on the ground that delegation of authority by the legislative branch to the executive branch, without any reasonable standards, is an unconstitutional delegation of legislative authority. The Secretary's discretionary authority is granted to him by the 1946 Act, not by the Board. The Board only makes recommendations, which the Secretary is "authorized," not "required" to follow. Isbrandtsen Co., Inc., 196 (201).

Section 5(e) of the 1946 Act provides that the Secretary of Commerce may, in his discretion, reject or approve a charter application, but may not approve unless in his opinion the chartering would be consistent with the policies of the Act. Recommendation to the Secretary that preference be given to applicants who, together with their closely affiliated companies, use predominantly American-flag vessels when operating in the commerce of the United States, is within the discretionary authority granted to the Secretary by Congress. The recommendation is sufficiently clear and precise to enable the Secretary to follow it. Section 804 of the 1936 Act and section 10 of the 1946 Act recognize the reasonableness of "affiliated interests" as a standard and guide. "Predominantly" has a clearly understood meaning and its reasonableness as a legal standard has been recognized. Id. (201, 202).

The Board will recommend to the Secretary of Commerce under Section 5(e) that in allocating charters of Government vessels—consistent with the policy of the 1936 and 1946 Acts—preference be given to applicants who, together with their closely affiliated companies, use predominantly American-flag vessels in the foreign commerce of the United States. Id. (203).

The question of whether preference should be given to charter applicants on the basis of the ships operating in particular trade routes and sailing frequency, in proportion to the service provided, is not an issue under Public Law 591. If vessel allocation priority becomes necessary it can be handled administratively. Lykes Bros. S.S. Co., Inc., 205 (IX).

—Charter conditions

While applicant has met the statutory requirements for bareboat charter, the public interest requires that conditions be incorporated in the charter to ensure reimbursement to the Government of all costs of breaking out the ship and putting it in class. Thus conditions will be recommended to the Secretary that applicant

pay for break-out, readying, and lay-up costs. Gulf & South American S.S. Co., 109 (111).

Except in special circumstances where the urgency of the situation overrides the desire to recoup average activation, repair and deactivation expenses, as a desired goal, charters should be for a period which will enable the Administration to recoup substantially all such expenses. Where the charter is earlier terminated at charterer's option, then at the option of the Administrator a consideration for such early termination should be charged against charterer in an amount which, when added to charter hire already paid, will aggregate one year's charter hire. Since the Government will have recouped substantially all of said expenses during the first year of operation, in charters made for a longer period consideration should be given to reducing the rate of charter hire in the second and subsequent years, always consistent with the policies of the 1946 Act. Grace Line Inc., 143 (148).

In event that subsidization for a vessel which applicant seeks to charter is allowed, the charter party executed should include provisions to protect the interest of the Government under its operating-differential subsidy agreement with applicant. Id. (148).

The Board will not recommend that charters under section 5(e) be conditioned upon a minimum freight rate for coal, determined by the Administrator, where the possibility that applicant would charge a rate that would result in a loss and produce chaos among other operators in the coal trade is so remote as to be almost impossible; foreign-flag vessels dominate the trade and could make applicant's minimum rate their maximum; and there is little likelihood that applicant's vessels will be able to take cargoes away from American-flag vessels because they will be able to carry only 25 percent of the estimated increase in coal exports. American Coal Shipping, Inc., 154 (167, 168).

Charters granted principally to permit carriage of coal to foreign ports should be for an indefinite period to permit applicant to build or convert vessels. A year would be a reasonable time in which to complete plans and undertake definite commitments for new ships. The Administrator should renew the progress made, after charters have been in effect for six months, to determine whether continuation is warranted, and if applicant lacks reasonable excuse for insufficient progress, the option to terminate should be exercised. Id. (168).

An applicant for charter of Government-owned vessels under section 5(e) to carry coal to Europe will be limited to the carriage of coal outbound but will be permitted to carry ores inbound in order to obtain revenues needed for its successful operation in the coal trade. Id. (168).

Charters granted under section 5(e) need not be conditioned on the applicant paying break-out, lay-up, and incidental expenses. The Board will recommend that, with reference to such costs, the Secretary should establish uniform rates of charter hire which take into consideration the NSA fair and reasonable rates, and authorize the use of vessel operations revolving fund for the activation, repair, and deactivation cost provided for in Public Law 890, 84th Congress. Id. (168).

Charters under section 5(e) for foreign-aid cargoes will be awarded on conditions that vessels return home in ballast unless it is shown to the satisfaction of the Administrator that inbound cargoes would otherwise be declined by private owners of American-flag vessels. Pacific Far East Line, Inc., 177 (182).

—Charter to contract carrier

Unopposed application to charter vessel for contract carriage of sulphur from the Gulf to the Pacific Northwest and lumber from the Pacific Northwest to the North Atlantic recommended to the Secretary as the service is required in the

public interest, the service is not adequately served, and privately owned American-flag vessels are not available on reasonable conditions and at reasonable rates. Terminal S.S. Co., Inc., 214 (215).

—Inadequacy of service

(a) *In general*

Under section 5(e) there is inadequacy of American-flag service where, although applicant's sailings as well as foreign-flag sailings had decreased in the past year, this was due to weather conditions and mishaps; applicant recently had to decline very substantial amount of cargo on the routes involved; new farm legislation will substantially increase the movement of cotton; shippers were making sales of cotton subject to space availability; and the vessels involved will operate at capacity on berth. Lykes Bros. S.S. Co., Inc., 105 (106).

The adequacy of service contemplated by section 5(e) of the 1946 Act is the adequacy of American-flag vessels. The facts that American-flag vessels carried from 4 to 5 percent of American coal exports in 1955 and only 1 percent during the first 6 months of 1956, although coal exports increased 17 percent over 1955, conclusively establish that the export coal service is not adequately served by American-flag vessels. That such inadequacy may be due to rates which are too low to support an American-flag operation is not an issue. American Coal Shipping, Inc., 154 (164).

The inadequacy of service contemplated by section 5(e) is inadequacy of all American-flag operations in the service, not merely of a particular applicant or line. However, where a clear showing is made by an applicant that its American-flag vessels are unable to provide adequate service, a prima facie showing is made, and, in the absence of evidence to the contrary from competitive or other sources, a finding of inadequacy may be made. Lykes Bros. S.S. Co., Inc., 205 (206, 207).

Evidence of (1) inability to move 1,000 tons of asphalt in one instance from the Pacific Northwest to Juneau, (2) declination of a substantial number of privately owned motor vehicles of armed services personnel, and (3) an intra-Alaska shipment of about 4,000 tons of lumber, is insufficient to show inadequacy of service with reference to the Alaska trade, and statutory finding of inadequacy of service in the California, Pacific Northwest, British Columbia, Alaska service cannot be made. Coastwise Line, 209 (210).

The facts that applicant's vessels have been sailing full for at least six months; that firm offerings in excess of 150,000 tons of cargo recently have been declined for lack of vessel space; and that there is a continuing backlog of cargoes to be moved, fully supports a finding that the services are not adequately served. Isthmian Lines, Inc., 242 (245).

(b) *Foreign trade*

Service is inadequate where, although no other American-flag vessel serves the route, there is foreign competition and increased industrial and commercial development substantiate that there is need for an additional vessel. Gulf and South American S.S. Co., 109 (110).

Charter of vessels will be restricted to movements of grain to Israel solely in instances where intervenor cannot carry the cargo offered, where it is shown that the intervenor is willing and able to carry the cargo in question on its regular liner services. Pacific Far East Line, Inc., 177 (181).

The facts that charter applicant has been operating its vessels without any substantial free space for 9 months, that there is considerable newsprint, applicant's dominant cargo, available, that one shipper had to ship by rail because vessel space was not available, and that additional goods will be available for shipment in the future, substantiate the conclusion that the service (Cali-

fornia, Pacific Northwest and British Columbia) is not adequately served. Coastwise Line, 209 (211).

Application to charter Government-owned ships for use between the Great Lakes and the Caribbean granted, where the service would relieve a shipping bottleneck; the present service is inadequate as to sailings, regularity and capacity; area to be served offers a natural outlet for a wide variety of Mid-western goods; and shipping rates are lower than rail-ocean rates and there are savings in handling costs. Grace Line Inc., 553 (555, 556).

Application to charter Government-owned vessels for use between the Great Lakes and United Kingdom and Continental ports granted, where large portion of the cargo will move by water rather than by rail; no American-flag vessels are in service on the trade route in question; the only ships available are the Government ships; and service by the foreign-flag ships engaged is not adequate. Id. (556, 557).

(c) *Intercoastal trade*

Inadequacy of service is shown by applicant for charter and operation of chartered vessels in intercoastal trade, where evidence establishes that there is a continuous and growing shortage of cargo space in the trade, ships are fully loaded, applicant is constantly receiving requests from shippers for additional service, all lumber space has been booked through June, and 57 million feet of lumber offered for shipment in May, June and July have been turned down for lack of space. Pope & Talbot, Inc., 99 (101, 103).

(d) *Government—military—national defense requirements*

Within the meaning of Public Law 591, 81st Congress, the service (transportation of coal from North Atlantic ports to France) is not adequately served by American-flag vessels where ICA claimed that there was such a shortage of American-flag vessels that some of its programs had not been announced; regular brokers for the French importing association found that only four such vessels in the charter market had been fixed at the time of hearing (against 15 applied for); only two vessels were definitely offered to the French association; owners of 18 others preferred to have them available to handle cargoes for the United States Government; and the volume of coal to be transported would require more vessels than the 15 sought and the 2 vessels mentioned above. Isbrandtsen Co., Inc., 95 (96, 97).

Where charter applicant is not able to accommodate all cargo offered on Trade Route 25 and both commercial and Government-sponsored cargoes will materially increase within the next ten months on the route, the service is not adequately served. Grace Line Inc., 143 (144).

Application to bareboat charter war-built vessels from the Government for the carriage of Government-sponsored bulk cargoes and other approved bulk cargoes approved; the fact, inter alia, that only 27.2% of the cargo moved on American-flag vessels in a previous month substantiates the fact that the service is not adequately served; and privately owned American-flag vessels are not available. American Export Lines, Inc., 188 (190, 191).

Applications under section 5(e) will be denied where the record establishes that there is no need for additional ships to transport Government-sponsored corgoes or coal; that the needs of the MSTS are being met and that more American-flag tramp ships are offered for charter at NSA rates or less than are requested. Prudential S.S. Corp., 420 (425).

—Notice and hearing

Under Rule 13(g), permitting taking official notice of material facts outside the record under certain circumstances, the Board will be influenced in its

decision with regard to an application for charter under section 5(e) of the 1946 Act for use of chartered vessels in intercoastal trade by the fact that, subsequent to hearing before an Examiner and oral argument before the Board, applicant's subsidiary, a subsidized operator, had diverted one of its owned vessels to operation in foreign trade. Pope & Talbot, Inc., 99 (103).

Telegrams received by the Board before and after the record was closed in a proceeding under section 5 of the Merchant Ship Sales Act, urging denial of the application, will be disregarded as inappropriate and contrary to the Administrative Procedure Act. American Coal Shipping, Inc., 154 (155).

Failure of applicants for bareboat charter of Government-owned vessels to appear does not result in prejudice, as the proceeding was held open "for the purpose of considering requests from any Government agency which is unable to secure privately owned vessels at reasonable rates and upon reasonable conditions to transport its cargoes." American Export Lines, Inc., 188 (192).

Proceedings under section 5(e) do not require a technical hearing procedure. Whether or not a given period of time constitutes timely notice depends upon the circumstances surrounding each case, including the urgency of the situation and the complexity of the issues. If intervenor felt that it had insufficient time to prepare its case, it should have asked for a postponement pursuant to Rule 7(e). Motion to dismiss application for charter was moot in any event because intervenor was not being prejudiced since it did not offer a service to British Columbia, the service for which the affirmative statutory findings were being made. Coastwise Line, 209 (212).

Interest in chartering vessels expressed by another steamship company prior to hearing will not be considered by the Board since no formal application was filed as is required by General Order 60, nor was the company represented at the hearing. Grace Line Inc., 553 (554).

—*Service required in the public interest*

(a) *In general*

While a service in which one commodity is carried from one port to another for but a single shipper is not in the public interest unless exceptional circumstances are shown, such circumstances are shown where, under mandate of Congress, wheat financed by ICA is to be moved to Pakistan in Government-owned chartered vessels, and no privately owned tonnage is available. Pacific Far East Line, Inc., 136 (138).

Under Public Law 591, the "public interest" issue is not satisfied by a showing merely that the promotion of the coal industry and the exportation of coal are in the public interest. The test is whether the proposed "service" is "required in the public interest." Proposed service (mainly carriage of coal to foreign ports) would not injure the American merchant marine as contended by opponents of the application to charter vessels for such carriage. Other objections that (1) such transportation, when performed by a newly formed company (and particularly by a company owned by the United Mine Workers, three railroads that carry coal to Hampton Roads and which handle more than 85 percent of the coal exported by sea, and seven coal mine operators and producers, including some of the largest) with Government-owned ships in competition with privately owned American-flag vessels, is not in the public interest, (2) that the objective of the applicant is to benefit the coal industry and not the American privately owned merchant marine, (3) that applicant will operate at a loss, depress coal rates, "break the market," which will drive tramp ships out of the coal trade, (4) that the combination of three such powerful elements of the coal industry to "stabilize" ocean freight rates constitutes an illegal combination in restraint of trade in violation of the antitrust laws, (5) that the applicant will carry

proprietary cargoes, (6) that the solution should be sought under section 211(h) of the Act, and (7) that the applicant is not qualified, do not sufficiently outweigh the benefits of the proposed service, i.e., assistance to the economy of many friendly countries; help to the American coal industry to retain its European markets, and thus benefits to the miners, the operators, the railroads, and the general economic welfare; and employment of 1,200 American seamen and use of American repair yards. Therefore, such service is "required in the public interest." American Coal Shipping, Inc., 154 (155–160).

Applicant for charter of 30 Government-owned vessels primarily to carry coal to foreign ports has not been shown to intend to operate at a loss or to break the market or unduly depress rates, where several directors testified to the contrary; the railroads which own stock in the applicant have pointed out that it would be illegal for them to engage in a loss venture; an experienced charter broker testified that the applicant could not break the market with 30 vessels; and coal exports were increasing so that even if the increase reached only one quarter of the estimate, cargoes would not be taken away from American-flag operators. Id. (160).

While the Board would not wish to charter Government-owned vessels to a company which it thought intended to use them in violation of the antitrust laws, and weight should be given to the antitrust policy of the nation in considering a charter application, the Board cannot decide authoritatively such questions as whether the transaction contemplates an illegal price-fixing device, an undue restraint of trade, or an attempt to monopolize; it can only express an opinion for the purpose of deciding whether the service is "required in the public interest." Id. (161).

Enforcement of the antitrust laws, except where superseded by the Shipping Act, 1916 (not here relevant) is primarily the responsibility of the Department of Justice, and the Board is satisfied that, if the Department deems it necessary it will review the operation of the applicant for charter of Government-owned vessels to carry coal to foreign countries from an antitrust point of view. Since the charters provide for annual review and termination by the Administrator for any reason upon 15 days' notice, the public interest will be amply protected against the continuance of any improper practices of the charterer should they develop (depressing of rates or breaking of the market, discrimination against coal shippers, or preference to applicant by the mine owners who owned one-third of applicant). Id. (162).

It would not be against the public interest to charter Government-owned vessels to a company which is owned one-third each by the United Mine Workers, three railroads that carry coal to a port, and seven coal mine operators and producers, where none of the coal to be carried by the company would be owned by it; some may be coal mined by one of the coal producing stockholders, but most will not be owned by a stockholder because it is customarily sold f.o.b. the mine; the company does not itself operate coal mines and its certificate of incorporation will not permit it to act as a coal dealer or coal broker; the company will carry for all shippers "first come, first served"; and the company will operate as an independent shipping line and offer its vessels on the market to any charterer and not confine them to the stockholders. Id. (162, 163).

On the issue of public interest under section 5(e) of the 1946 Act, the responsibility to pass upon an applicant's qualifications to charter vessels with respect to its "practical experience" or "any other factors that would be considered by a prudent businessman in entering into a transaction involving a large investment of his capital," required to be considered under section 713 of the 1936 Act, which is made a part of section 5 of the 1946 Act, rests with the Administrator. The

Board, however, will invite attention to the fact that although the applicant has never operated a vessel and has only a skeleton staff, its president is a steamship executive of 40 years' experience; two of its stockholders who own and operate United States-flag vessels have agreed to furnish the necessary experienced operating personnel; and its officers and directors are responsible men of wide business experience. Id. (164).

Under section 5(e) use of Government-owned vessels to service offshore oil and gas wells in the Gulf of Mexico is in the public interest where substantial conversion work will be performed in American shipyards, employment will be provided for American seamen, our offshore oil and gas resources will be more efficiently exploited, and the proposed charters would greatly reduce the dangers to workover crews during storms on the present nonself-propelled barges. Advantages to the American merchant marine and to our economy in general sufficiently distinguish the application from the case of Grace Line Inc., 3 FMB 703. Boston Shipping Corp., 372 (376, 377).

Use of Government-owned vessels in servicing offshore oil and gas wells is within the meaning of "service" in section 5(e) of the Merchant Ship Sales Act of 1946. This term is not to be interpreted so narrowly that only a charter application proposing to furnish an ordinary commercial shipping service may be approved. The prime purpose of section 5(e) was to eliminate, and to prevent in the future, competition between privately owned American-flag ships and Government-owned tonnage. Id. (377).

(b) *Foreign trade*

Vessels sought to be chartered under section 5(e) are clearly to be used in a service which is in the public interest where the routes involved are essential, and with the services thereon, form important arteries for the movement of cotton, sulfur and other products from United States Gulf ports. Lykes Bros. S.S. Co., Inc., 105 (106).

Vessels sought to be chartered for use on Trade Route No. 25 would be used in a service which is in the public interest. Although one vessel would not be integrated in applicant's voyage sequence and turnaround schedule on the route, it will operate without serving the full range of United States Pacific coast ports and will carry Public Law 480 cargoes. Grace Line Inc., 143 (144).

Charter of 30 Government-owned vessels to carry coal to foreign countries and to carry other suitable bulk cargoes, including manganese, bauxite, and iron ores, the vessels to be operated under the American flag with American crews, would be a service under Public Law 591 which is clearly in the public interest, as one of the policies of the Act is to promote an American merchant marine sufficient to carry a substantial portion of the waterborne export and import commerce of the United States. American Coal Shipping, Inc., 154 (158).

Operation of a Government-owned vessel by an American-flag charterer in the California, Pacific Northwest, British Columbia trade would be in the public interest. Coastwise Line, 209 (210).

Services for which applicant desires to use Government-owned vessels, being on Trade Route No. 18 declared essential by the Administrator under section 211 of the Merchant Marine Act, 1936, are clearly in the public interest. Isthmian Lines, Inc., 242 (245).

Application to charter Government-owned vessels for use between Great Lakes ports and North Atlantic European ports granted, where the area to be served was declared an essential foreign trade route by the Maritime Administrator; no American-flag vessels operate on the route; and the Government vessels are the only suitable United States-flag vessels available. Grace Line Inc., 553 (558).

(c) *Intercoastal trade*

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., 99 (100).

(d) *Government—military—national defense requirements*

Within the meaning of Public Law 591, 81st Congress, vessels clearly are to be used in a service which is in the public interest where they are to carry coal from North Atlantic ports to Belgian, Dutch, and French ports; the French economy needs a greater quantity of coal because of winter weather conditions; imports from other European countries have fallen off; the welfare of France as a member of NATO and OEEC is extremely vital to that of the United States; the economic stability of France is contingent in large measure upon its ability to obtain coal from the United States; and the mining of coal and its exportation is advantageous to those industries. Isbrandtsen Co., Inc., 95 (96).

Charter of vessels for transportation exclusively of Government-sponsored aid cargoes is in the public interest where the failure to authorize charters, in the face of the inadequacy of other American-flag tonnage, would frustrate our national foreign-aid programs and would result in a disservice to the American merchant marine. Pacific Far East Line, Inc., 177 (180).

The Board is authorized to award charters for the carriage of Government-sponsored cargoes on other than essential trade routes under section 5(e) and need not proceed under section 11(a) which authorizes a Government agency operation for account of the particular department having cargo to move. Id. (182, 183).

—Unavailability of privately owned vessels

Where a lesser rate than $11.60 per ton for the carriage of coal would be unprofitable and where no privately owned American-flag vessels were available, other than those few which were fixed prior to hearing or were offered during the hearing at the rate of $11.60, granting of application to charter 15 Government-owned vessels under Public Law 591, 81st Congress, would be recommended to the Secretary of Commerce. Isbrandtsen Co., Inc., 95 (97).

Where evidence discloses that an applicant for charter of three vessels under section 5(e) for use in intercoastal trade acquiesced in the action of its subsidiary in diverting one owned vessel from its subsidized service to presumably more lucrative operation in foreign trade, the Board would recommend that grant of the application be limited to two vessels and conditioned upon the placing the privately owned vessel in the intercoastal trade and its remaining therein until expiration of the charters, unless the vessel should be again required in the subsidized service of the subsidiary in which event the third vessel may be chartered. Pope & Talbot, 99 (103).

Under section 5(e) privately owned vessels are not available at reasonable rates for use in the service involved where several months earlier applicant had been offered only one vessel (several were needed) at a rate applicant considered too high, and which would have resulted in a loss, rates had risen since that time, and applicant was willing to charter the vessels involved at a 15 percent basic charter hire rate, possibly at a small loss, since it felt that it owed a duty to its shippers to furnish adequate service. Lykes Bros. S.S. Co., Inc., 105 (107).

Where the 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 Government 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; that there is no cargo that will be available for movement beyond the capacity of available tonnage; that there is no dearth of tramp ships for early employment; and that the berth operators will be able to accommodate substantially increased volume of Government-sponsored cargoes in the ensuing fiscal year, the Board cannot find that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions, and at reasonable rates for use in the world-wide service under consideration, and application to bareboat charter Government-owned vessels will be denied. Marine Transport Lines, Inc., 112 (116, 117).

Polarus and members of ATSA had knowledge of cargoes of wheat, financed by ICA, to be moved from the Pacific Northwest to Pakistan, and had ample time, if they had no vessel available, to canvass the market to determine the availability of privately owned vessels, and if found not available at reasonable rates, to initiate a request for charter of Government-owned vessels. This was not done by Polarus or members of ATSA until the date of the hearing on the PFEL application. There is no reason why Polarus should be given preference over PFEL. The argument that the cargo is tramp type and should be limited to tramp operators is without merit. Pacific Far East Line, Inc., 136 (137, 138).

Although the record is clear that at the time of the hearing privately owned American-flag service was not adequate to accommodate the cargoes involved, an applicant to charter Government-owned vessels should have established the extent to which the market for privately owned vessels was canvassed—when, by whom, and in what manner—and should have produced a witness who could testify directly in the matter. Id. (138).

While the Board has held that an applicant to charter Government-owned vessels under section 5(e) should establish the extent to which the market for privately owned vessels was canvassed, the record in the instant case shows that no American-flag owner has offered a ship for charter at any rate since notice of hearing, although applicant's need was so well known that the filing of the application had a depressing effect on the charter market. Thus while not condoning applicant's failure to try to charter vessels, the Board believes that United States-flag owners who oppose the application, and who own ships which they say may be forced out of business if the application is granted, should use self-help to the extent of offering their vessels to a prospective charterer. American Coal Shipping, Inc., 154 (165, 166).

Where privately owned American-flag vessels are offered at the going market level but not in excess of NSA fair and reasonable rates and upon reasonable conditions, no Government-owned vessels should be allowed to carry cargo until such privately owned vessels have been employed. The going market level is established by the supply of and demand for privately owned vessels, not by offerings conditioned upon obtaining Government charters. Pacific Far East Line, Inc., 177 (182).

Application for bareboat charter of Government-owned vessel approved where vessel was needed to take place of a stranded vessel, full capacity of the vessel was obligated by firm commitments, applicant had been turning down cargo for the past 45 days, and applicant had checked the charter market and was advised by its broker that there was no American-flag vessel available, regardless of type or rate. States S.S. Co., 186 (187).

Specific commitments, offers, arrangements, etc. by shippers for carriage of a commodity (coal), contingent upon the obtaining of Government vessels, are an indication of the need for charter of such vessels for carriage of that commodity.

However, there are other significant factors which must be considered in determining the number of vessels which may be chartered without seriously affecting the employment of privately owned vessels. Where the record shows that privately owned American-flag vessels might become available as well as other Government vessels for which charters had been previously recommended, the Board would recommend the charter of a maximum of 50 vessels, although commitments had been obtained for 69. Isbrandtsen Co., Inc., 196 (199, 200).

Where privately owned vessels chartered by applicant are at the rate of $9,400 per month, operation at this rate affords a profit, and the most attractive offer applicant secured for an additional vessel was at $15,000 per month, which it considered exorbitant, privately owned vessels are not available on reasonable conditions and at reasonable rates. Coastwise Line, 209 (211).

CHARTERS. For Charter of War-Built Vessels under Public Law 591, 81st Congress, see Charter of War-Built Vessels.

CHECKING CHARGE. See Service Charge; Terminal Facilities.

CLASSIFICATIONS. See also Tariffs.

Terms in a tariff are to be construed in a manner consistent with general understanding and commercial usage. It is an unrealistic and strained interpretation of a tariff for a shipper to describe kerosene stoves and portable ovens as "Pans, Enameled, Iron or Steelware" and classify them under tariff item "Enameled Iron or Steelware" when there were specific items for "Stoves—Coal, Gas, Gasoline, Oil or Wood Burning" and "Ovens, Not Electric." Samuel Kaye—Collection of Brokerage/Misclassification, 385 (398).

Where, in order to obtain the lower rate on stoves and ovens it was necessary to classify the particular items in completely unrealistic ways in order to avoid the specific and obvious generic terms "stoves" and "ovens" which appeared alphabetically in the tariff, the misclassification (under "Enameled Iron or Steelware") was done knowingly and willfully as a device to obtain lower freight on the shipments involved. To the extent that the forwarder and shipper had any doubt they should have made inquiry. Indifference is tantamount to outright and active violation. Attributing admitted misclassification of electric refrigerators to clerical error was not persuasive in the light of the forwarder's demonstrated disregard for the truth. Id. (398).

Freight forwarder and shipper, knowingly and willfully, by means of false classification of shipments of stoves, ovens, and refrigerators, obtained transportation for property at less than the rates or charges which would otherwise have been applicable, in violation of the first paragraph of section 16. Freight forwarder, being an "other person subject to this Act," also violated section 16 Second in that he allowed a shipper to obtain transportation at less than regular rates or charges, by means of false classification of stoves, ovens, and refrigerators. Id. (399).

Where in shipping glassware items, the traffic manager of an export company resorted to a dictionary definition of a jar which did violence to the clear meaning of the tariff, there is, at best, such an indifference and lack of care in construing the tariff as to constitute a deliberate violation of section 16 by the exporter. When in doubt as to proper tariff designation of his commodity, a shipper has the duty to make diligent and good faith inquiry of the carrier or conference publishing the tariff. Markt & Hammacher Co.—Misclassification of Glassware, 509 (511).

A shipper who knowingly and willfully misclassifies a commodity violates section 16 of the Shipping Act, even though he receives no benefit therefrom as in the case where title passes to a foreign buyer prior to shipment and freight

and related costs are paid by the buyer. Benefit to a shipper is not a sine qua non to a finding of a knowing and willful misclassification by a shipper and lack of motive or reason is not necessary for a finding of a violation. Id. (511).

Manufacturer-shipper which has considered packer's tumblers as separate and distinct from bottles or jars was guilty of a misclassification when it classified packer's tumblers as "Bottles or Jars, Empty, Glass" rather than "Tumblers," each of the classifications being contained in the applicable ocean tariffs. Hazel-Atlas Glass Co.—Misclassification of Glass Tumblers, 515 (518).

An unwitting failure to comply with the statute (section 16, Shipping Act, 1916) is not sufficient to constitute a violation. In order to show a knowing and willful violation, however, it is not necessary to establish an intentional violation of law or an evil purpose, particularly, as here, where the statute does not involve moral turpitude. A conscious purpose to avoid enlightenment, where there is a duty to know, supports a charge of a violation. Knowledge may be presumed where one, upon whom a duty to know has been cast, intentionally or willfully keeps himself in ignorance. Indifference to diligent inquiry on the part of a shipper or a forwarder constitutes knowing and willful conduct tantamount to an outright and active violation. Id. (519).

Having not found the specific tariff classification for packer's tumblers, the manufacturer-shipper had two alternatives: (1) to designate the articles as tumblers or (2) to inquire of the carrier or the conference as to the correct classification. The failure to designate the shipments properly, together with the failure to inquire—a manifest lack of due diligence in view of the surrounding circumstances—evinces a knowing and willful attempt on the part of the shipper to avoid the proper tariff rate. The shipper knowingly and willfully violated section 16. Id. (519, 520).

A freight forwarder, in following written instructions from its principal, is not thereby insulated from a finding of a violation of section 16 of the Act. A registered freight forwarder holds itself out to the shipping public as an expert in the handling of ocean freight, and its expertise includes a knowledge of applicable tariffs. If the forwarder prepared the necessary bills of lading, procured cargo insurance, consular invoices and customs declaration as forwarders generally do, the nature of the cargo necessarily should be within the forwarder's knowledge. The forwarder has a duty to take reasonable steps to inform itself as to the nature of the cargo it is handling and to act lawfully with respect thereto. Id. (520).

COMMON CARRIERS. See also Agreements under Section 15; Evidence, Ports.

—Who is common carrier

The entity which constitutes a "common carrier by water in foreign commerce" is subject to the provisions of the 1916 Act and the jurisdiction of the Board. The legislative history of the Act indicates that the person to be regulated is the common carrier at common law. And at common law a common carrier is one who holds himself out to carry for hire the goods of those who choose to employ him. He must take the goods of all who offer "unless his complement for the trip is full, or the goods be of such kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey." Banana Distributors, Inc. *v.* Grace Line Inc., 615 (620).

Since bananas do not confront Grace with liability from extraordinary danger and they constitute a commodity which Grace is most accustomed to carry, Grace is a common carrier of bananas. Id. (620, 623).

Where the vessels of Grace employed in carrying bananas for its chosen shippers are otherwise engaged in carrying general cargo for all who choose

to employ them, Grace is a common carrier by water within the meaning of section 1 of the Act. Id. (621); Philip R. Consolo *v.* Flota Mercante Grancolombiana, 633 (638).

To qualify as a common carrier, a carrier's undertaking to carry must continue for a certain time at least, subsequent to the receipt of goods for the purpose of transportation. A carrier which advertised sailings in its own name between Glasgow and ports on the Great Lakes of vessels operated by other lines, but later changed the advertisements to show itself as loading agent for undisclosed principals, and which did not actually operate any services from the United Kingdom to Great Lakes ports, has not been shown to have operated as a common carrier in the United Kingdom-United States Great Lakes trade. Oranje Line *v.* Anchor Line Ltd., 714 (719).

—Duties of common carrier

Since bananas are susceptible to common carriage, it follows that respondent, a common carrier of general cargo, has carried under contract a commodity which is capable of being and should have been carried under terms of common carriage. Banana Distributors, Inc. *v.* Grace Line Inc., 278 (283).

The so-called specialty cases, dealing with the question whether common carrier obligation is owed by one common carrier to another common carrier who is a shipper do not apply to cases where a normal shipper-carrier relationship has been presented. Id. (283).

The specialty cases, other than those involving common carrier—common carrier relationships, involve commodities which, by their very nature, are not capable of being carried under the terms of common carriage, and since they dealt with the question of liability, they do not stand for the proposition that shippers similarly situated could legally be denied space. It is therefore unnecessary for the Board to examine the authorities which say that a common carrier may at the same time and with the same facility be both a common carrier and contract carrier. Id. (284).

A common carrier would be held guilty of discrimination against qualified banana shippers, in violation of sections 14 and 16, where it refused to carry bananas for them. Tender of the merchandise need not be proved, where record discloses that space had been demanded and refused. Id. (284).

Where the demand for space exceeds the supply a common carrier must equitably prorate its available space among shippers. Id. (284).

Having chosen to act as common carriers subject to the 1916 and 1933 Acts, carriers assume the obligation to present or make available in regulatory proceedings sufficient probative and substantial evidence to enable the Board properly to carry out its investigative and regulatory duties. Carriers are not excused from their duties because they have maintained books and records, where the books and records are such that it is difficult to extract relevant and material data from them, or where such data is inextricably intertwined with other operations, or is confidential. U.S. Atlantic and Gulf/Puerto Rico Rate Increase, 426 (430).

A common carrier, subject to the provisions of the Act, may not exempt itself, in part, from the provisions of the Act with respect to the carriage of bananas of qualified shippers. Cases sanctioning the exclusion of carriers from facilities of another carrier, do not apply to the exclusion from such facilities of the general public. Banana Distributors, Inc. *v.* Grace Line Inc., 615 (621, 622).

A common carrier by water may except certain goods from its holding out to carry, but whatever it does carry, it carries subject to the provisions of the Shipping Act and may not prefer certain shippers in the carriage of certain commodities (bananas) to the exclusion of others. Id. (622, 623).

Even if up to 15 additional hours were required to accommodate six banana shippers that fact would not justify exclusive long term space contracts to a favored shipper and the denial of that space to a qualified competitor. Operational difficulties and vessel limitations do not justify prejudice and discrimination otherwise undue and unreasonable. Philip R. Consolo *v.* Flota Mercante Grancolombiana, 633 (639).

—Forward booking

Prorated forward booking of refrigerated space for bananas for a period of two years is proper, since forward booking is not new to common carriage, and the two-year duration is reasonable in that it would afford existing importers the protection they require while providing a reasonable opportunity for prospective shippers to engage in the trade. Banana Distributors, Inc. *v.* Grace Line Inc., 278 (285).

Qualified banana shippers must not be excluded from participation in the trade in refrigerated compartments of common carrier's vessels. However, practical arrangements designed to minimize or eliminate commingling of bananas of several shippers should be left to the parties involved. Prospective shippers may be required to post a bond covering the reefer space assigned, and the carrier may otherwise establish reasonable rules covering dead freight, inspection, and loading and stowing, which prospective shippers must meet to qualify as users of such space. Space must be reallocated at the end of the forward-booking period, if additional qualified importers desire reefer space. Banana Distributors, Inc., *v.* Grace Line Inc., 615 (626).

Forward-booking system for carriage of Ecuador bananas is not an admission that bananas constitute a specialty. During the Chilean fruit season, Grace, as a common carrier, transports such fruit under forward booking arrangements, and when the offerings exceed the available space, the space is prorated among the shippers. Id. (626).

Forward booking is not new to common carriage. In view of the economic problems in the banana trade, a two-year period can be characterized as "just" and "reasonable" rather than "unjustly discriminatory" and "unreasonably prejudicial," and affords existing banana importers the protection they require while providing a reasonable opportunity for prospective shippers to engage in the trade. Id. (626).

COMPLAINTS. See Agreements under Section 15.

CONTRACT RATES.

—In general

Initiation of dual-rate system is necessary as a competitive measure to offset the effect of nonconference competition where, without the system, the conference's percentage participation in total commercial movement has been decreasing and conference carriage of the more remunerative general cargo has decreased in volume while nonconference carriage of such cargo has increased. Secretary of Agriculture *v.* North Atlantic Continental Freight Conference, 20 (33).

Provisions of tariffs, permits, dock receipts, bills of lading or other shipping documents may not be controlling over provisions of dual-rate contract in any case where they may operate directly or indirectly to change the amount of spread between contract and noncontract rates, impose on contract shippers additional requirements not imposed on all shippers, or otherwise be inconsistent with provisions of the dual-rate contract. Id. (36).

The foreseeable advantages of proposed dual-rate system outweigh the foreseeable disadvantages where the increased carriage of cargo by conference lines

is not likely to tend toward monopoly in view of the number of active independents in the trade, the large volume of free cargo for which all carriers 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; where the existence of the contracts guaranteeing to shippers levels of rates for the period of the contract will decrease pressure on conference lines to wage a rate battle with nonconference lines; and where stability of rates and assurance of basic core of cargo will enable conference lines to put improved service on berth and more efficiently plan sailings and service. Id. (37).

—Antitrust laws

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, depends for approval on the competitive need shown to exist in keeping with command of court that concerted conduct approved by the Board and thus exempted from the antitrust laws must not offend the spirit of those laws any more than necessary to serve the purposes of the Shipping Act. Mitsui S.S. Co., Ltd. *v.* Anglo Canadian Shipping Co., Ltd., 74 (92).

—Detriment to commerce

Proposed dual-rate system will not be detrimental to the commerce of the United States where the rates will remain stable for at least successive 6 months periods, and will enable nonconference carriers to stabilize rates at customary lower levels if desired; and a general increase in rates charged to shippers, alleged to be likely because of increased cargo carryings on conference vessels, is highly improbable in view of (1) the effectiveness of nonconference competition, (2) effectiveness of competition of other carriers and conferences serving the ports of discharge in this trade from ports of loading not served by conference involved, (3) effectiveness of carrier competition at other gateways to areas served by conference involved, and (4) power of the Board over conference rates which are found to be detrimental to the commerce of the United States. Secretary of Agriculture *v.* North Atlantic Continental Freight Conference, 20 (35).

Where, upon complaint of nonconference carrier and shipper, the Board finds that a new conference interpretation of a shipper's rate agreement is an agreement or modification of an approved agreement which requires approval under section 15 and which has been effectuated prior to such approval, it need not consider whether the new interpretation is detrimental to the commerce of the United States, but will require the conference to cease and desist from effectuation of the interpretation until such time as the agreement has been approved under section 15. Detriment to the commerce of the United States would then be ground for disapproval. Mitsui S.S. Co., Ltd. *v.* Anglo Canadian Shipping Co., Ltd., 74 (92).

—Discrimination; Unfairness

Although the use of dual rates is prima facie discriminatory, the discrimination is not unjust where the shippers will retain complete freedom of choice between signing and not signing the contract; no shippers will be preferred as all will have an equal opportunity to avail themselves of the contract rate; shippers will not be coerced to sign since collectively the non-conference carriers provide complete port coverage and frequent and regular service; no greater handicap will be placed on cargoes moving at noncontract rates than the handicap placed on cargoes moving on conference vessels as compared with those

moving on nonconference lines at rates as low as or lower than the differential; and there is no indication that, collectively, nonconference vessels do not offer the same types of facilities as those offered by conference vessels. Secretary of Agriculture *v.* North Atlantic Continental Freight Conference, 20 (34).

Proposed dual-rate system will not be unfair as between carriers where membership in the conference is open to independent carriers regularly operating, or furnishing evidence of intention to so operate in the trade; the independent carrier is free to remain outside conference and maintain its rate advantage; and independent carriers will not be eliminated from the trade since there is a large volume of bulk-type commodities which will not be subject to the system, they will remain able to compete with conference carriers because of their comprehensive coverage and service, and it is probable that conference vessels will carry no more than 75 percent of total liner cargo. Id. (34, 35).

—F.o.b., f.a.s., etc., shipments

Where proposed dual-rate contract provision might be construed as requiring 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 Board will require, in lieu thereof, 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. 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. Secretary of Agriculture *v.* North Atlantic Continental Freight Conference, 20 (35, 36).

Interpretation of conference shipers' rate agreement as including all goods of contract signatroies sold for shipment in the conference trade, whether sold f.o.b., f.a.s., c.i.f., or c. and f. basis, was found to be a new agreement between carriers, effectuated in violation of section 15 of the Shipping Act of 1916, since the agreement does not specify that f.o.b. and f.a.s. shipments of a signatory must move via conference vessels; shippers disagree as to whether the agreement imposes that obligation; the custom of the industry contemplates that ordinary f.o.b. and f.a.s. shipments are those of the buyer; the conference previously expressed a broad opinion to the effect that f.a.s. shipments are not included within the coverage of the agreement; and the new agreement has a secondary effect on nonsignatory buyers, not the natural and logical result of the agreement as written. Mitsui S.S. Co., Ltd. *v.* Anglo Canadian Shipping Co., Ltd., 74 (91).

Interpretation of 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 not to have resulted in violations of sections 14, 16, 17, and 18 of the Shipping Act of 1916, as 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; one party 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 certain shippers' rate agreements have been terminated, complainants have not established that the movement which resulted in termination of those agreements 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 of any actual loss by specific discrimination against a car-

rier, nor against any foreign consignee; and unjust rates have not been charged by the conference. Id. (93).

—Institution of dual-rate system

Filing of statement under General Order 76 with respect to dual-rate system will be considered by the Board as also filing under section 15 which is required where conference intends to institute or reinstitute the system. Secretary of Agriculture *v.* North Atlantic Continental Freight Conference, 20 (37).

—Stability of rates

Initiation of dual-rate system is necessary to insure stability of rates and service to shippers where, despite present stability of rates, the competitive pressure on conference lines has been increasing; it is impossible for conference lines to maintain stability of rates and at the same time a proportionate share of the desirable general cargo; and a guarantee of rates for the 6-month period contemplated will facilitate forward trading by shippers and minimize the threat of rate wars, with their disastrous effects on carriers and on shippers. Secretary of Agriculture *v.* North Atlantic Continental Freight Conference, 20 (34).

DEFERRED REBATES. See Rebates.

DETRIMENT TO COMMERCE. See Agreements under Section 15; Brokerage; Contract Rates; Port Equalization; Practices; Terminal Facilities.

DEVICES TO DEFEAT APPLICABLE RATES. See also Classifications; Rebates.

Whether a particular arrangement violates the statute in that it amounts to a direct or indirect securing of transportation at less than applicable rates, willfully and knowingly, is a question of fact. If the corporate form is used to evade a statute, then the corporate entity must be disregarded while the Board looks to the substance and reality of the matter. A freight forwarder's registration may be suspended or cancelled if the device employed constitutes a violation of the Board's General Order 72 or the Shipping Act of 1916. Brokerage on Ocean Freight—Max Le Pack, 435 (440).

Violation of section 16 of the Act and section 244.13 of G.O. 72 is obtaining transportation at less than applicable rates by unfair device was "willful," within the meaning of section 16, where respondents had competent counsel to advise them, had wide knowledge and business experience in the export business and were aware of, or, at least should have known by diligent inquiry, the requirements of the law. Id. (444).

DISCRIMINATION. See also Agreements under Section 15; Brokerage; Common Carriers; Contract Rates; Evidence; Port Equalization; Preference and Prejudice; Tariffs; Terminal Facilities.

Evidence of confusion and misunderstanding on the part of both the shipper and the carrier as to the rate to be charged for shipment of dismantled aluminum plant is insufficient to show that there was any arrangement or agreement to carry the cargo at rates other than the applicable tariff charges, in violation of section 14-Fourth of the Shipping Act of 1916; nor does the record indicate that any actions of respondent were retaliatory within the meaning of section 14-Third of the Shipping Act of 1916. Aluminum Products of Puerto Rico, Inc. *v.* Trans-Caribbean Motor Transport, Inc., 1 (VII).

No discriminatory treatment violation of section 14-Fourth is shown where conference charged rate on seed beans under item "Seeds, Agricultural, n.o.s."; rates on similar commodities which stow the same as seed beans and have the

same values were lower, but no evidence of any comparative transportation factors was presented; an item of seed beans lower than the "n.o.s." item was established by the conference after complainant shipped its beans; and there was no evidence that carrier's failure to adjust and settle shipper's claims for application of the reduced rate had resulted in unjust discrimation against the shipper in favor of any other shipper. Asgrow Export Corp. *v.* The Hellenic Lines, Ltd., 597 (599).

In order to sustain a charge of unjust discrimination under section 16-First or section 17, complainant must prove (1) that the preferred port, cargo, or shipper is actually competitive with complainant, (2) that the discrimination complained of is the proximate cause of injury to complainant, and (3) that such discrimination is undue, unreasonable, or unjust. There was no violation of these sections where complainant's shipment of seed beans was its first and only shipment and there was no evidence that any other shipper of seed beans to the same range had been charged a lower rate Id. (600).

Provision of agreement that arbitration procedures set up to resolve disputes between parties to the agreement must be governed by Dutch law, was not shown to be discriminatory as between carrier or otherwise in violation of the Act. Such a provision cannot affect the rights of any person or limit the Board's jurisdiction under the Act. Oranje Line *v.* Anchor Line Ltd., 714 (730).

DOCKAGE CHARGE. See Freas Formula; Rates; Service Charge.

DUAL COMMON AND CONTRACT CARRIERS. See Common Carriers.

DUAL-RATE CONTRACTS. See Contract Rates.

EQUALIZATION. See Port Equalization.

ESSENTIAL TRADE ROUTES. See Subsidies, Operating-Differential.

EVIDENCE. See also Practice and Procedure.

Letters, though hearsay, may be introduced in evidence in Board proceedings subject to the requirement that rules or orders issued by the Board be supported by reliable, probative and substantial evidence. In any event the question of admissibility is moot where the Examiner found contrary to the proposition for which the letters were offered. City of Portland *v.* Pacific Westbound Conference, 118 (128).

Summary evidence without reasonable access to supporting and underlying books, records, and accounts by which the accuracy and sufficiency of the evidence may be tested, is not "reliable, probative, and substantial evidence" as required by section 7(c) of the Administrative Procedure Act and, therefore, not sufficient basis for findings as to the lawfulness of rates under section 18 of the 1916 Shipping Act and the Intercoastal Shipping Act of 1933. U.S. Atlantic and Gulf/Puerto Rico Rate Increase, 426 (429).

Having chosen to act as common carriers subject to the 1916 and 1933 Acts, carriers assume the obligation to present or make available in regulatory proceedings sufficient probative and substantial evidence to enable the Board properly to carry out its investigative and regulatory duties. Carriers are not excused from their duties because they have maintained books and records, where the books and records are such that it is difficult to extract material data from them, or where such data is inextricably intertwined with other operations, or is confidential. Id. (430).

Evidence concerning issuance of joint advertisements of sailings purporting to show allocation of ports as between carriers does not justify, of itself, a finding that ports were so allocated by agreement when the record details the actual ports served. Oranje Line *v.* Anchor Line Ltd., 714 (732).

Complainants alleging concerted rate action in violation of the Shipping Act of 1916 have the burden of proof and the inference properly to be drawn is that most favorable to the respondents. Id. (733).

EXCLUSIVE-PATRONAGE CONTRACTS. See Contract Rates.

FAIR RETURN. See Rates.

FIGHTING SHIP.

Section 14-Second of the Shipping Act of 1916 is not violated by the action of carriers in conceiving an agreement which would allegedly force a dichotomy of service as between United States and Canadian Great Lakes ports, with the aim of driving complainants from the Canadian trade and thus eliminating them from service at United States ports, since it is economically impossible to serve only United States ports under present circumstances. Whether service is conducted by a particular vessel at ports on both borders of the Great Lakes does not depend upon the territorial coverage of particular conference agreements. Oranje Line *v.* Anchor Line Ltd., 714 (733).

FINDINGS IN FORMER CASES.

Decision in Intercoastal S.S. Freight Assn. *v.* Northwest Marine Terminals Assn., 4 FMB 387, will not be reversed. Assuming the Board could properly set aside the report and order in this proceeding, there is no valid reason for so doing. Whether carriers are entitled to reparation from terminals does not depend upon whether the terminals have suffered a general deficiency in revenue. The principal portion of the report 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, was 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. The Board will not depart from that principle. The Board did not determine in Intercoastal 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. Terminal Rate Structure—Pacific Northwest Ports, 53 (58).

Under authority of section 25 of the Act, the Board will modify its report (4 FMB 696) by eliminating the words "or unapproved" appearing on page 704, the words "or an unapproved" appearing in the ultimate paragraph, and the sentence beginning "In the present case we are not authorized . . .", appearing at page 704. Pacific Coast European Conference—Payment of Brokerage, 65 (72).

FORWARD BOOKING. See Common Carriers.

FORWARDERS AND FORWARDING. See also Agreements under Section 15; Brokerage, Classifications; Devices to Defeat Applicable Rates; Rebates.

Although the regulatory provisions of the 1916 Act do not apply to brokers as brokers are not "other persons subject to this Act" within the meaning of section 1, forwarders are "other persons," and the Board has jurisdiction to issue rules regulating practices of freight forwarders, including the collection of brokerage fees by freight forwarders and the payment of brokerage fees by common carriers by water. Proposed Rules Governing Freight Forwarders, 328 (330).

In addition to the general rule-making power vested in the Board by section 204 of the 1936 Act, section 17 of the 1916 Act expressly grants authority to the Board to promulgate rules relating to the business practices of freight for-

warders since the activities of forwarders, including collection of brokerage payments, are intimately connected with the "receiving, handling, storing, or delivery of property", within the meaning of section 17. Id. (330).

Arguments directed to the merits of proposed rules relating to the business practices of freight forwarders, or conjecture as to procedural steps which may be followed in adopting the rules, are not germane to the question of the Board's jurisdiction to issue such rules. Id. (332).

A freight forwarder is "another person" subject to the Act. Brokerage on Ocean Freight—Max Le Pack, 435 (439).

FREAS FORMULA. See also Rates.

Application of the Freas Formula is not precluded in the Northwest because a disparity between Northwest and California dockage charges would be created by assignment of charges against the vessel for use of working areas to the handling rather than to the dockage charge. The level of terminal rates is not at issue and it is the total of terminal charges rather than the level of a single charge which affects competition between the two areas. Terminal Rate Structure—Pacific Northwest Ports, 53 (54).

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 the party for whom, under the contract, 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. The terminal operator may bill and collect from the vessel, and in instances where the charges are incurred for the benefit of the cargo, the carrier shall bill and collect such charges from the shipper or consignee. Id. (56, 57); id. (326).

GENERAL ORDER 60. See Charter of War-Built Vessels.

GENERAL ORDER 71. See Rates.

GENERAL ORDER 72. See Brokerage; Devices to Defeat Applicable Rates; Rebates.

GENERAL ORDER 76. See Contract Rates.

GEOGRAPHICAL ADVANTAGES AND DISADVANTAGES. See Port Equalization.

HANDLING CHARGE. See Freas Formula; Rates.

INTERCOASTAL OPERATIONS (Sec. 805(a)).

—In general

Agreements and understandings between subsidy applicant and shippers covering present or future movements of cargo in domestic trade are relevant and material to section 805(a) issues. Section 805(a) deals with any and every domestic intercoastal or coastwise trade in which an applicant is engaged, and is not merely confined to a situation where the domestic service is a part of the route for which subsidy is sought. Findings by the Board that permission to engage in domestic coastwise or intercoastal trade may or may not result in

unfair competition or be prejudicial to the objects and policy of the 1936 Act must be predicated on relevant facts, among which is the amount of cargo available for carriage in the domestic trade. Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service, 140 (142).

A subsidy applicant's vessel replacement program, although a matter in which the Board is interested, has no relationship to 605(c) or 805(a) issues. Id. (142).

"Confidential" information in a subsidy application is submitted to the Board pursuant to section 601 of the 1936 Act for its exclusive use in carrying out its functions under that section. Such confidential information is not subject to scrutiny in either a 605(c) or an 805(a) proceeding since it is not material to the issues under those sections. Id. (142).

—Competition to domestic operators

There is no basis for a finding of unfair competition under section 805(a) where the only carrier opposing an application does not carry the same merchandise and does not serve the same ports as proposed by applicant, except one. Pope & Talbot, Inc., 99 (101).

Data concerning way cargo carried on subsidy applicant's round-the-world vessels are not germane to section 805(a) issues. Way cargoes carried on foreign legs of such proposed service cannot adversely affect carriers engaged solely in the domestic commerce of the United States. Similarly, agreement between shippers and applicant covering present and future cargo movements in the foreign commerce of the United States cannot unduly prejudice United States coastwise and intercoastal operators. Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service, 140 (141, 142).

Where Matson, an exclusively domestic operator, has engaged in the California/Hawaii trade for more than 73 years; the service has been developed and maintained by private investment without benefit of subsidy; in contrast, applicant (PFEL) for section 805(a) permission to call at Hawaii is primarily a subsidized operator in foreign commerce; Matson has been operating at a modest profit; and applicant would "skim the cream" off the trade, Matson needs the available cargo, has the capacity to carry it, and as opposed to applicant is fundamentally entitled to such cargoes. Furthermore, the diversion of the volume of cargo which the applicant would carry would seriously jeopardize Matson's vessel-replacement program and would impede development and continuation of its service. The Board should be particularly careful to protect the existing operator in an offshore territorial trade. To permit PFEL to carry cargoes in the trade would result in unfair competition to Matson and would be prejudicial to the objects and policy of the Act. Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii, 287 (297–300).

Prior decisions of the Board and Administrator have stated the principle that a subsidized operator should not be permitted to deprive regular domestic carriers of cargoes which they need, have the capacity to carry, and to which they are fundamentally entitled. Id. (299).

Matson as the predominant carrier in the Pacific coast/Hawaii trade should not be protected from free competition. Denial of section 805(a) permission to applicant to make calls at Hawaii in connection with its unsubsidized trans-pacific voyages does not protect Matson from such competition. Any unsubsidized United States-flag carrier may at any time, and without restriction or permision from the Board, enter into competition with Matson in the trade. Id. (300).

Continuation of intercoastal service from California ports to ports north of Baltimore by subsidized operator would constitute, under section 805(a), unfair

competition to an operator engaged exclusively in domestic trade, and would be contrary to the objects and policies of the Act, where the domestic operator has long been associated with the trade; adequately served the ports at which it called, has had comparatively little free space and operates at a loss, but can carry the small cargoes carried by the subsidy applicant. Isbrandtsen Co., Inc.—Subsidy E/B Round The World, 448 (460, 461).

Continuation of intercoastal service between Philadelphia-Baltimore and Puerto Rico by subsidized operator would constitute unfair competition where it is obvious that applicant's carryings could easily have been made by its chief competitor, an exclusively domestic operator. Id. (462).

Proposed intercoastal service by applicant for subsidy would result in unfair competition to carriers operating exclusively in the coastwise or intercoastal service, and would be prejudicial to the objects and policy of the Act, where there is no showing that the service of exclusively domestic operators in this trade (lumber and wood pulp trade) is inadequate; and the proposed service would take cargo which the exclusively intercoastal operators need, have the capacity to carry and to which they are fundamentally entitled. Id. (463).

While the Board will not extend permission under section 805(a) to authorize a subsidized operator to serve a particular port at some future time when it deems the service feasible, the Board does hold that the service would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, nor would it be prejudicial to the objects and policy of the Act. The finding may be modified or vacated if service is not re-established at the port within a reasonable time. Isbrandtsen Co., Inc.—Subsidy, E/B Round The World, 483 (484).

Argument of intervenor that in serving both New York and Boston it adequately serves the needs of New Haven intercoastally is not controlling in a section 805(a) proceeding. To accept such an argument would prejudice New Haven consignees of intercoastal cargo. Granting of section 805(a) permission for subsidized operator to serve New Haven from California would be consonant with the congressional policy favoring port development, as manifested in section 8 of the Merchant Marine Act of 1920. Id. (484, 485).

In section 805(a) proceedings, the burden of proof is on applicant, and a protestant has only the burden of rebuttal. Domestic operators will be protected even where they have not operated exclusively in the domestic trade. Doubts should be resolved in favor of the exclusively domestic operator. T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 531 (534).

Continuation of SML's Pacific/Atlantic lumber service would not result in unfair competition to any exclusively domestic operator nor be prejudicial to the objects and policy of the Merchant Marine Act of 1936, where applicant for subsidy has conducted the service for 5 years as an integral part of its tri-continent service; offerings have exceeded available vessel space for 6 years; applicant has carried about 12% of the movement; and growing offerings have resulted in the intercoastal trade becoming unbalanced. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (550, 551).

The "fundamentally entitled" doctrine, under which application for section 805(a) permission is denied where a subsidized operator seeks to inaugurate intercoastal service in competition with an exclusively domestic operator long established in the trade; or where a subsidy applicant seeks to continue domestic services as part of subsidized offshore services using subsidized vessels where such domestic services have been served by domestic operators who need the cargo and have the ability to carry it, will not be extended or applied to deny the continuation of an exclusively domestic service by a subsidy applicant where the

applicant has a long and continued association with the protected trade, and where he proposes to operate such service separate from his subsidized service. Application of the doctrine would mean that such an operator could not participate in the development of our merchant marine by inaugurating a separate and distinct subsidized service without suffering the penalty of being ousted from his unconnected traditional domestic service. T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 666 (670-672).

Application for written permission under section 805(a) of the Merchant Marine Act of 1936 to continue bulk cargo service between any and all United States ports on the Great Lakes, in the event of an award of a subsidy contract, was denied where applicant was a comparative newcomer to the trade, the movement of the commodities involved was declining or would decline in the future, and intervening carriers, although not exclusively engaged in the domestic trades, have been long associated with the movement of bulk cargoes devoted primarily to the protected services. Id. (672, 673).

—"Domestic intercoastal or coastwise service"

An operator furnishing a service that includes foreign ports is not engaged exclusively in the coastwise or intercoastal trade within the meaning of section 805(a). Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii, 287 (297).

An operator which provides a service between Philadelphia and Baltimore and Puerto Rico, which is separate and distinct from a service which it provides between New York and Puerto Rico with calls at the Dominican Republic, is entitled to the protection of section 805(a), as an exclusively domestic operator for the former service. Isbrandtsen Co., Inc.—Subsidy, E/B Round The World, 448 (461).

Section 605(a) clearly relates only to the Board's authority to pay subsidy. It was not intended to increase or enlarge the number or class of persons specified in section 805(a) "exclusively operating in the coastwise or intercoastal service". An operator on the Great Lakes engaged in foreign commerce with Canada, is not "exclusively operating" in domestic trade within the meaning of section 805(a). T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 531 (533, 534).

—Grandfather rights

Isthmian qualifies under the "grandfather" clause of section 805(a) for continued operation in the Atlantic/Hawaii Trade in the event subsidy is awarded to its parent corporation, SML. There is some question as to its "grandfather" rights in the Gulf/Hawaii Service, but it is not necessary to resolve the issue, since no exclusively domestic operator contends that the continuation of the service would result in unfair competition, and it is apparent from the record that continuation would be in furtherance of the objects and policy of the Act. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (550).

The "grandfather" clause of section 805(a) requires that SML be granted permission to continue its Gulf/Intercoastal service. In any event no unfair competition would result to any exclusively domestic operator nor would there be prejudice to the objects and policy of the Act, since SML offers the only general cargo service in the trade, a large number of shippers are served, and SML's carryings have been substantial. Id. (551).

The "grandfather" clause of section 805(a) requires that permission be given to subsidy applicant for its Pacific/Gulf intercoastal service. In addition, there is no evidence of unfair competition since the applicant offers the only general cargo service in the trade, a large number of shippers are served and the applicant's caryings have been substantial. Id. (551).

—Intervention and hearing

Examiner properly denied motion of intervenor domestic operators to require subsidy applicant to produce in section 805(a) proceeding, traffic data from 1950 to date, rather than from 1951, where the work and expense entailed would be great and the value of such additional data would be disproportionate to such work and expense. Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service, 140 (142).

Where applicant requests permission to carry cargo between the Pacific coast and Hawaii on vessels which would not proceed beyond Guam, whereas, before the hearing, it requested permission to perform the transportation between the Pacific coast and Hawaii as part of a service that would include calls in the Far East, the difference is insufficient to warrant a finding that the operation proposed is outside the scope of the authorized hearing. Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii, 287 (294).

The burden of proving the statutory requirements of section 805(a) is upon the applicant, and the domestic operator has only the burden of rebutting the prima facie proof required by section 805(a). The Board and its predecessors have indicated a special concern for the protection of coastwise and intercoastal operators. Doubts should be resolved in favor of the domestic operator. Id. (297).

The status of Oceanic's (subsidized subsidiary of Matson) permission with respect to Matson's domestic services is irrelevant to the question of whether Matson is operating "exclusively" in the domestic coastwise or intercoastal trade. To the extent that Matson is an operator in the California/Hawaii service it is clearly entitled to the protection of section 805(a) and has standing to oppose application of subsidized operator for permission to call its vessels at Hawaii on unsubsidized transpacific voyages. Id. (297).

An applicant may not, in a petition for reconsideration, request permission under section 805(a) of the Merchant Marine Act of 1936, for a service substantially different from that in the original application, upon which public hearings were held. The denial is without prejudice, however, to the filing of another application. Isbrandtsen Co., Inc.—Subsidy, E/B Round The World, 483 (484).

Proceedings under section 805(a) will be remanded, where the Board needs a more complete record to determine the controversy on the merits, though a remand would afford a protesting intervenor a second opportunity to establish his case. T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 531 (534).

Whether section 605(a), which relates solely to the Board's authority to pay subsidy, prohibits such payment on a particular voyage which includes a domestic leg is, like other issues, to be considered by the Board precedent to tender of a contract. It cannot be collaterally attacked in an 805(a) proceeding. States Marine Corp.—Sec. 805(a) Application, 537 (550).

—Prejudice to objects and policy of the Act (See also Competition to domestic operators, infra, and single voyages; unopposed applications, supra)

Since no exclusively domestic operator carried general cargo intercoastally eastbound to Norfolk and Baltimore, it cannot be found that subsidy applicant's service to these ports would result in the unfair competition proscribed by section 805(a). Nor would granting of permission to serve these ports be prejudicial to the objects and policy of the Act. Such permission, like all grants of section 805(a) permission, save where grandfather rights are concerned, may be withdrawn where changed conditions warrant. Isbrandtsen Co., Inc.—Subsidy, E/B Round The World, 448 (461).

Continuation of intercoastal service from Puerto Rico to New York by subsidized operator would be prejudicial to the objects and policies of the Act,

although the competing operator is not exclusively engaged in domestic trade because it calls at the Dominican Republic, where the competitor engages primarily in domestic trade; the carryings of the subsidy applicant have been negligible and are not needed to constitute a successful round-the-world service; and the competitor would and could accommodate the cargoes carried by the applicant without impairing the requirements of the Puerto Rican shippers. Id. (462).

Participation by subsidized operator in Gulf-North Atlantic bulk trade would be prejudicial to the objects and policy of the Act, where applicant is a relative newcomer to the trade whereas the intervenors have been in the trade for many years; applicant completely neglected this trade for over a year; intervenors have served applicant's principal shippers, apparently satisfactorily; the trade could be adequately served by intervenors without the contribution of applicant; and applicant's carryings have been substantial. Id. (463, 464).

A charter will not be barred by the provisions of section 805(a) as prejudicial to the objects and policy of the Act on the ground that the American-flag tramp fleet is a vital part of the American merchant marine and that to permit the charter would deprive an unsubsidized tramp vessel of needed cargo, where it is shown that the only available tramp vessel was refused because of the inadequacy of capacity for charterer's requirements, it was unavailable at the time of the hearing, and no other tramp vessel was available. Oceanic S.S. Co.—Sec. 805(a) Application, 560 (562).

Application for written permission under section 805(a) of the Merchant Marine Act of 1936 to continue domestic water carrier operations (automobiles from Detroit to Buffalo and Cleveland) in the event of an award of a subsidy contract was granted by the Board where the applicant had been engaged for many years in such operations; denial of the application would result merely in the deactivation of applicant's carriers and the reactivation of a competitor's carriers, which would not further the policy of the Act; and the principal shipper would be denied his choice of carriers. T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 666 (672).

—Single voyages, unopposed applications

Application by subsidized operator for section 805(a) permission for its parent intercoastal company to operate the S.S. Lurline on one voyage in January, carrying passengers and their automobiles between San Francisco and Seattle, Seattle and Hawaii, and Seattle and ports in California via Hawaii, would not result in unfair competition to any exclusive domestic operator, or be prejudicial to the objects and policy of the Act, where the vessel is regularly engaged in the California-Hawaii passenger trade; there is a lull in January but a demand for a voyage between the ports in question; and by granting the application the operator would avoid the possibility of laying up the vessel. Oceanic S.S. Co.—Sec. 805(a) Application, 505 (506).

Application under 805(a) to engage in one intercoastal voyage carrying a full cargo of lumber from North Pacific ports to North Atlantic ports was granted, upon finding that it would not result in unfair competition to carriers operating exclusively in domestic service, and would not be prejudicial to the objects and policy of the Act. Moore-McCormack Lines, Inc.—Sec. 805(a) Application, 523.

Grant of applications of American President Lines under section 805(a) to carry passengers, automobiles and household goods, booked by MSTS, from Hawaii to California on the S.S. President Hoover on two voyages would not result in unfair competition to any exclusive domestic operator, or be prejudicial to the objects and policies of the Act. APL carries passengers between California and Hawaii on two vessels and has pending an application under 805(a) to add a

third vessel, and Matson does not object to the single voyages provided they are without prejudice to the position of any party in APL's "third vessel" application. American President Lines, Ltd.—Sec. 805(a) Application, 535; 631; 646.

Under section 805(a) single voyages of vessels owned by subsidized operator, and time chartered to intercoastal operator, to carry lumber from North Pacific ports to Gulf or North Atlantic ports, would not result in unfair competition to any exclusively domestic service, or be prejudicial to the objects and policy of the Act. The intercoastal operator has tried unsuccessfully to obtain an appropriate vessel for the service and no exclusively domestic operator has opposed the application. Moore-McCormack Lines, Inc.—Sec. 805(a) Application, 629; 644.

Application for written permission under section 805(a) of the Merchant Marine Act of 1936 for a single voyage to carry lumber from Pacific ports to North Atlantic and Gulf ports, was granted by the Administration where no intervenor appeared after proper publication of notice and no exclusively domestic operator had indicated opposition thereto. Farrell Lines, Inc.—Sec. 805(a) Application, 659.

Application for written permission under section 805(a) of the Merchant Marine Act of 1936 for a single voyage in intercoastal service, carrying general cargo, was granted by the Administrator where no intervenor appeared after proper publication of notice, and the regular vessels of the steamship line to which the vessel in question was to be subchartered were unable to meet the needs of shippers. Moore-McCormack Lines, Inc.—Sec. 805(a) Application, 663 (664).

Permission under section 805(a) of the Merchant Marine Act of 1936 granted where the service (Gulf/Hawaii) appeared to be vital to the economy of Hawaii, no party protested, and there was no indication that continuance of the service would result in unfair competition to any other domestic operator. Isthmian Lines, Inc.—Subsidy Applications, 677 (710).

Application for written permission under section 805(a) for a single voyage to carry lumber from one Pacific port to North Atlantic ports was granted where no intervenor appeared after proper publication of notice, no exclusively domestic operator objected, and the vessel in question was required to meet the needs of shippers. Farrell Lines, Inc.—Sec. 805(a) Application, 756.

Permission under section 805(a) granted to subsidy applicant for the continuance of operation, by an affiliate, of a tanker in intercoastal trade where the applicant could not divert cargo from the operation because its vessels were not suitable, U.S. Coast Guard regulations would prohibit applicant's vessels from carrying the type of cargo involved, and no exclusively domestic operator opposed the continuance of the operation. States Marine Lines, Inc.—Sec. 805(a) Application, 763.

Application for permission under section 805(a) for a vessel under time charter to engage in one intercoastal voyage, carrying lumber from Pacific ports to North Atlantic ports, was granted, since no unfair competition to anyone operating exclusively in the intercoastal trade would result and no prejudice to the objects and policy of the Act existed, where the charterer had been unable to obtain any other suitable vessel for the particular sailing, the normal pattern of scheduling in the charterer's intercoastal service would not be increased and no party intervened in opposition. Moore-McCormack Lines, Inc.—Sec. 805(a) Application, 766.

Application for written permission under section 805(a) for a single voyage, carrying lumber from North Pacific ports to Atlantic ports, was granted where no intervenor appeared after proper publication of notice, no other suitable vessel was available, and the sailing would not increase the normal pattern of

scheduling in the charterer's intercoastal service. Moore-McCormack Lines, Inc.--Sec. 805(a) Application, 799.

INTERCOASTAL SHIPPING ACT, 1933. See also Tariffs.

The charging and demanding of rates for shipment from Florida to Puerto Rico of dismantled aluminum plant, different from those specified in tariff, are in violation of section 2 of the Intercoastal Shipping Act of 1933. Aluminum Products of Puerto Rico *v.* Trans-Caribbean Motor Transport, Inc., 1 (XI).

Under section 3 of the Intercoastal Shipping Act of 1933 the burden is upon the carriers to prove that their rates are just and reasonable. U.S. Atlantic and Gulf/Puerto Rico Rate Increase, 426 (427); General Increases in Alaskan Rates and Charges, 486 (495).

Failure of carrier to state separately in its tariff charges for ocean freight and terminal services (and to specify docks at which it called) resulted in a violation of section 2 of the 1933 Act and section 18 of the 1916 Act, particularly when it calculated and collected such charges. Aleutian Homes, Inc. *v.* Coastwise Line, 602 (612, 613).

Section 18 of the 1916 Act and section 2 of the 1933 Act, which require the filing of rates, rules and regulations relating to terminal services, apply only to common carriers by water in interstate commerce, not to an independent terminal. Terminal operators as such are not required by the 1933 Act to file their tariffs with the Board or to meet statutory requirements of that Act. Of course, such operator may violate sections 15, 16, or 17 of the 1916 Act, and may be liable for proven damages resulting therefrom. Aleutian Homes, Inc. *v.* Coastwise Line, 602 (613).

Where carrier had the duty to publish lawful terminal charges and apply them lawfully but failed to do so—rather in effect adopting the terminals' tariffs, misapplying them, and collecting overcharges—the carrier alone may be held responsible for the overcharges. Id. (613).

JURISDICTION. See also Discrimination; Forwarders and Forwarding; Reparation.

Under Reorganization Plan No. 21 of 1950 determinations of essentiality of services, routes, and lines under sections 211(a) and (b) were assigned exclusively to the Secretary of Commerce to be exercised in consonance with the general maritime policy laid down in section 101 of the 1936 Act. These determinations, delegated to the Administrator, may be appealed only to the Secretary and not to the Board. States Marine Corp.—Subsidy, Tri-Continent Service, 60 (62).

While the Board has been allocated, under Reorganization Plan No. 21 of 1950, the functions of making, amending, and terminating subsidy contracts, it is clear from the congressional hearings that the Board determinations are limited and circumscribed, in effect, by route patterns and requirements as established by the Administrator under section 211 of the 1936 Act. The Secretary has no power to alter, limit, modify, or review Board determination made under sections 605(c) or 601(a) of the Act. Id. (63).

While the Board, after advisory hearings under section 605(c), determines whether that section is a bar to award of subsidy, other determinations to be made by the Board under section 601(a) may operate as a bar 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 findings as to essentiality of service 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. Id. (63).

In discharging its duties under section 605(c), where the precise route, the sailing frequencies thereon, or types of vessels to be operated thereon, is an issue in relation to the purposes and policies of the 1936 Act, the Board is obliged to determine the issues without regard to the Administrator's section 211 determinations, and the Board's findings are final. Where the determinations are in conflict, 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 advice of the Board or on the record compiled in the section 605(c) proceedings, alters his prior determination. Id. (63, 64).

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 exercise of delegated legislative power whereby the Administartor defines the limits within which the Board may award subsidy. Section 211 determinations 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. Id. (64).

The Maritime Board is not rigidly limited in its 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 a proceeding. A provision in the Interstate Commerce Act similar to Section 22 of the 1916 Act has been interpreted to require the Interstate Commerce Commission to investigate a complaint and take proper action on its own motion, provided the respondent has a full opportunity to make its defense; and to require the Commission to look to the substance of the complaint rather than its form, without being limited by strict rules of pleading and practice which govern the courts. The Maritime Board 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. City of Portland *v.* Pacific Westbound Conference, 118 (129, 130).

While it was unnecessary for the Board to decide whether it was estopped from declaring that it had no jurisdiction over shipments originating in Canada and destined for South America because of a position it allegedly took in court, the Board would point out that its jurisdiction is as set out in statute, and cannot be enlarged or divested by any act or omission of its own. American Union Transport *v.* River Plate & Brazil Conferences, 216 (224).

The United States Warehouse Act, which relates to the storage of grain as opposed to its movement, does not limit the jurisdiction conferred on the Board by the 1916 Shipping Act. Thus a terminal operator, although licensed under the Warehouse Act, is subject to the Board's jurisdiction. D. J. Roach, Inc. *v.* Albany Port District, 333 (334).

Board has jurisdiction over a person engaging in terminal activities, as an "other person" within section 1 of the Shipping Act of 1916. Company which leases and operates loading galleries, chutes, and other paraphernalia which constitute the only means by which grain vessels operating as common carriers by water in interstate and foreign commerce are loaded at the port in question, is a terminal operator. Id. (334, 335).

Respondents are common carriers and [terminal operators] "other persons" subject to the Act, and the Board has exclusive jurisdiction over their terminal operation agreements and the truck loading and unloading tariffs issued thereunder. Approval by Congress of the New York-New Jersey Waterfront Commission did not convert that interstate compact to federal law and thereby supersede the primary and exclusive jurisdiction of the Board as set forth in the 1916 Shipping Act. Empire State Highway Transportation Assn. *v.* American Export Lines, Inc., 565 (591).

Operator of grain elevator whose grain storage activities are regulated by the Secretary of Agriculture under the Warehouse Act is subject to the jurisdiction of the Board in its terminal activities under the Shipping Act of 1916. Agreement Nos. 8225 and 8225–1, Between Greater Baton Rouge Port Commission and Cargill, Inc., 648 (654).

The Board has jurisdiction under section 15 of the Shipping Act of 1916 over agreements between common carriers where the agreements cover both the foreign commerce of the United States and the intimately related foreign commerce of Canada. Oranje Line *v.* Anchor Line Ltd., 714 (728).

In exercising jurisdiction under section 15 of the Shipping Act with respect to agreements embracing the foreign commerce of other nations as well as that of the United States, the Board does not assert regulatory power over the foreign commerce of any other nation. Approval of an agreement does not affect the authority of a foreign country over its commerce, although it does exempt the approved agreement from the provisions of the antitrust laws. Id. (728, 729).

LEASES. See Agreements under Section 15; Terminal Facilities.

LOADING AND UNLOADING. See Jurisdiction; Practices; Tariffs; Terminal Facilities.

MERCHANT MARINE ACT OF 1936. See Intercoastal Operations; Jurisdiction; Pooling Agreements.

MERCHANT SHIP SALES ACT OF 1946. See Charter of War-Built Vessels.

MONOPOLY. See Agreements under Section 15; Practices.

NEW YORK-NEW JERSEY WATERFRONT COMMISSION. See Jurisdiction.

OPERATING-DIFFERENTIAL SUBSIDIES. See Subsidies, Operating-Differential.

POOLING AGREEMENTS.

A pooling agreement among three American-flag and nine foreign-flag lines which places a ceiling on the amount of cargo that can be carried by American-flag lines, without guaranteeing them a minimum, is not commensurate with the purposes, policy and provisions of the Shipping Act of 1916. Consequently, where two of the American-flag lines involved are subsidized and, under the terms of the subsidy contracts, they may participate in a pool only with the consent of the Administrator, such consent will be denied to a pooling agreement whereby American-flag vessels are allocated 34.5 percent of rubber originating from Thailand, unless the agreement is modified to provide that such vessels will carry "not less" than 34.5 percent of the cargo covered by the agreement. American President Lines, Ltd., 323 (324).

PORT EQUALIZATION.

Where port equalization charges as between Puget Sound port and California port on shipments of dynamite originating in Puget Sound area will result in unjust discrimination if carrier, as indicated by the record, should resume direct service from Puget Sound to the Philippines, the Board must inform itself as to whether carrier will institute such service. The Board has an affirmative duty to investigate as well as to decide, and is not limited by the scope of court order (which allowed Board to modify findings of fact, or make new findings by reason of additional evidence, or modify or set aside its prior order), or its own order reopening the proceeding to take additional evidence, or of the complaint which involved past equalization practices. City of Portland *v.* Pacific Westbound Conference, 118 (129, 130).

Where traffic in explosives would move, but for equalization, through Blake Island, which is the explosives loading area for vessels calling at Seattle, the Board's jurisdiction under Section 22 to determine whether there is unjust discrimination between ports does not depend on whether complainant Port of Seattle is injured, rather than another port area. Id. (130).

Where complaint is brought by Northwest ports alleging discrimination as the result of port equalization charges between such ports and California port, the discrimination is not justified because a foreign-flag carrier only would serve Northwest ports. 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 Shipping Act contemplate such discrimination. The Board must decide the issue in the same way as if the foreign-flag carrier were the equalizing carrier and the American-flag carrier the one unable to procure cargo because of equalization. Id. (131).

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 Shipping Act and detrimental to the commerce of the United States as contrary to section 8 of the Merchant Marine Act of 1920, if accomplished by transshipment to the same extent as if accomplished by equalization. Id. (134).

PORTS. See also Agreements under Section 15; Port Equalization; Terminal Facilities.

The port of San Francisco is the "nearest port" with respect to the ports of Alameda, Oakland, Richmond, and Stockton, within the meaning of section 205. Encinal Terminals *v.* Pacific Westbound Conference, 316 (320).

A conference agreement which prevents individual lines from extending any service to the ports of Oakland, Alameda, Richmond and Stockton, California, at the lower rates established for the "nearest port" (San Francisco) and compels the line to charge higher local rates, is clearly unlawful under section 205. Id. (321).

Section 205 does not authorize the Board to require an individual carrier to extend any service to particular ports. It is directed only to the prevention of an individual common carrier from extending service to ports described in the section. Id. (321).

Where conference carriers' action is held in violation of section 205 of the 1936 Act as preventing carriers from serving ports at same rate charged at "nearest port," it becomes unnecessary to consider allegations of violations of sections of the 1916 Act. Conference carriers must modify their tariff to permit members, at their individual discretion, to serve complainant ports at the same rates applicable from the "nearest port." Id. (321, 322).

PRACTICE AND PROCEDURE. See also Charter of War-Built Vessels; Evidence; Intercoastal Operations (Sec. 805(a)); Subsidies, Operating-Differential.

—Notice requirements; Bills of particulars

Minimum requirements stated in section 5(a) of the Administrative Procedure Act do not necessarily contemplate issuance of bills of particulars on demand of a respondent to an agency proceeding. Granting of bills of particulars is discretionary. Pacific Coast European Conference—Limitation on Membership, 39 (41, 42).

The Board, in the exercise of its discretion, has authorized filing of requests for bills of particulars in proceedings commenced by complaint but not in Board-initiated proceedings. Id. (42).

The standards set by section 5(a) of the Administrative Procedure Act with respect to notice of the issues of law and fact with which a party is to be confronted in administrative proceedings are minimum standards; when those standards are satisfied, the method of protecting a respondent from surprise as a result of ambiguous pleading is in the sound discretion of the Board, and the Board may, in the exercise of such discretion, authorize or deny demands for bills of particulars. Id. (42).

Absence of a rule for a bill of particulars does not 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 the matters alleged by informal request, in prehearing conference, by motion to terminate the proceeding, 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 issues and does not extend to amplification of ultimate facts in pleadings. Id. (42, 43).

The moving party 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. Id. (43).

A Board order requiring a conference to show cause at a hearing before an examiner why the Board should not (1) find that effectuation without Board approval of an agreement to condition admission of a new member to its withdrawing from pending litigation in which its position is opposed to that of the conference, is in violation of section 15 of the Shipping 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, meets the requirements of section 5(a) of the Administrative Procedure Act to give sufficient notice of the issues of fact and law with which a party is to be confronted. A request by the conference for a bill of particulars will be denied. Id. (43).

—Objections to evidence

Public Counsel may properly object, on grounds of irrelevancy, to questions put to a witness who is an official of the Board/Administration. By making such an objection, Public Counsel does not thereby indicate partisanship or become an advocate of a particular partisan interest any more than if he objected to the testimony of someone else. The official had no personal interest in the proceeding, and even if Public Counsel raised objections on his behalf, there could be no conflict of interest on the part of Public Counsel. Waterman S.S. Corp.—Sec. 805(a) Application, 768.

—Oral argument

There has been no violation of the Board's Rules or of the Administrative Procedure Act or of section 23 of the Shipping Act where, on the question of whether an amendment to a conference brokerage rule was unlawful as an unapproved agreement, the Board gave notice to the conference that the issue would be decided after oral argument and oral argument was held, at which counsel for the conference appeared. Pacific Coast European Conference—Payment of Brokerage, 65 (71, 72).

—Record, matters included in

Motion to strike portion of exceptions which alluded to an alleged legal opinion of the General Counsel of the Administration, not a part of the record, will be granted. Boston Shipping Corp., 372 (377).

—Rule Making

Section 2(c) of the Administrative Procedure Act defines a "rule" as "the whole or any part of any agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy." Action of the Board which implements, interprets, or prescribes law or policy for the future, whether such action is of general or particular applicability, is "rule making" under the Act. Proposed Rules Governing Freight Forwarders, 328 (329).

While it was unnecessary for the Board to determine whether the 1916 Act itself, despite the lack of express statutory authority, necessarily includes the power to make rules in a proper proceeding, in view of the language of the Supreme Court in California *v.* United States, 320 U.S. 577, 582, the Board believes that the rule-making power is implicit in the regulatory powers vested in it. Id. (329).

Section 204 of the Merchant Marine Act of 1936 confers on the Board general rule-making power with respect to the regulatory provisions of the 1916 Act. To the extent that the 1916 Act vests powers and duties in the Board to regulate the activities of freight forwarders the Board has authority to promulgate rules and regulations with respect to the business practices of forwarders. Id. (329, 330).

As the administrative agency charged under the 1916 Act with the regulation of the shipping industry, the Board has the power, where practices in conflict with regulatory provisions of the Act are found, to issue rules prohibiting such practices. Id. (329).

PRACTICES. See also Brokerage; Rates; Tariffs; Terminal Facilities.

Where the tariff involved provides that charges shall be determined on the basis of cube or weight, whichever yields the greater revenue, carrier's failure to properly determine the cube is clearly an unjust and unreasonable practice within the meaning of section 18 of the Shipping Act of 1916. Further, an "exchange fee" for transfer of funds from Puerto Rico back to the United States where no payments were made to carrier in Puerto Rico, and a "heavy lift cargo" charge where carrier failed to show that any piece weighed in excess of 2,000 pounds, are unjust and unreasonable practices within the meaning of this section. Aluminum Products of Puerto Rico *v.* Trans-Caribbean Motor Transport, Inc., 1 (X).

Provision in tariff for extra charge for loading or unloading cargo weighing more than 6,000 pounds per piece, such charge to be negotiated, is an unjust and unreasonable practice in violation of section 17 of the Shipping Act, as it provides no standards by which terminals, truckers and the general public can be guided in knowing what the charge will be or how it will be determined. Empire State Highway Transportation Assn. *v.* American Export Lines, Inc., 565 (590).

Agreement for the rendering of stevedoring services by a grain elevator operator on a monopolistic basis would be detrimental to the commerce of the United States and would be an unjust and unreasonable practice relating to the receiving, handling, and storing of property in violation of section 17 of the Shipping Act of 1916, since the responsibility for proper loading and seaworthiness of a vessel rests with the master and to prohibit the vessel from participation in the selection of a stevedore would require strong justification; there is no evidence that such a monopoly will improve the efficiency of the grain elevator involved; and the stevedoring activities take place exclusively on the vessel and not on the

grain elevator property. Agreements Nos. 8225 and 8225–1, Between Greater Baton Rouge Port Commission and Cargill, Inc., 648 (655, 656).

PREFERENCE AND PREJUDICE. See also Common Carriers; Contract Rates; Rates; Terminal Facilities.

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. Where the record fails to show that any actions of carrier subjected shipper to any undue or unreasonable prejudice or disadvantage in relation to any other shipper, section 16 of the Shipping Act of 1916 has not been violated. Aluminum Products of Puerto Rico, Inc. *v.* Trans-Caribbean Motor Transport, Inc., 1 (VII).

In summarily denying reefer space for bananas to certain shippers who had requested space and in favoring others, a carrier would be guilty of discriminating against the former and subjecting them to prejudice and disadvantage with reference to cargo space, while the latter would be preferred. Banana Distributors, Inc. *v.* Grace Line Inc., 615 (624).

Where no valid reason [the carrier alleged that bananas of different shippers could not be commingled] justifies the refusal of space to qualified shippers of bananas and the preference accorded the chosen shippers, the discrimination will be held unjust in violation of section 14–Fourth and the prejudice and disadvantage will be held undue in violation of section 16–First. Id. (625); Philip R. Consolo *v.* Flota Mercante Grancolombiana, 633 (638, 639).

PUBLIC LAW 591 81st CONGRESS. See Charter of War-Built Vessels.

RATES. See also Agreements under Section 15; Contract Rates; Intercoastal Shipping Act, 1933; Tariffs.

—Allocation of costs

Freas formula as a proper method of segregating terminal costs and carrying charges will be approved as not unreasonable or unjust within the meaning of section 17 of the Shipping Act. provided that charges against the vessel for use of working areas in connection with the terminal's handling operation are assigned to handling rather than dockage charge, and that the service charge be so defined that it will fall on those persons for whom services have been performed. Terminal Rate Structure—Pacific Northwest Ports, 53 (54).

Approval of Freas formula for segregating terminal costs an carrying charges and apportioning such costs and charges to the various wharfinger services is not rate making. The regulations and practices of terminal operators must conform to a standard of justice and reasonbleness as required by section 17 of the Shipping Act. A system of cost accounting which may result in assessment of charges against persons not directly benefited by services rendered may be an unjust and unreasonable practice and is subject to the Board's jurisdiction. Id. (54, 55).

Board has the power under section 17 to find that public terminals are entitled to a fair return on investment. A terminal practice of cost allocation whereunder no allowance is made for terminal equipment maintenance, depreciation, and replacement, and which threatens future steamship operations and port efficiency is prima facie unreasonable and a matter for the Board's attention. Id. (57).

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. Id. (59).

—Commodity rates

Different rate treatment, i.e., a lesser increase, is justified for transportation of raw sugar from Hawaii based upon competition with local beet sugar and decreased handling costs for sugar. General Increase in Hawaiian Rates, 347 (353, 358).

Different rate treatment, i.e., a lesser increase, is justified for transportation of automobiles and strapped lumber to Hawaii because they are easily and speedily loaded and because the carrier is trying to convert a lumber shipper to the method of shipping strapped lumber. Id. (353, 357, 358).

A lower rate on transportation of tin plate to Hawaii is justified where the commodity makes a substantial contribution to vessel operating and overhead expenses, and an unregulated tramp carrier is carrying full shipments of tin plate to Hawaii and unless the competition is met ratewise, loss of the contribution would result. Id. (353, 357).

A lower rate on canned pineapple as compared with other commodities requiring the same services is unjust and unreasonable where the movement of pineapple is substantial and the rate applied to other commodities would, if applied to pineapple, produce substantial revenue. The increase in transportation cost would result in a retail increase of less than 1/10 of one percent per can, and thus there is no competitive reason for favoring canned pineapple. Id. (357).

While conference rates are not to be used as a device for equalizing the competitive position of domestic manufacturers of wood products and their foreign competitors, as a corollary, the existence of competitive disadvantages unrelated to transportation circumstances may not be used to cloak the imposition of prejudicial, preferential, or discriminatory rate structures upon competitive commodities or shippers. Nickey Brothers, Inc. *v.* Manila Conference, 467 (477).

As in the case of the ICC, the Board has no power to adjust rates for the purpose of retarding or promoting the progress and development of any particular commercial enterprise, and any superiority or commercial advantage which one commodity or shipper may have over another may not be urged as a reason for denying a nonprejudicial adjustment of freight rates. The Board is therefore concerned only with the impact of an assailed rate differential, and the lawfulness of the differential must be determined with regard to surrounding transportation circumstances and conditions. Id. (477).

Where generally in the foreign commerce of the United States the rates on shipping logs do not exceed those on lumber, except as here from the Philippines to Gulf/Atlantic ports, a rebuttable presumption is created that to the extent that rates on logs exceed those on lumber, the differential is undue and unjust unless there are justifiable transportation circumstances to indicate otherwise, Id. (478).

Rates on Philippine mahogany logs from the Philippines to Gulf/Atlantic ports are unduly prejudicial to, and unjustly discriminatory against, such logs and the receivers thereof, and unduly preferential of Philippine mahogany lumber and the shippers and receivers thereof, in violation of sections 16-First and 17, to the extent rates on logs exceed rates on bundled lumber where, as to the value of the commodities, the claim experience of the carriers, and the cost of service, the transportation conditions for logs are no less favorable than those for lumber. The only disabilities attributable to logs are their incompatibility with other cargoes because of their wet condition when loaded, and the possibility of minor ship damage upon loading, and these disabilities were not proven to be detrimental to the only conference carrier presenting evidence. Id. (478).

Rates in tariff found to be unreasonably high in relation to other rates and therefore detrimental to commerce where the record discloses that the goods (iron and steel) move in larger volume than other metals moving at a lower rate, and that shipments are generally similar to the other metals in handling characteristics. Empire State Highway Transportation Assn. *v.* American Export Lines, Inc., 565 (590).

—Eastbound-westbound rates

Proposed increased rate on eastbound refrigerated cargo which would be less than increased rate on such cargo westbound is justified by the fact that there is far less demand for eastbound space and otherwise the cargo might be lost altogether. General Increase in Hawaiian Rates, 347 (353).

—Fair return

In determining reasonableness of proposed rates, the Board will consider (a) the value of the property necessarily devoted to the enterprise, (b) the rate of return which would be just and reasonable, and (c) the anticipated revenue tonnage in order to ascertain whether the return would approximate the fair return. General Increase in Hawaiian Rates, 347 (350).

Carrier is entitled to a return on its investment equal to that generally being made at the same time and in the same general area on investments in other businesses having similar risks. Its return should be sufficient to assure confidence in the financial integrity of the company so as to maintain its credit and to attract capital. Id. (357).

Under section 3 of the Intercoastal Act carriers are entitled to a fair return on the reasonable value of property at the time it is being used for the public. Neither the Board nor its predecessors has ever followed the operating-ratio theory which has been used in motor carrier rate cases by the ICC, where the ratio of operating revenues (and expenses) to investment in capital equipment is relatively large, i.e., four or five to one or better. Here, the carrier's ratio of revenue (and expenses) to capital investment is only slightly in excess of two to one, and the Board will not depart from its fair-return-on-fair-value standard previously used. General Increase in Alaskan Rates and Charges, 486 (495).

—Vessel and other property values

Where vessels were purchased at a time when their cost was considerably lower than they are at present and if the fleet were liquidated it would have twice the amount of its book value available for other investment, book value (under which proposed tariffs would yield an unreasonably high return), as the measure of the fair value of property devoted to the trades, is entirely unrealistic for use as a rate base. General Increase in Hawaiian Rates, 347 (356).

Depreciated reproduction cost (under which proposed tariffs would yield an unreasonably low return) of vessels alone does not provide an appropriate base for use as a rate base since it assumes for rate-making purposes that the carrier presenty has reproduced its capital assets. Id. (356).

Since proposed tariffs would produce net profits which are within the zone of reasonableness as applied to any of three proposed "fair values"—(a) market value plus "working capital" and "property other than vessels"; (b) an adjustment of (a) to eliminate claimed short term peak in vessel values; (c) average of book value and depreciated reproduction cost—and the increased rates are closely correlated to actual cost increases, they are just and reasonable. It is therefore unnecessary for the Board to determine with exactitude the "fair value" of the carrier's property to establish a rate base. Id. (357).

In order to carry out its duty under the 1916 and 1933 Acts to determine whether rates are just and reasonable, the Board must have before it a record

of the operating and financial results of the common-carrier operations, including a full disclosure of all relevant and material data which will aid the Board in making an accurate determination of the value of carrier assets devoted to the service and properly includable in a rate base upon which to determine a fair return. U.S. Atlantic and Gulf/Puerto Rico Rate Increase, 426 (429).

In ascertaining fair value of vessels for purposes of a rate base, the Board will consider as excessively high the use of net book value weighted 30 percent and reproduction cost depreciated weighted 70 percent, since this gives unreasonable emphasis to hypothetical reproduction costs where the record shows that the vessels will probably not be reproduced and that the carrier has historically never operated with newly constructed tonnage. Furthermore, book value alone is unrealistic. General Increase in Alaska Rates and Charges, 486 (497).

Where owned property other than vessels is appraised at $684,418.00 although the net book value is only $183,445.00, and the value of much of the property has been charged off as depreciation in operating expenses, and certain of this equipment is depreciated in only one or two years and is treated more as an expense item than as capital equipment, the proper valuation of the property is book value. Id. (498).

In ascertaining fair value for a rate base, the Board will include a fair value for vessels chartered from the Government rather than allowing the charter hire as an item of operating expense. Such inclusion is more realistic and less subject to market fluctuations. However, it would be improper to allow a return on the value of non-owned property and at the same time allow the cost of using such property, i.e., charter hire, to remain as an operating expense. Therefore, projected operating expenses will be reduced by the amount of annual charter hire. Id. (498).

Neither the Board nor any of its predecessors has ever included a separate "going concern value" in a rate base; on the contrary, such a separate value in rate proceedings has been specifically rejected. The Board will not include such a value in the rate base. Id. (500).

—Working capital

For rate-base purposes a calculation in accordance with General Order No. 71 is a fair and reasonable valuation of working capital, no sound reason justifying a higher value having been presented. General Increase in Alaskan Rates and Charges, 486 (500).

REBATES. See also Devices to Defeat Applicable Rates.

Where, under an arrangement by which freight-forwarding service and brokerage service, if any, was to be performed for a consignee without compensation, the forwarder relying upon the carrier for full compensation, the consignee was having property transported at less than the rate of transportation therefor, together with the cost of the incidental services in connection therewith. This is the evil which Congress had in mind in providing, inter alia, in section 16 of the Shipping Act that it shall be unlawful for any consignee by any unjust or unfair device to obtain transportation at less than rates otherwise applicable. Waiving of a freight-forwarding fee from the consignee and collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent the brokerage service included the cost of freight-forwarding services, and therefore an "unjust or unfair device or means." American Union Transport *v.* River Plate & Brazil Conferences, 216 (222).

Where freight forwarder performed services for consignee gratis and expected compensation from carriers in the nature of brokerage payments, the payment of such brokerage would have resulted in an indirect rebate to the consignee which

the Board cannot permit. Even if brokerage were otherwise recoverable, the Board would not order it paid where such payment would countenance a violation of section 16 and thus be illegal. Id. (223).

Nothing in the Shipping Act exempts from the provisions of section 16 any designated shipper, such as a government, or class of shippers. Id. (223).

To the extent individual substantially owned and effectively controlled a forwarding company, collection of brokerage payments by the company on the individual's shipments in the names of his 100 percent owned corporations inured to the benefit of the shipper. To the extent of such benefit there has been an obtaining of transportation by the shippers at less than rates otherwise applicable. It is not necessary that there be complete ownership and control of the forwarder by the shipper in order for such collection of brokerage to be an unlawful rebate under section 16. The prohibitions of section 16 expressly apply to "indirect" rebates. It has been held that if the forwarder-shipper relationship is sufficient to create in the forwarder a beneficial interest in a shipment, collection of brokerage by the forwarder would be a violation of section 16. 400 (407, 408).

The fact that the actual amount of brokerage which the record expressly proves to have been collected may be small has no bearing on the issue of whether or not such collection is unlawful under the Act or appropriate Board orders. Id. (407).

Violations of the first paragraph of section 16, 16-Second and General Order 72 have been clearly shown where freight forwarder (controlled by an individual) collected brokerage on shipments of companies wholly owned by the same individual; two witnesses testified that the individual knew such collection was illegal; forwarder made knowingly false statement in application to the Board for registration under General Order 72 that it was not affiliated with or engaged in any other business; and forwarder had been furnished with a copy of General Order 72 which clearly stated that it was unlawful for a forwarder to collect brokerage when it has a beneficial interest in a shipment or directly or indirectly controls or is controlled by the shipper or consignee. Id. (408, 409).

A shipper who forms a dummy freight forwarding corporation and indirectly siphons off forwarding fees by providing a job and salary for a relative, in effect pays an ocean freight which is diminished to the extent of the brokerage payment to the forwarding corporation, and thus violates section 16 and the Board's General Order 72, even though there is no evidence to show that any of the brokerage fees received by the corporation were turned over to the shipper. Brokerage on Ocean Freight—Max Le Pack, 435 (439, 440).

Collection of brokerage by freight forwarding corporation from carriers on shipments made by companies, where the companies were owned by individuals who also owned and controlled the forwarding corporation, was a forbidden rebate and violated section 16 of the Shipping Act, and General Order 72. Id. (442).

REPARATION. See also Findings in Former Cases.

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, and thus may permit a carrier to seek reparation against a shipper for violation of section 16. Aluminum Products of Puerto Rico *v.* Trans-Caribbean Motor Transport, Inc., 1 (2).

Shipper is not entitled to reparation under section 22 of the Shipping Act of 1916, even though the tariff filed by carrier and its actions in connection with the shipments involved were violative of the Shipping Act of 1916, and the Inter-

coastal Shipping Act of 1933, where shipper has not shown that it has paid in excess of applicable tariff charges or has otherwise suffered injury as a result of such violations. Id. (XI).

Under section 22 of the 1916 Act, cause of action for carrier's overcharges accrues when the freight charges are fully paid, not at the time of delivery of shipments. The parties may not agree to waive or postpone the running of the statute. The expiration of the time limit not only bars the remedy but also extinguishes the right, thereby nullifying the jurisdiction of the Board over claims. Aleutian Homes, Inc. *v.* Coastwise Line, 602 (611, 612).

Under Section 22 of the 1916 Act, cause of action for carrier's overcharges accrues when the freight charges are fully paid, not at the time of delivery of the shipments. Both the Supreme Court and the Interstate Commerce Commission so held in cases decided under the Interstate Commerce Act when it—like the 1916 Act now—contained no language contrary to the settled rule that the time when a cause of action accures is when a suit may first be legally instituted upon it. Id. 611.

Application by carrier pursuant to Rule 6(b) of the Board's Rules to pay voluntarily to purchaser of goods reparation for freight charges was denied where the application of the rate was explained by the carrier to the shipper prior to acceptance of the shipment, carrier was obligated to charge the applicable rate, and there was no showing that the rate was unreasonable. Ketchikan Spruce Mills *v.* Coastwise Line, 661 (662).

Payment of reparation under the special docket procedure can be approved only upon an affirmative finding that the rate charged was in fact unreasonable, in the same manner as if the carrier were opposing the payment. The mere fact, without more, that the ultimate consignee would have routed the shipment via an alternative route, at a lesser total cost, does not justify the conclusion that the rate charged was unreasonable. Id. (662).

RETALIATION.

Evidence of confusion and misunderstanding on the part of both the shipper and the carrier as to rate to be charged for shipment of dismantled aluminum plant is insufficient to show that there was any arrangement or agreement to carry the cargo at rates other than applicable tariff charges, in violation of section 14-Fourth of the Shipping Act of 1916; nor does the record indicate that any actions of respondent were retaliatory within the meaning of section 14-Third of the Shipping Act of 1916. Aluminum Products of Puerto, Inc. *v.* Trans-Caribbean Motor Transport, Inc., 1 (VII).

RULE MAKING. See Agreements under Section 15; Forwarders; Practice and Procedure.

SERVICE CHARGE. See also Freas Formula; Rates; Terminal Facilities.

In view of the high proportion of nonchecked cargo which moves through Pacific Northwest public terminals, reasonableness and justice require that a checking charge be assessed only when earned and only against the party for whom the service was performed. Charge for checking may not be included in a service charge. Terminal Rate Structure—Pacific Northwest Ports, 53 (55).

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. Id. (56).

"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. Id. (56).

Decision in Intercoastal S.S. Freight Assn. *v.* Northwest Marine Terminals Assn., 4 FMB 387, will not be reversed. Assuming the Board could properly set aside the report and order in this proceeding, there is no valid reason for so doing. Whether carriers are entitled to reparation from terminals does not depend upon whether the terminals have suffered a general deficiency in revenue. The principal portion of the report 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, was 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. The Board will not depart from that principle. The Board did not determine in Intercoastal 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. Id. (58).

A uniform service charge to be applied to California terminals not party to this proceeding may not be prescribed here. Id. (58, 59).

STEVEDORING. See Agreements under Section 15; Practices; Terminal Facilities.

SUBSIDIES, CONSTRUCTION-DIFFERENTIAL. [No Cases.]

SUBSIDIES, OPERATING-DIFFERENTIAL.

Accomplishment of the purposes and policy of the Act (§ 605(c)).

Where existing service is found to be inadequate, little need be said as to the required finding on accomplishment of the purposes and policy of the Act. Finding of inadequacy is the primary reason for making the second finding. Arnold Bernstein Line, Inc.—Subsidy, Route 8, 46 (50).

Assuming the contracts are awarded to both U.S. Lines and Matson Orient,, United States-flag vessels would carry a combined total of only 46.7 percent of the inbound and outbound liner movements on Route 12 if they go out with capacity loads and if cargo offerings do not exceed those of 1956. The foregoing is well within the grasp of United States-flag vessels on this service and additional vessels should be operated on the route in furtherance of the purposes and policy of the Act. Matson Orient Lines, Inc.—Subsidy, Route 12, 410 (415).

Granting of application for operating-differential subsidy for service in winter months would be consonant with the purposes and policy of the Merchant Marine Act of 1936, where United States-flag service on the routes in question is inadequate and the service proposed by applicant would increase United States-flag participation in the commercial movement. Further, unless the operation was allowed, applicant's vessels would be tied up during the winter months, with resulting unemployment and the jeopardizing of the open season service. Isbrandtsen Co., Inc.—Subsidy, Trade Route 32, 525 (529).

The policy of the Merchant Act of 1936 is "to foster the development of . . . a merchant marine" and the Board is concerned with that policy and not with an over-all transportation policy which would take into account the interests of railroads. T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 666 (670).

—Adequacy of service

(a) *In general*

United States-flag service is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, as amended, where there is no American-flag "combination passenger and freight vessel" service on the route in question, and participation by United States-flag carriers in both passenger and cargo carryings is small. Arnold Bernstein Line, Inc.—Subsidy, Route 8, 46 (49, 50).

In considering adequacy of service under section 605(c), determination of adequacy must be based on present and probable future conditions, and cannot be unduly concerned with conditions in the past. American President Lines, Ltd.—Increased Sailings, Route 17, 359 (368).

Present service on trade route by vessels of United States registry is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, where there has been a relatively low participation of United States-flag vessels in this trade and a high rate of United States-flag vessel utilization, particularly outbound. Adequacy refers to the "service *already provided* by vessels of United States registry in such service." Matson Orient Line, Inc.—Subsidy, Route 12, 410 (414, 415).

Adequacy or inadequacy should be determined on the basis of present requirements and not necessarily on the basis of earlier favorable section 605(c) determinations for other applicants which have indicated no immediate intention of commencing a service and which have not participated in this proceeding and made their intentions known. Waterman S.S. Corp.—Subsidy Route 21 Etc., 771 (788).

(b) *Bulk-type cargoes*

In determining adequacy of service, bulk-type commodities must be considered to the extent that they may reasonably be expected to be carried by liners. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (313).

Where, in the outbound portion of the Westbound Round-The-World service, for the period 1953 through 1956, bulk (nonliner) cargo carryings were small; on the inbound portions such carryings have been somewhat larger but have declined; and the subsidy applicant's participation in the nonliner carryings have been minor, and nothing in the record indicates a future trend toward significant bulk carryings on liner vessels in applicant's westbound Round-the-World service, only liner commercial cargo carryings will be considered in determining United States-flag participation on the route. Isthmian Lines, Inc.—Subsidy Applications, 677 (689).

In determining United States-flag participation in APL's RWW service, inclusion of coal traffic to Japan in liner commercial carryings would give an unrealistic and artificial picture of such participation. Japanese vessels carry the great bulk of the coal movement but the carryings are in many respects similar to nonliner tramp operations. In prior proceedings, these coal statistics were not excluded, but the Board is persuaded that their exclusion is proper in this case. Three-fourths of the annual coal movement should be eliminated from the total outbound traffic statistics in APL's RWW service. Id. (696, 697).

In proceedings under section 605(c) of the Merchant Marine Act of 1936 all movement of bulk-type nonliner cargoes will not be considered in determination of adequacy of American-flag service, in the absence of special circumstances which were not found to exist in this proceeding. Id. (702, 703).

(c) *50% test*

United States-flag participation in a trade of over 50 percent does not necessarily preclude a finding of inadequacy of United States-flag service. The 50 percent test is a general guide and must not defeat more cogent factors.

Where, although United States-flag participation in the present liner carryings in the Northwest/Far East service exceeded 50 percent, a tremendous—and growing—volume of bulk commodities is available in the Northwest, the ability of liners to convert these bulk-type cargoes to liner type is increasing, there is a comparatively small amount of free space on liners, and United States-flag vessel participation in this nonliner cargo movement is meager, the Northwest/Far East service, without the 10 to 16 annual sailings of the subsidy applicant, is not adequately served by vessels of United States registry. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (314, 315).

United States-flag service is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936 where it is apparent that its participation inbound, outbound, and overall is substantially below the general goal of 50 percent, that at no time in the past 4 years did such participation reach or exceed 50 percent, and there probably will be an increase in cargo in the future. Therefore, additional vessels should be operated in the service for the accomplishment of the purposes and policy of the Act. American President Lines, Ltd.—Increased Sailings, Route 17, 359 (370).

(d) *Outbound-inbound legs; segments of routes*

In view of the recognition by the Board and its predecessor that service to and from the Philippines, Hong Kong, Indochina, and Thailand is required to sustain the Atlantic/Straits service, it is proper in determining adequacy of United States-flag service for the Board and the Administrator, in a 605(c) proceeding, to consider service over the complete outbound and inbound legs of the route and over the route as a whole, rather than segment by segment individually. American President Lines, Ltd.—Increased Sailings, Route 17, 359 (370).

Present service provided by United States-flag vessels is inadequate in outbound trade within the meaning of section 605(c) where, to the fartherest point (Malaya), United States-flag participation reached 50 percent in only one year and had declined to 44 percent in 1955; to Italy, United States-flag participation reached 51 percent in 1952 but in 1954 and 1955, when more tonnage moved, had declined to 28 and 29 percent respectively; and cargoes will increase substantially in the near future due to the expanding economies of the countries along the route and the continuing aid these areas will receive from the Government. Isbrandtsen Co., Inc.—Subsidy, E/B Round the World, 448 (455, 456).

Present service provided by United States-flag vessels is inadequate in inbound trade within the meaning of section 605(c) where, overtonnaging notwithstanding, there is a low percentage of carryings by United States-flag vessels, cargo offerings are increasing, and the ability of fast modern vessels to attract additional cargoes leads to the finding that United States-flag vessels may reasonably be expected to increase their carryings. Id. (457).

Overall trade route statistics are appropriate for a determination of adequacy of service under section 605(c) of the Merchant Marine Act of 1936, in view of the comparatively small geographical areas defined by the trade routes in question (Services A and B, Routes 5, 7, 8, 9) and the preponderance of the movement on these routes passing through the ports applicant proposes to serve. Isbrandtsen Co., Inc.—Subsidy, Trade Route 32, 525 (528).

Section 605(c) is a bar to the carriage of cargoes on subsidized vessels of applicant on Trade Route 30 inbound (Far East to the Pacific Northwest) on the Tricontinent service, since the applicant does not conduct an existing service and there is no evidence to support a finding of inadequacy of service to the extent of 60 to 84 sailings (over and above those proposed in the applicant's

transpacific services). However, this is not to be construed as a bar to the inbound carriage of cargoes on such vessels for discharge at Gulf or Atlantic ports. Furthermore, as the record fails to show inadequacy of United States-flag service from the Far East to Hawaii, and as applicant does not operate an existing service there, section 605(c) is also a bar to award of subsidy for such service. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (544, 545).

While the applicant proposes mainly outbound service on Trade Routes 26A and B, the Board may well insist upon certain inbound service under sections of the Act other than 605(c), but since the routes in their entirety are inadequately served, section 605(c) does not interpose a bar to the award of subsidy for operation of United States-flag vessels thereon. Topping-off on Trade Routes 26A and B at North Atlantic ports is not being done by foreign-flag vessels and whether a definitive contract, if one is awarded, will permit such top-offs as proposed, or will restrict the number of sailings on which top-offs will be permitted, is an issue to be considered by the Board under other sections of the Act, not section 605(c). Id. (546) ; id. (740).

With respect to proposed North Atlantic top-offs on Trade Routes Nos. 26A and B, the routes involved in the topping-off operation (Nos. 5, 6, 7, 8, and 9) are inadequately served. Since United States-flag participation has been well below 50 percent, since United States-flag vessels have a comparatively high utilization record, and since these routes enjoy the largest movement of United States outbound liner commercial traffic, additional vessels should be operated. As the routes in their entirety are inadequately served, section 605(c) is not a bar to either the inbound or the outbound movement. Id. (546) ; id. (740, 741).

Section 605(c) interposes a bar to applicant's proposal to carry inbound cargo from Europe to the Gulf, while traversing Trade Route 21, so as to be in position then for outbound sailings on Trade Route 22 to the Far East, since there has been no showing that there is an existing service on Trade Route 21 or that the Route is inadequately served. However, there is no prohibition against carriage of inbound cargo on Trade Routes 26A and B (where there is inadequate service) from Europe to the Pacific coast on vessels sailing from Europe to the Gulf. Such service may be required by the Board under other sections of the Act. Id. (546, 547).

Available free space on an inbound service which covers a long and comprehensive trade route does not of itself require a finding that such service is adequate as to certain isolated segments on that route. The record supports the finding that inbound service from the Red Sea and Gulf of Aden to North Atlantic (average participation in liner commercial cargo carryings 39 percent) and California (average participation in liner commercial cargo carryings 35 percent) is inadequate, and additional vessels should be operated thereon. Isthmian Lines, Inc.—Subsidy Applications, 677 (701).

In the past, the Board has indicated that normally it will consider adequacy of United States-flag service for a trade route as a whole and not for particular ports or segments within the route description. Where, however, the applicant seeks the privilege of extending service on its subsidized route to ports not within the route description; where one port (New Orleans) is by far the dominant port for the movement of outbound cargo as compared with the other Gulf ports; and where United States-flag participation is extremely high through the dominant port as compared with such participation outbound from the other secondary Gulf ports, it is realistic to look to adequacy of United States-flag service separately for New Orleans and for the other Gulf ports. Gulf & S.A. S.S. Co.—Service Extension, Route 31, 747 (753).

Where United States-flag participation between Gulf ports, other than New Orleans, and the Canal Zone has amounted to only 3 percent in the most recent period of record, it follows that such participation is inadequate and that additional vessels should be operated in the service. Id. (753).

Where, in the most recent period of record, United States-flag participation between New Orleans and the Canal Zone was 83 percent; United Fruit refrigerated vessels which provide this southbound service have had substantial free space and offer sufficient capacity to carry virtually all the New Orleans-to-Canal Zone traffic; and the obnoxious or undesirable cargoes which United Fruit will not carry are a relatively minor portion of the cargo moving from New Orleans to the Canal Zone, and should not affect findings as to adequacy of United States-flag services to the service as a whole, it follows that present service is adequate. Gulf & S.A. S.S. Co. should be permitted to carry cargoes which United Fruit refuses to carry in its reefer vessels on special permission from the Maritime Administrator. Id. (754).

(e) *Privilege calls*

Where United States-flag liners have virtually no foreign competition (Hawaii-Far East) and the service is not inadequately served, section 605(c) interposes a bar to the award of subsidy for privilege calls at Hawaii to load and discharge cargo in the foreign commerce of the United States, which off-route point would be a segment of applicant's proposed service. To subsidize an obviously off-route point simply because the remainder of the proposed route is inadequately served would militate against the very purpose of the subsidy program. Matson Orient Line, Inc.—Subsidy, Route 12, 410 (418).

Casablanca and Spanish Morocco are specifically designated as integral parts of Trade Route No. 13, and since the Board specifically found that United States-flag service on the route is inadequate and that additional vessels should be operated thereon, the privilege of serving Casablanca and Spanish Morocco is not barred by the provisions of section 605(c). For similar reasons privilege calls at Okinawa on Trade Routes Nos. 12 and 22, and Iceland on eastbound tricontinent sailings are not barred. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 739 (745).

(f) *Round-the-World services*

Cargo carryings of the Westbound Round-the-World Panama—Panama sailings and the Eastbound Round-the-World sailings of subsidy applicant should not be excluded from calculations of United States-flag carryings on the Westbound Round-the-World service because they were considered not to be "existing service" within the meaning of section 605(c). Regardless of the direction and the route travelled the vessels carrried cargoes under United States flag, and such carryings cannot be ignored in determining United States-flag participation on the route. Isthmian Lines Inc.—Subsidy Applications, 677 (689).

Upon analysis of present and authorized service on APL's RWW route, service by vessels of United States registry is adequate (60 percent outbound, 50 inbound participation in liner commercial cargo carryings), and additional vessels should not be operated on the route. Section 605(c) interposes a bar to the award of subsidy to APL for the operation of additional vessels. Id. (700).

Without the vessel capacity to carry the cargoes in the India-Pakistan-Ceylon service previously carried by Isthmian's ERW vessels, United States-flag participation of 46 percent outbound, 48 percent inbound, and 47 percent over-all would be inadequate. However, the service is not inadequately served to the extent of the maximum of 36 annual sailings requested by Isthmian, which is 20 more than the 16 previously found to be existing. Considering the traffic previously

carried by the ERW sailings, and the availability of some of the nonliner-type cargoes for liner movement, the services is inadequate to the extent of 8 sailings per year in addition to the 16 existing sailings of Isthmian. Id. (703).

(g) *Trade Route No. 10*

Where United States-flag participation in outbound carryings on Trade Route 10 has declined from a high of 48.2 percent in 1956 to 34.6 percent in 1958; participation inbound remains at about 50 percent; in 1948 participation by the applicant itself was its highest, 4.7 percent outbound and 12.8 percent inbound; and a large volume of commercial cargo moved on the route on other than liner vessels, in which cargo United States-flag participation had decreased to 5 percent outbound in 1958 and to 6.5 percent inbound in 1958, the record fully supported the conclusion that United States-flag service on the route is inadequate. This result would be even more true if Prudential's participation be excluded. The route is not adequately served and additional vessels of the United States registry should be operated thereon. Prudential Steamship Corp.—Subsidy, Route 10, 758 (761, 762).

(h) *Trade Route No. 12*

United States-flag service on Trade Route 12 is inadequate and additional vessels should be operated thereon within the meaning of section 605(c), where United States-flag participation in liner commercial traffic, outbound, inbound, and overall, did not exceed 22, 30, and 25 percent respectively for the past five years of record; United States-flag sailings did not exceed 36 percent of total liner sailings in either direction for the only 3 years of record; and the general trend of traffic on the route has been upward. United States Lines Co.—Increased Sailings, Route 12, 379 (382–384).

The Board will take note that Japanese vessels have been strongly entrenched in the transpacific trade on Routes 29 and 30, yet United States-flag participation in each of those trades exceeds 60 percent. In 1956 when United States Lines introduced its Mariners to the Route 12 trade, its outbound free space remained low. On the record, and considering the recent history of United States-flag liner services to the Far East, to limit adequacy to 40 percent of the total liner movement on Route 12 at the 1956 traffic level would not be warranted. Matson Orient Line, Inc.—Subsidy, Route 12, 410 (415).

United States-flag participation on Trade Route 12 is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, where it has not kept pace with the offerings, declining from 19 percent to 16 percent in recent years; there is no evidence that offerings will decline in the future; and United States-flag vessels can capture offerings, as evidenced by the high space utilization of such vessels. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (543, 544).

Where previous subsidy awards would put into the trade on Route 12 enough United States-flag vessel capacity to carry 59 percent of the liner commercial cargo, but one carrier has no tonnage on the route, has not signed a subsidy contract, and it is not known whether it will ever operate in the service, Trade Route 12 inbound is inadequately served by vessels of United States registry and additional service proposed by Waterman should be permitted. Waterman S.S. Corp.—Subsidy, Route 21 Etc., 771 (789).

(i) *Trade Route No. 13*

United States-flag service on Trade Route 13 is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, though United States-flag participation has been above 50 percent, where the commercial movement has

experienced growth; the service would be inadequate without applicant's carryings; and because of physical limitations, the remaining United States-flag lines could not accommodate more than a small fraction of applicant's carryings. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (547).

(j) *Trade Route No. 21*

If the United States is to have the type of merchant marine envisioned by the Act, United States-flag capacity should not be limited to an amount sufficient to carry only 30 percent of the average outbound commercial liner movement (on Trade Route Nos. 7, 8, and 9) during the period 1953 through 1957. Without deciding the exact level of United States-flag participation, capacity sufficient to carry 39 percent of the outbound commercial liner movement over the 1953–1957 period certainly is not in excess of that which is needed to accomplish the purposes and policy of the Act. Finding of inadequacy on the North Atlantic routes will be based on an estimate of a movement of 2,500,000 tons—the annual average of the five-year period 1953–57—and on the firm belief that in the future at least this much cargo will be moving on the routes. The present capacity of USL vessels, plus those of States Marine and Isbrandtsen (total 30 percent) is insufficient to provide adequate United States service on the routes. Additional service proposed by Waterman should be permitted, including proposed top-offs in connection with its operations on Trade Route No. 21. Waterman S.S. Corp.—Subsidy, Route 21, Etc., 771 (796, 797).

(k) *Trade Route No. 22*

United States-flag participation on Trade Route 22 is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, where, without applicant's contribution, it would be considerably less than 50 percent. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (544).

Where, without the service of the applicant, United States-flag participation in liner commercial traffic on Route 22 outbound would have averaged only 46 percent for the period 1953–1957; excluding applicant's vessels, the cubic ultilization of the fleet was 97 percent in 1956 and 1957; in 1956 there was unused capacity of only 2.5 million cubic feet to handle the 12.9 million cubic feet occupied by applicant's cargoes, and in 1957, 1.7 million feet to handle 10 million cubic feet utilized by applicant's cargoes; and a competitor had turned down cargoes in both years, Trade Route 22 outbound is inadequately served by vessel of United States registry, and additional vessels should be operated thereon to the extent contemplated in the application. Waterman S.S. Corp.—Subsidy, Route 21, Etc., 771 (786).

(l) *Trade Routes Nos. 26A and B*

United States-flag service on Trade Routes 26 A and B is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936, where it is extremely low (about 8 percent); applicant provides the only United States-flag liner service and there is no evidence that the commercial offerings will not remain at least at the present level during the foreseeable future. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (545); 739 (740).

(m) *Trade Route No. 29*

Where United States-flag participation on Trade Route 29 has stood at about 70 percent and there is very little chance of increasing it to more than 75 percent, including Waterman's service, the route is adequately served and it is not necessary, in the accomplishment of the objects and policy of the Act, to operate additional vessels thereon. Waterman S.S. Corp.—Subsidy, Route 21, Etc., 771 (791).

(n) *Trade Route No. 30*

Where United States-flag participation in Trade Route No. 30 traffic was 76 percent in 1959, with the lines serving the Northwest exclusively having significant quantities of free space available, service on the route is adequate and additional vessels are not required in the accomplishment of the purposes and policy of the Act. Waterman S.S. Corp.—Subsidy, Route 21, Etc., 771 (791).

(o) *Trade Routes Nos. 5, 6, 7, 8, 9, 11*

United States-flag participation on Trade Routes 5, 6, 7, 8, 9, and 11 is inadequate within the meaning of section 605(c) of the Merchant Marine Act of 1936. Since United States-flag participation has been well below 50 percent; United States-flag vessels have a comparatively high utilization ratio; and the routes enjoy the largest movement of United States outbound liner commercial traffic, additional vessels should be operated thereon. As the routes in their entirety are inadequately served, section 605(c) is not a bar to either the inbound or outbound movement. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (546).

(p) *Space utilization*

Service by vessels of United States registry is inadequate under section 605(c) where United States-flag participation in the liner commercial movement has been well below 50 percent and intervenor's free space factor has ranged from 5 to 17 percent during the past several years. In addition, the combined liner/nonliner commercial offerings have shown a marked growth, with an attendant overall decline in United States-flag participation, and applicant's experience as a transatlantic bulk hauler should lead to success in converting some of the nonliner offerings. Isbrandtsen Co., Inc.—Subsidy, Trade Route 32, 525 (528).

Existing service under section 605(c) of the Merchant Marine Act of 1936 is adequate where projected American-flag participation is 57 percent outbound, 39 percent inbound, and 49 percent overall, which includes the carryings of the subsidy applicant plus approximately 7 additional sailings found to be needed and applicant's free space has been increasing. Isthmian Line, Inc.—Subsidy Applications, 677 (694, 695).

—Authority of the Board

Section 605(a) refers to payment of subsidy, and, as respects trade between the United States and Canada on the Great Lakes, it prohibits the Board from subsidizing such voyages. T. J. McCarthy S.S. Co.—Sec. 805(a) Application, 531 (533).

It is well settled that a favorable 605(c) determination does not of itself result in a subsidy contract, and precedent to any award the Board must make other determinations with respect to the application under other sections of the Act. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (543); 739 (740).

—Confidential information

Confidential information in a subsidy application is not subject to scrutiny in a section 605(c) proceeding since it is not material to the issues under that section. States Marine Corp.—Subsidy, Tri-Continent Service, 149 (152).

"Confidential" information in a subsidy application is submitted to the Board pursuant to section 601 of the 1936 Act for its exclusive use in carrying out its functions under that section. Such confidential information is not subject to scrutiny in either a 605(c) or an 805(a) proceeding since it is not material to the issues under those sections. Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service, 140 (142).

—Contract provisions

After section 605(c) issues are resolved, the Board under other sections of Title VI of the Act may well insist on a contract at variance with the service proposed by the applicant. It is obvious that an applicant cannot limit the scope of the ports of call which the Board might require under a contract by applying only for those which he might wish to serve. If such were the case, the function of the Maritime Administrator under section 211 of the Act and those of the Board under Title VI of the Act would become meaningless. Isbrandtsen Co., Inc.—Subsidy, Trade Route 32, 525 (528).

Where a subsidy applicant proposes chiefly outbound service on Trade Route 12, and there is substantial inbound movement on the Route—1,740,000 long tons inbound as compared to 1,722,000 long tons outbound in 1955—the Board, if subsidy is awarded, under sections of the Act other than section 605(c), may well insist upon substantial inbound service being rendered by vessels on the Route. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (544).

Section 605(c) does not interpose a bar to award of subsidy where an applicant seeks the privilege of calling at Hawaii for outbound cargoes destined for Europe, applicant moved 26,000 tons in the trade in 1956, and applicant is the only United States-flag operator providing a liner service there. However, the fact that section 605(c) is not a bar is not a commitment that the Board will include the privilege in a contract under section 601. Id. (546).

A section 605(c) proceeding does not afford an applicant an election to carry inbound cargoes as it chooses and to exercise selectively regarding outbound port and area service; service descriptions in subsidy contracts are not measured solely by the application. Id. (549).

Section 605(c) does not interpose a bar to the award of subsidy to SML for its proposed number of transpacific sailings, including top-offs with tricontinent vessels. Under section 601(a), the Board may well insist upon a service description quite different from that contemplated in the application and may require all of applicant's Trade Route 12 and Trade Route 22 sailings to be direct, thereby foreclosing California top-offs which are not barred by section 605(c). Id. (549).

The Board in fixing the service description of an operator in a given operating-differential subsidy contract, will take into consideration, in keeping with the purposes and policy of the Act, data relative to (1) the financial support afforded the essential service of the applicant by the foreign-to-foreign or way-port calls, (2) the ability of the applicant to accommodate such way-port cargo without impairing the needs of United States importers and exporters, and (3) the manner and type of competition of competing carriers in the trade. States Marine Corp.—Subsidy Tricontinent, Etc., Services, 739 (744).

In view of a finding of inadequacy and the need for the operation of additional vessels to overcome this inadequacy, the precise terms of the subsidy contract are immaterial. Any contract entered into, after a finding of inadequacy under section 605(c), necessarily will aid in the accomplishment of the purposes and policy of the Act. This is true whether the contract merely requires the service proposed by the applicant or whether the Board requires, under other sections of the Act, a service on the route at variance with that proposed by the applicant. Waterman S.S. Corp.—Subsidy, Route 21, Etc., 771 (782, 783).

—Definitions of terms used

The word "service" in section 605(c) is used broadly to cover the entire scope of operations; it includes the scope, regularity, and probable permanency of the operations, the route covered, the traffic handled, the support given by

the shipping public, and other factors which concern the bona fide character of the operation. None of these elements alone is determinative—nor would a deficiency in any one necessarily be fatal. A finding that applicant's proposed service is in general accord with its existing operation is sufficient to establish "existing service" within the meaning of the section. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (311).

—Dual or multiple subsidies

The Merchant Marine Act of 1936 does not require a finding that the extent of existing inadequacy of United States-flag service be determined. Since the granting of all pending subsidy applications on Trade Route 12 would mean about 52 percent United States-flag vessel participation, assuming no increase in cargo offerings in the future, an additional five percent is not so great that the Board can say that it cannot or will not be achieved. Where there has been no section 605(c) hearing in one pending application, and no recommended decision in two others, the Board cannot find that 52 percent of United States-flag participation would constitute a "substantial portion of the water-borne export and import foreign commerce of the United States." In any event, a favorable 605(c) determination does not in itself result in award of subsidy, pending applications may be amended or withdrawn, and the record in later 605(c) hearings may indicate that cargo offerings have changed materially. Matson Orient Line, Inc.—Subsidy, Route 12, 410 (416).

The purposes and policy clause of section 605(c) is not intended to determine which of several subsidy applications is best suited to achieve adequacy on a given trade route. Thus comparative consideration of such applications is not necessary in a section 605(c) hearing. Id. (417).

A motion for comparative consideration of subsidy applications under section 605(c), advanced on the ground that the Administrator might fix the number of certain subsidized voyages on trade routes too low to allow subsidy on all such voyages requested by all applicants, will be denied, since at this time the effect of a possible future section 211 determination by the Administrator upon the applications is unknown, and findings under section 605(c) do not guarantee a subsidy contract or award subsidy to any particular applicant, and are not, therefore, "mutually exclusive" within the meaning of the Ashbacker doctrine. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 507 (508).

—Effect of approval under section 605(c)

Approval under section 605(c) alone is not tantamount to award of subsidy, nor is such action an indication that award of a contract necessarily follows. States Marine Corp.—Subsidy, Tri-Continent Service, 149 (152).

—Essential Trade Route determinations

Section 605(c) proceedings need not be delayed until the Administrator has determined under section 211 that the trade route in question is essential. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (308).

Determination of "essentiality" is a quasi-legislative function, exercised by the Administrator, and is independent of the Board's actions under section 605(c). A favorable section 605(c) determination, followed by other favorable determinations under other sections of the Act, cannot result in the award of a subsidy contract unless and until the Administrator, pursuant to section 211, determines the route to be essential. It is not necessary for the Board, in a section 605(c) proceeding to determine the essentiality of a particular trade route. States Marine Corp.—Subsidy Tricontinent, Etc., Services, 739 (741).

—Existing service

Under section 605(c), foreign-flag operations have no place in the determination of whether or not subsidy applicant has an existing United States-flag service on the route or routes on which subsidy is sought. States Marine Corp.—Subsidy Tricontinent Service, 149 (151).

Sailings commenced subsequent to the date of filing application for subsidy cannot be considered in determining existing service. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (311).

Although the Examiner found that applicant had an annual average of nine sailings in the Pacific Northwest/Far East service, four of those sailings were also relied upon to support a finding of existing service in applicant's Pacific Coast/Far East service; one sailing may not be construed to be a sailing in more than one service for the purpose of measuring existing service. Moreover, the four sailings in question originated in California and called at the Northwest on route to the Far East. Id. (312).

Five sailings annually cannot support a finding of an existing service of 10 to 16 sailings annually within the meaning of section 605(c). Id. (312).

In determining whether a subsidy applicant is operating an "existing service" within the meaning of section 605(c), the Board must look to the entire scope of the applicant's operation, including vessels and sailings, the route covered, the scope, regularity, and probable permanency of the operations. Isbrandtsen Co., Inc.—Subsidy, E/B Round The World, 448 (453).

Where subsidy applicant which proposes 24 to 29 sailings fortnightly to the Azores, has carried only small parcels of MSTS cargoes to the Azores, and has averaged but two calls per year, in an irregular pattern, it does not qualify as an existing operator, since, under section 605(c), its past operation must have been reasonably in accord with its proposed subsidized service. Id. (453, 454).

An applicant for subsidy does not qualify as "an existing operator" in so far as service to Genoa, the Philippines, Los Angeles, or New Haven is concerned where service to such ports was interrupted and nonexistent at the time of hearing. Id. (454).

Where subsidy applicant topped off, annually, an average of 39 sailings from California with its Trade Routes Nos. 12 and 22 vessels, carrying, generally, slightly less than 400 tons of general cargo per voyage, this average is sufficient to establish applicant as an existing operator, within the meaning of section 605(c) as to 36 proposed California top-offs on the Routes. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (548, 549).

Where applicant proposes 24 to 36 sailings on Trade Route 29 and 12 to 24 sailings on Trade Route 30, it has established itself as conducting an existing service under section 605(c) by reason of having averaged 24.5 direct sailings per year between 1952 and 1955 on Trade Route 29; 4 per year on Trade Route 30; and 33.25 per year integrated sailings from California and Northwest ports. The integrated sailings proposed, 12 to 24, are to sail half from California and half from the Northwest and are included in the total proposed on each route, and although past integrated sailings were mainly from California, it is proper to credit them 50 percent to each Route since they served both areas. Id. (548).

The fact that sailings in Services Nos. 1 and 2 of Trade Route No. 17 furnished service at some of the ports served by true Westbound Round-the-World sailings is not a basis for considering the outbound portion of each Westbound Round-the-World-Panama—Panama sailing and the inbound portion of each Eastbound-Round-the-World-Suez—Suez sailing as constituent parts of one Westbound Round-the-World sailing. This patchwork service was not in general accord with the Westbound Round-the-World service for which subsidy is sought, and cannot

be considered "existing service" within the meaning of section 605(c). Isthmian Lines, Inc.—Subsidy Applications, 677 (688).

If applicant's eastbound sailings could be considered to be in accord generally with the service provided by the westbound service, the eastbound service was suspended several months before the application for subsidy was filed, and should not for that reason be considered as "existing service" within the meaning of section 605(c). Id. (688).

Since Isthmian's ERW sailings serviced the India-Pakistan-Ceylon service only incidentally and were suspended some months before the application for subsidy was filed, they will not be considered as part of an "existing" I-P-C service. Isthmian is operating an existing service in its I-P-C service to the extent of 16 sailings annually. Section 605(c) does not interpose or bar the award of subsidy for such existing service. Id. (702).

A service under section 605(c) of the Merchant Marine Act of 1936 is not an existing one where there were only 8 sailings in the five months preceeding the filing of application for subsidy. Probable permanency of operations cannot be inferred from such service. Id. (706).

In view of the Board's findings that United States-flag service on each of the component essential trade routes comprising the tricontinent service, as well as the overall service on the tricontinent service as a unit are inadequately served and that additional vessels should be operated thereon, the determination of whether applicant's service was "existing" is largely academic. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 739 (742).

Trade Route No. 21 is predominantly an export trade. In 1957, 2,983,100 tons of liner commercial cargo moved outbound as compared with only 686,700 tons inbound. Under such circumstances, an applicant's existing operation will be judged on the basis of its outbound service. Waterman S.S. Corp.—Subsidy Route 21 Etc., 771 (778).

In order to qualify as an existing service an operation must have been in "reasonable general accord" with the proposed subsidized service. Id. (778).

Proposed North Atlantic top-offs are not in reasonable general accord with applicant's operation on the Gulf/U.K. and Continent service were military cargo exclusively was lifted. A service confined to military cargo to the complete exclusion of all commercial cargo will not be considered as a part of an existing service. Id. (778, 784).

An applicant for subsidy must demonstrate an existing service at the time the application for subsidy is filed, the service performed must have been in "reasonably general accord" with the proposed subsidized service, and "regardless of the wisdom of [an operator's] decision to interrupt service," or "its intention to resume service," an interruption of service negates any claim to an existing service. Id. (793).

—Foreign-flag affiliations

Data pertaining to a subsidy applicant's foreign-flag affiliations on routes and services other than those for which subsidy is sought, are not relevant to issues raised in either a section 605(c) or a section 805(a) proceeding. These matters will be determined by the Board under section 804 before final determination on the subsidy application. Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service, 140 (141).

Subsidy applicant's foreign-flag affiliations on routes not under consideration can have no bearing on issues of existing United States-flag service, adequacy of service, or undue advantage and undue prejudice in a section 605(c) proceeding, or the issues of unfair competition or the objects and policies of the Merchant Marine Act of 1936 in a section 805(a) hearing. Id. (141).

For purposes of a section 605(c) hearing statistics compiled on a semi-annual basis identifying all of the cargo carried by subsidy applicant for affiliated interests is sufficient. Moreover, details of all of the affiliated interests' shipments on all vessels regardless of flag, in connection with the carriage of cargo for affiliated interests by the applicant, are not required for 605(c) proceedings. States Marine Corp.—Subsidy, Tri-Continent Service, 149 (151).

Foreign-flag operations of a subsidy applicant are subject to thorough scrutiny by the Board prior to award of subsidy, but this is made under section 804 and not section 605(c) of the 1936 Act. Id. (152).

Board would not compel subsidy applicant to produce data relating to its foreign-flag relationships in a section 605(c) hearing, other than data which it has agreed to furnish relating to foreign-flag sailings on the routes and services involved. Id. (152).

Questions regarding citizenship of subsidy applicant in light of foreign-flag relationships will be given thorough examination when the application is considered pursuant to section 601, and need not be the subject of inquiry in a 605(c) proceeding. Id. (152).

—Hearing and Findings (See Dual or Multiple Subsidies, supra, and Scope of section 605(c) hearing, infra)

—Scope of section 605(c) hearing; issues

Intervenor is not permitted in section 605(c) proceeding to go into the question of whether Trade Route 8, Service No. 1, is essential under section 211 of the Act. The Board has previously determined the route and service to be essential. Arnold Bernstein Line, Inc.—Subsidy, Route 8, 46 (49).

Where the Maritime Administrator published tentative findings in the Federal Register in reaffirmance of the essentiality of Trade Route No. 8, among other routes, and in the exercise of his discretion extended to interested persons an opportunity to be heard, intervenor should have presented arguments as to essentiality of service proposed for Trade Route No. 8 to the Administrator rather than to the Board. Id. (51).

In a section 605(c) proceeding, the Board will not receive in evidence either the Administrator's section 211 determination or the data upon which it was based. States Marine Corp.—Subsidy, Tri-Continent Service, 60 (64).

The Board's determination under the 1936 Act and its disposition of pending problems are made in an orderly fashion although not necessarily in sectional sequence. It would serve no useful purpose to conglomerate in one proceeding all the several matters which require serious consideration by the Board antecedent to the subsidy contract award. To the extent there remains to be made any determination, all prior actions are subject to or dependent thereon before finality has been achieved. States Marine Corp.—Subsidy, Tri-Continent Service, 149 (152).

Examiner's ruling denying request of intervenors in a section 605(c) hearing for list of all common stockholders of subsidy applicant and of its affiliate Anderson, Clayton, and details as to the holdings of each such stockholder will be sustained on ground that such data are irrelevant to the issues in the hearing. Id. (153).

Intervenors' request in a section 605(c) proceeding for record of performance of agreements between subsidy applicant and another steamship company and its stockholders, will be denied as based on alleged possible violations of the 1936 Act which have no bearing in a 605(c) hearing and should not be considered. Id. (153).

Where there is no showing of existing service, it must be determined, in order for applicant to prevail, that American-flag service is inadequate and that addi-

tional service is required to accomplish the purposes and policy of the Act. States S.S. Co.— Subsidy, Pacific Coast/Far East, 304 (312).

Although the Board finds that section 605(c) interposes no bar to the subsidization of applicant's proposed services, award of subsidy must depend upon a determination by the Administrator that such services are essential within the meaning of section 211. Id. (315).

Failure by subsidy applicant to disclose the time when it intends to inaugurate a specific service does not preclude a favorable section 605(c) determination. However, the Board will insist upon action by the applicant to insure prompt determination of its application, and will review its 605(c) determinations unless the subsidy contract, if offered, is executed and operations commenced within a reasonable time. Matson Orient Line, Inc.—Subsidy, Route 12, 410 (417, 418).

It is well settled that a favorable 605(c) determination does not of itself result in a subsidy contract, and precedent to any award the Board must make other determinations with respect to the application under other sections of the Act. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (543) ; 739 (740).

In a section 605(c) proceeding the Board is not concerned with such matters as vessel interchange, sailing spreads and "round voyages." Id. (543) ; (742).

Allegation of an unlawful agreement between subsidy applicant, SML, and Bloomfield is beyond the scope of a section 605(c) proceeding. Id. (549) ; (742).

The provisions of section 605(c) are not specifically applicable to foreign sailings. This does not mean that the rights of United States-flag operators conducting services between foreign ports will be ignored. It means that in framing the service descriptions of an operating-differential contract the section 605(c) tests will be considered as a guide to, as distinguished from a control on, the Board, and hence no hearing is required under section 605(c). Id. (744).

—Service in addition to existing service

Although it is apparent that an applicant under section 605(c) does not have existing service in the trade in question to the extent of the 24 to 30 annual sailings sought, its average of 23.5 is so close to the number of sailings proposed that the Board would not regard the service in that regard as in addition to the existing service, especially in view of applicant's 25 and 26 sailings in two previous years. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (309).

—Statistical data required

Where ports and areas in a subsidy applicant's proposed service vary materially from the ports and areas covered by services and trade routes which the proposed service overlaps, it is obvious that the statistical data with respect to number of sailings and amount of cargo from and to each port proposed to be served are relevant and material to issues of existing service, adequacy of service, and undue advantage and prejudice raised in a section 605(c) proceeding. Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service, 140 (141).

—Undue advantage or prejudice as between citizens

In determining whether the effect of a subsidy award would result in undue advantage or will be unduly prejudicial, the prime responsibility is one of providing adequate service by vessels of United States registry in the "competitive services, routes, or lines." Foreign-flag relationships and operations which pertain to routes and services other than those involved in section 605(c) proceeding or which represent nonmaritime foreign activities are not relevant or material to the resolution of the issue of "undue advantage" and "unduly prejudicial." States Marine Corp.—Subsidy, Tricontinent Service, 149 (151, 152).

The burden of proving undue advantage and undue prejudice under section 605(c) rests upon the party claiming it, and a subsidized operator has a greater

burden than a nonsubsidized operator. States S.S. Co.—Subsidy, Pacific Coast/Far East, 304 (309, 310).

Any undue prejudice which might result to intervenor because subsidy applicant would be able to secure quick-loading bottom cargoes in the Northwest and then stop off in California, while intervenor is required to shift from berth to berth in the Northwest before sailing directly to the Far East, is offset by intervenor's ability to offer the shippers of such easy, quick-loading cargoes a direct service to the Far East, which the applicant will not be able to do if subsidy is awarded, at least in this service, and it is only in connection with this service that the Board is considering undue prejudice to intervenor. Id. (310).

PFEL contends that it would be unduly prejudiced by an award of subsidy to States solely because the dual-range loading privilege sought by States—loading first in the Northwest then stopping off in California before sailing outbound—is not enjoyed by PFEL. But in arguing this position PFEL merely argued its contentions—it offered no evidence in support of its claim, and in view of its burden of conclusively proving its contention, the argument must be disregarded. Id. (310).

Undue prejudice under section 605(c) does not necessarily result from the fact that one operator is subsidized and a competing operator is not. The unsubsidized operator must prove that award of subsidy would result in undue prejudice to itself or undue advantage to the subsidy applicant. Id. (310, 311).

Where the Board determines that a trade is not adequately served, the operation of additional vessels is necessarily in furtherance of the purposes and policy of the Act, and whether the granting of subsidy would result in undue advantage or undue prejudice is not in issue. Id. (315).

In a section 605(c) proceeding, where additional subsidized sailings requested would be in addition to existing service, only the issues of whether United States-flag participation in the service is adequate and whether additional vessels should be operated in the accomplishment of the purposes and policy of the Act, will be determined. When considering such a service the Board does not weigh whether the award of subsidy would give undue advantage or be unduly prejudicial as between citizens of the United States operating competitive services. American President Lines, Ltd.—Increased Sailings, Route 17, 359 (367).

Where a subsidy application involves a service which would be in addition to existing services, the only issues for determination under section 605(c) are whether the service already provided by United States-flag vessels is inadequate, and whether, in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon. No consideration need be given to the question of undue advantage or prejudice. U.S. Lines Co.—Increased Sailings, Route 12, 379 (381).

It is well settled that the issue of advantage and prejudice arises only in connection with "existing service," and then, if proved, interposes a bar to the award of subsidy for such existing service only in the event that the record dictates a finding that the service, already provided by other United States-flag vessels is adequate. The burden of proof on this issue rests upon the party claiming it, and a subsidized operator has a greater burden of proof than does a nonsubsidized operator. Isbrandtsen Co., Inc.—Subsidy, E/B Round-The-World 448 (454).

The effect of granting an operating-differential subsidy contract would not 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, as claim that an award of subsidy as to ports and areas not falling within applicant's existing service would result in prejudice is untenable; intervenor en-

joys a rather broad latitude in port coverage; argument that there will be prejudice where applicant carries only outbound cargoes while intervenor must carry both out and inbound is without merit; and the frequent and comprehensive service offered by intervenor under its subsidy contracts is sufficient protection to offset any advantage applicant would derive from subsidy. Id. (454, 455).

Intervenor's claim of undue prejudice by the inbound carriage of cargoes on Trade Route 30 has been removed by the conclusion that the operation inbound of tricontinent vessels on the route is barred by section 605(c). Any prejudice which it might suffer by reason of subsidy applicant's carriage of inbound cargoes by vessels sailing *outbound from the Pacific Northwest* springs not from the fact of subsidization but from the fact of the applicant's presence in the field. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 537 (549).

Intervenor, a competitor, cannot complain, in the context of section 605(c), that subsidy applicant would be in a better position than itself if subsidy is awarded, merely because the subsidy applicant petitions for ballasting many voyages home and limited service to certain areas and might receive something different from that which intervenor petitioned for and received. To hold that such facts constitute undue prejudice would result in the Board's requiring all operators on any given trade route to receive identical contracts and provide identical services. If applicant's competitors feel that the service descriptions in their contracts do not provide for efficient service, their relief, if any, is to petition for modifications of their contracts. Id. (549).

Findings by the Board, in proceedings under section 605(c) of the Merchant Marine Act of 1936, that service already provided by vessels of United States registry on a particular trade route is inadequate, dispose of the issue of undue prejudice raised by an intervenor. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 675.

Since trades on Routes Nos. 13 and 22 are clearly inadequate without the carryings of SML, and since the Board finds that additional vessels should be operated thereon, the issue of undue advantage and prejudice was not before the Board. However, the record establishes and the Board finds, that the granting of subsidy to SML for the operation of its vessels on Trade Routes Nos. 13 and 22 would not result in undue advantage to SML or in undue prejudice to Lykes. States Marine Corp.—Subsidy, Tricontinent, Etc., Services, 739 (742).

Nationalistic pressures, currency problems, and nonconference foreign-flag competition on the route, which effectively prevent United States-flag vessels from obtaining a larger share of the available cargo are insufficient reasons to block the efforts of United States-flag operators to improve their position. Moreover, the record does not justify the conclusion that any additional cargo which Prudential might secure would be taken solely from the other United States-flag operators. Prudential Steamship Corp.—Subsidy Route 10, 758 (761, 762).

A subsidized operator cannot object to competition from another subsidized operator on a route inadequately served by United States-flag vessels. With respect to top-offs, Lykes calls direct from the Gulf on both Trade Routes Nos. 21 and 22 and since Waterman in topping off will not be offering as direct or fast a service to Gulf shippers, and the full reach of Waterman's vessels will not be available on berth in the Gulf, there would be no undue prejudice to Lykes or undue advantage to Waterman. Lykes' remedy is to request modification of its service descriptions. Waterman S.S. Corp.—Subsidy, Route 21, Etc., 771 (782).

Waterman has an existing service of 23 annual sailings calling regularly in the Gulf, Japan, and Korea, and occasionally in Formosa and Okinawa, with 12 top-offs at California ports, and award of subsidy covering this service, in-

cluding 12 California top-offs, will not result in undue advantage to applicant or undue prejudice to any intervenor, and is not barred by section 605(c). Id. (786).

—Vessels, suitability of

In a section 605(c) hearing, evidence relating to vessel types to be employed, exact route, source of the vessels, ability and willingness to acquire new vessels, design features to be incorporated in new vessels, exact time the new service will be inaugurated, and the like, are immaterial and irrelevant. Matson Orient Line, Inc.—Subsidy, Route 12, 410 (417).

A subsidy applicant's vessel replacement program, although a matter in which the Board is interested, has no relationship to 605(c) or 805(a) issues. Isbrandtsen Co., Inc.—Subsidy, Round-The-World Service, 140 (142).

TARIFFS. See also Agreements under Section 15; Classifications; Contract Rates; Intercoastal Shipping Act, 1933; Jurisdiction; Ports; Practices; Rates; Terminal Facilities.

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. Aluminum Products of Puerto Rico, Inc. *v.* Trans-Caribbean Motor Transport, Inc., 1 (VI).

In failing to undertake its obligations of loading and discharging cargo and furnishing adequate terminal facilities, tariff, by reason of its *exclusive* f.i.o. rates applicable to each and every shipper, is unjustly discriminatory to small shippers in violation of section 14–Fourth of the Shipping Act of 1916, as amended, and by reason of its failure to specify terminals it is in violation of section 2 of the Intercoastal Shipping Act of 1933. United States Atlantic & Gulf-Puerto Rico Conference *v.* American Union Transport, Inc., 171 (176).

Although a tariff which has been replaced by an unobjectionable one cannot be cancelled, it can and will be declared defective where the record is complete and each of the parties has been fairly and fully heard. The record showed unjust discrimination, by reason of exclusive f.i.o. rates, in violation of section 14–Fourth of the 1916 Act and failure to specify terminals in violation of section 2 of the 1933 Act. Id. (176).

Tariff provisions must be applied uniformly where terminals have been permitted to operate in concert under a joint tariff pursuant to section 15 approval of such concerted action. Parties to such an agreement must insist that individual member terminals properly apply all charges, rules, and regulations of the tariff. If the tariff is violated by any member, proper corrective action should be taken, as provided by the basic agreement. Concurrence by members in activity differing from and in derogation of the express provisions of their agreement and tariff might, under certain circumstances, amount to a tacit understanding which would modify their approved agreement. Empire State Highway Transportation Assn. *v.* American Export Lines, Inc., 565 (588).

While, on the record [which showed that some terminals failed at times to comply with tariff provision that any truck in line to receive or discharge cargo at a certain time should be worked at straight-time rates, and with a provision permitting partial service in truck loading], the Board could not find that there is a tacit understanding to permit individual terminals to violate tariff provisions, the Board would insist that steps be taken to maintain uniformity of practices under the tariff. The Board would necessarily consider disapproval of the basic agreement if such a tacit understanding existed, unless corrective steps were taken. Id. (588).

In determining whether the general level of rates and the rules and regulations of a tariff conform to the standards of the Act, the Board is more concerned

with the effect of the implementation of the tariff than with the particular methods by which tariff is constructed. A general level of rates which would permit an operating ratio of $1.07 of revenue for each dollar of expense would not allow terminal operators an excessively high profit. Id. (589).

It is a well established rule of tariff interpretation that the terms used in a tariff should be construed in a manner consistent with general understanding and accepted commercial usage. Aleutian Homes, Inc. *v.* Coastwise Line, 602 (608).

Addition in tariff item of the phrase "including electrical, plumbing, heating and ventilating equipment" did not cure the admitted ambiguity of the term "houses, KD, prefabricated"—rather it appeared to increase the ambiguity of the item. Applying the rule applicable to written instruments generally, this ambiguity must be construed against the carrier which made and issued the tariff. Id. (609).

An understanding between a carrier and a shipper cannot vary the proper construction or application of a tariff, since the published tariff is binding on the parties. However, the action of the carrier and shipper may be factors to be considered in determining what was a fair and reasonable interpretation of an ambiguous tariff item. Id. (609).

Carrier's reclassification of articles was in violation of section 18 of the 1916 Act and section 2 of the 1933 Act where components of prefabricated houses were accepted for shipment by the carrier at its prefabricated house rate and later certain articles such as kitchen cabinets, wardrobes and panel shake siding were retroactively assessed higher rates; the term "prefabricated house" is ambiguous; an ambiguity must be construed against the carrier issuing the tariff; and both the carrier and shipper understood that the "prefabricated house" item would be applicable to all shipments. Reclassification of wooden house parts under terminal tariff from "Freight, N.O.S." to "Building Materials, prefabricated, wooden or metallic, ..." was also improper and in violation of section 18 of the 1916 Act and section 2 of the 1933 Act. Id. (609, 610).

TERMINAL FACILITIES. See also Agreements under Section 15; Findings in Former Cases; Intercoastal Shipping Act, 1933; Rates; Tariffs.

—Loading regulations

Proposed exclusive terminal loading tariff regulation applicable to lumber, which on its face applies to all who utilize the terminal, is not unduly preferential under section 16 of the 1916 Shipping Act. However, possibility that the equality contemplated by the regulation will, in practice, be disregarded is relevant to the reasonableness of the regulation under section 17. Lopez Trucking, Inc. *v.* Wiggin Terminals, Inc., 3 (14).

Proposed exclusive terminal loading tariff regulation is not unduly prejudicial to a port, in violation of section 16 of the 1916 Shipping Act where there is no evidence showing unequal treatment of localities by the terminal operator. Evidence of diversion of traffic by the lumber dealers involved which may occur upon application of the regulation is immaterial to allegation of violation of section 16, but is relevant to the issue of reasonableness of the regulation under section 17. Id. (15).

Proposed exclusive terminal loading tariff regulation applicable to lumber only is not unduly preferential of other cargoes, in violation of section 16 of the 1916 Shipping Act, since neither injury to such cargoes nor an existing and effective competitive relationship between lumber and other commodities was shown, as is required before such a violation may be established. Id. (15).

Proposed exclusive terminal tariff regulation applicable to lumber is an unreasonable regulation, and the effectuation thereof is an unreasonable practice, in

violation of section 17 of the 1916 Shipping Act, where considerable uncertainty exists as to whether the regulation would be applied uniformly to all lumber dealers. 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 unreasonable. Id. (15).

Proposed exclusive terminal loading regulation is unreasonable under section 17 of the 1916 Shipping Act where the disadvantages and injurious effects, such as increased costs of truck loading and diversion of the commodity (lumber) to other ports, would outweigh the benefits, such as efficiency of operations, which benefits can be secured by other uncontested and innocuous means, such as enforcement of other rules and regulations relating to traffic control. Id. (16).

In determining the reasonableness of a proposed tariff regulation under section 17 of the 1916 Shipping Act, it is the reasonableness of the regulation itself and the contemplated practice thereunder which must be considered and not the motivating reason for the regulation, such as that it resulted from demands of a labor union. Id. (17).

Record does not support a finding that elimination of partial service in truck loading would be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Shipping Act, where such elimination should encourage the use of specialized trucks, thus relieving congestion at the piers and reducing costs, and would remove an important area of friction and disputes between truckers and terminals. Empire State Highway Transportation Assn. *v.* American Export Lines, Inc., 565 (589).

Agreement permitting terminals to eliminate "no service" in connection with truck unloading, i.e., prohibiting truckers from unloading trucks themselves, would be detrimental to the commerce of the United States as unloading by truckmen is a much-used long standing practice which has not interfered with efficient operation of the piers. Id. (592).

Agreement permitting terminals to eliminate "no service" in connection with truck loading, i.e., prohibiting truckers from loading their own trucks, would not be unjustly discriminatory or unfair, detrimental to the commerce of the United States or in violation of the Shipping Act, where traditionally the terminals have provided substantially more such services than unloading services, and if the terminals provided all truck loading services they would be able to schedule more efficiently the use of their labor and equipment and could substantially improve the efficiency of their terminal operations. Id. (592).

—Stevedoring

Refusal by terminal operator to employ stevedoring subcontractor is not unduly prejudicial in violation of section 16-First of the 1916 Act, where terminal operator agreed with vessels to perform stevedoring services, and merely subcontracted certain of its stevedoring operations to other stevedoring contractors, who, in turn, performed the work for the terminal operator, and not for the vessel or the cargo. Likewise, employment of one stevedoring subcontractor to the exclusion of another, under the above circumstances, does not constitute an unreasonable regulation or practice in connection with the receiving, handling, or storing of property, under section 17 of the Act. D. J. Roach, Inc. *v.* Albany Port District, 333 (335).

Joint decision of terminal operators to end complainant's services in connection with grain stevedoring is not an agreement such as described in section 15 of the Shipping Act, and the record failed to show that such decision in any way affected transportation rates or fares, competition between shippers, carriers, or others afforded protection by the Act, allotment of ports, limitations on the

volume of passengers or freight, or the transportation by water of persons or goods. Id. (335).

An agreement between Matson Navigation Co. and Encinal Terminals, filed with and approved by the Board, which is only evidence of a general intention of the parties to enter the stevedoring, terminal and carloading and unloading business as partners acting through a new corporate entity, Matcinal, is incomplete where it fails to mention that Matcinal would operate a pier as sublicensee of Encinal, that Encinal would endeavor to secure certain stevedoring facilities for Matcinal, that the stevedoring of Matson's vessels at Encinal's terminal would be performed by Matcinal rather than by Matson Terminals, and that Matson Navigation would endeavor to transfer certain stevedoring services from Matson Terminals to Matcinal. Associated-Banning Co. *v.* Matson Navigation Co., 336 (342).

—Terminal operator as "other person" subject to Act

Operator of terminal facilities in Baton Rouge and other areas is clearly an "other person" subject to the Shipping Act of 1916. Agreements Nos. 8225 and 8225–1, Between Greater Baton Rouge Port Commission and Cargill, Inc., 648 (654).

TRADE ROUTES. See Subsidies, Operating-Differential.

TRUCK LOADING AND UNLOADING. See Jurisdiction; Terminal Facilities.

UNITED STATES WAREHOUSE ACT. See Jurisdiction.

UNJUST OR UNFAIR DEVICES. See Devices to Defeat Applicable Rates; Rebates.

VESSEL VALUES. See Rates.

VOLUME. See Practices.

WEIGHT OR MEASUREMENT. See Practices.

WORKING CAPITAL. See Rates.

WHARFAGE. See Agreements under Section 15; Terminal Facilities.