DECISIONS OF THE
FEDERAL MARITIME COMMISSION

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DECISIONS OF THE

FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

No. 892

STATES MARINE LINES—HOHENBERG BROTHERS
VIOLATION OF SECTION 16

Decided October 6, 1961

Respondents, Hohenberg Bros. Inc., as shippers, found to have knowingly and willfully, directly, by an unjust or unfair means obtained transportation by water for property consisting of 400 bales of cotton at less than the rates or charges which would otherwise be applicable in violation of Sec. 16 of the Shipping Act, 1916, as amended.

Respondents, States Marine Lines, Inc., as a common carrier by water, found, directly and in conjunction with another person, to have allowed a person to obtain transportation for property consisting of 400 bales of cotton at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing and by an unjust device or means in violation of Sec. 16 of the Shipping Act, 1916, as amended.

Elkan Turk and *Herman Goldman* for respondent States Marine Lines, Inc.

Alan F. Wohlstetter for respondent Hohenberg Brothers Company.

Edward Aptaker as Public Counsel.

REPORT OF THE COMMISSION

Acting Chairman, JAMES L. PIMPER; *Acting Commissioners:* FRANK BARTON, JOHN HARLLEE, THOMAS LISI and OSCAR H. NIELSON

BY: JOHN HARLLEE, *Acting Commissioner*

PROCEEDINGS

The Federal Maritime Board ordered that an investigation be instituted to determine whether Hohenberg Bros., Memphis, Tenn. (herein called "Hohenberg") as a shipper, and Global Bulk Transport Corp. (formerly States Marine Corp.) and States

Marine Lines, Inc. (formerly States Marine Corp. of Delaware) (herein called "States Marine"), common carriers by water in foreign commerce, had acted in violation of Sec. 16 of the Shipping Act, 1916, as amended (Act) (25 F.R. 2118, No. 50, March 12, 1960). Hohenberg and States Marine were made respondents. Hearings were held before an Examiner and briefs and replies were filed. The Examiner concluded that both Hohenberg and States Marine had willfully violated Sec. 16 of the Act. Exceptions to the recommended decision have been filed and the Federal Maritime Commission (Commission) has held oral argument.

FACTS

1. Hohenberg, a shipper of cotton in Memphis, Tennessee, in the latter part of 1957 shipped 600 bales of cotton in 6 100-bale lots or packages to the Howard Terminals at San Francisco, California.

2. Howard Terminals was instructed to have the cotton placed on board a vessel for shipment to Bremen, Germany.

3. Hohenberg, by its forwarder, prepared a States Marine bill of lading No. 6 covering the shipment on board the *SS Alca,* a Finnish flag vessel. The Shipper is shown as the United States Commodity Company, a trade name for Hohenberg. Under the heading "Particulars Furnished by Shipper" the following appears: (States Marine furnished the information for this part of the B/L).

"Marks and Numbers	No. Pkgs.	Description of Packages & Goods	Measurement in Cu. Ft.	Gross Weight In Pounds
ICOE/USCO	100 (A)			50,959#
CYOE/USCO	100 (A)	BUYER'S FORWARDING AGENT		51,315#
SCOE/USCO	100 (A)	FREDERICH ELLMERS		51,887#
GIOE/USCO	100 (A)			51,108#
BOOE/USCO	100 (B)			51,576#
ZEOE/USCO	100 (B)			51,893#
	600	BALES STANDARD DENSITY COTTON		308,738#

The total freight is shown as $8616.00. The bill of lading is dated at San Francisco, California December 20, 1957 and is over the signature of D. W. Fleming "For the Master States Marine-Isthmian Agency Inc."

4. The freight was based on the following provisions of the Pacific Coast European Conference Tariff No. 13 showing the rates and charges established by States Marine applicable to the shipment and are as follows:

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GENERAL SECTION	Rate Basis	***	Groups[1] 3	
***				
COTTON AND COTTON LINTERS, subject to rules prescribed by the Cotton Inspection Division, Cargo Protection and Inspection Bureau, San Francisco, California				
Cotton, compresed to densities per cubic foot at shipside as indicated.				
High Density Bales, 32# or more,	100#		2.20	
Standard Density Bales, 27# and up to 32#,	100#		2.45	
		***		***
22½# and up to 27#,	100#		2.70	
Gin Bales, Less than 22½#	100#		4.90	
***				"

5. While on the pier awaiting shipment, the packages were inspected by the Pacific Cargo Inspection Bureau, Cargo Inspection Division, an agency of the Pacific Coast European Conference and four reports containing "a Statement of the Weights, Measurements and Densities" were prepared covering four of the 100 bale packages. The reports are dated December 27, 1957, signed by J. Kelley, under the certification that his statements are "true and correct to the best of my information." Each report showed the weight, length, width, thickness, cubic feet and density of each bale measured (identified by number) and summarized the average densities of each lot of bales as follows:

1. Marked ICOE-25 of 99 bales of cotton-25 lbs. 9 oz.
2. Marked CYOE-25 of 100 bales of cotton-25 lbs. 12 oz.
3. Marked SCOE-25 of 99 bales of cotton-26 lbs. 10 oz.
4. Marked GIOE-25 of 100 bales of cotton-24 lbs. 4 oz.

[1] "Groups", refers to rates to destination ports; "3" to the ports of Copenhagen, Denmark; Bremen and Hamburg, Germany.

(Note: The inspected bales cover the lots identified as "(A)" in the bill of lading).

6. The Pacific Cargo Inspection Bureau (identified in the tariff as, "Cargo Protection and Inspection Bureau") was engaged to assist States Marine, as a Member of the Pacific Coast European Conference, in enforcing the transportation rates and charges contained in its established tariffs.

7. a. Hohenberg had knowledge of the Inspection Bureau Report about the same time that it received the bill of lading, but it did not receive a copy of the inspection report as shown by the following testimony by witness Rudi E. Scheidt, Vice President of Hohenberg Bros.:

Q. Did you have any knowledge that the Pacific Company's inspection bureau had weighed and measured these bales?

A. We received knowledge of it at about the same time as the bill of lading. However, we did not receive a copy of the inspection report. We got that verbally and on the bill of lading.

b. After the shipper was billed, Hohenberg's Fresno manager telephoned a representative of States Marine and asked him for a lower rate on the cotton covered by bill of lading No. 6 as shown by the following testimony of witness Joseph A. de la Pena, Vice President of States Marine:

Q. Will you, in referring to paragraph 4 of this letter, and I quote the last sentence: "Hohenberg also stated that this complaint had been previously handled by their Mr. Bischoff with Mr. de la Pena in San Francisco but had been unable to receive any satisfaction." Would you say that that sentence refers to your personal meeting with Mr. Bischoff, or the later telephonic conversation with him?

A. As I recall it, it was a telephone conversation.

Q. He asked whether or not he could get a lower rate on the cotton after the shipment had been made and after the bill was sent. What did you tell him?

A. I told him that we couldn't reduce the rate because the inspection bureau had inspected the shipment and found that some of the bales were oversized.

Q. And his reply to that, do you recall it?

A. He didn't pursue it further with me. All I told him was that I could do nothing for him.

c. Hohenberg's representative had also indicated previously that it would be shipping some "oversized" bales and knew by the reference to oversize that it meant bales having a lower density than 27 lbs. per cu. ft. as shown by the following testimony of witness Joseph A. de la Pena:

MR. WOHLSTETTER: I'd like to have clarified as to what Public Counsel means by oversized.

EXAMINER JOHNSON: I think his question is clear enough. I think this witness can answer it.

A. The bales were oversized.

Q. Did Mr. Bischoff indicate this to you in his conversation at that time?

A. Yes, he did.

Q. So Mr. Bischoff knew that some of these bales in the 400 group were oversized and would not properly take a lower rate?

A. I just can't say in the 400. He mentioned the shipment to me. He didn't mention how many were oversized, what particular lots it might be. In fact, I didn't get into any detailed discussion with him at all. He just generally mentioned it to me and that was my comment to him.

Q. Did he generally mention that some of the bales in this particular shipment were oversized so as to not qualify properly for the $2.45 rate?

A. Yes, he did mention that some of the bales were oversized.

***

Q. When you talked to him later by phone, did you have any doubts of what he was talking about?

A. No.

Q. What was he saying to you, then?

A. It was bill of lading 6.

Q. What did he say?

A. He said in substance that the bill of lading had been processed and the shipper had been billed—

Q. Did he—

Mr. WOHLSTETTER: Let him finish.

A. (Continuing) He specifically mentioned about this shipment and this bill of lading.

***

8. Hohenberg was informed that States Marine had rated only 200 of the 600 bales at $2.45 per cwt. and the remaining 400 bales at $2.70 per cwt. Hohenberg questioned the rating in February of 1958 and presented arguments as to the probability of error in measurements, based on its reliance on the capabilities of a Murray gin-press to make a bale having a density in excess of 27 lbs. per cu. ft. Hohenberg did not inspect the bales but relied on its experience with the gin-press that was used.

9. In response to Hohenberg's arguments and requests, States Marine issued a "Correction to Freight List (Manifest)" dated January 31, 1958 for the shipper United States Commodity Company and the manifest of the *SS Alca* bill of lading No. 6 revising the bill of lading to show the freight on 400 "A" bales of cotton as $5029.09 instead of $5542.26. States Marine sent on February 10, 1958 a refund check in the amount of $513.17 payable to the order of Hohenberg Bros. which was subsequently endorsed by Hohenberg Bros. and negotiated.

10. The following statements from States Marine inter-office correspondence are also contained in the exhibits:

a. An inter-office States Marine memorandum dated January 27, 1958:

> Re S/S ALCA, Voy. 1—SF/Bremen, B/L 6 states: . . . This lading indicates that 400 bales is rated at $2.70/100 lbs. while the remaining 200 bales is rated at $2.45/100 lbs.
>
> Hohenberg was aware that some of the bales were oversized but was of the understanding that we would protect them with the $2.45 rate on the entire 600 bales provided actual measurements were not taken by the inspection bureau.

The memorandum is signed by H. H. Woody, Jr. of the States Marine Memphis office and is addressed to N. E. Wallen of the Los Angeles States Marine Office.

b. A letter dated February 6, 1958 from J. A. de la Pena of the San Francisco States Marine office to L. D. Estes of the New Orleans States Marine office says referring to this shipment:

> Frankly, the inspector was justified in imposing this penalty because Hohenberg in Fresno informed me that the bales were oversized but he had hoped they would be cleared before the inspector caught up the shipment.
>
> Since the inspector examined the bales before they were loaded and issued an inspection report, there was no choice other than for us to follow through. However, because of Woody's outline to you of this situation, we are issuing a correction and will try to conceal it from the Inspection Bureau, which I am sure we can do.

DISCUSSION

1. *Charges against the shipper under the first paragraph of Sec. 16.*

The first paragraph of Sec. 16 of the Act provides that " it shall be unlawful for any shipper . . . or any officer, agent, or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing . . . false reports of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable". The recital in the Board's order instituting the proceeding is that there is information before the Board that Hohenberg in connection with the shipment of certain cotton on the *SS Alca* on or about January 8, 1958 from the port of San Francisco, California through the means of false billing, false classification, and by other unfair devices or means attempted to and did obtain transportation by water for such property at less than the rates which would otherwise be applicable.

The proofs show that the shipper Hohenberg shipped 600 bales of cotton on the *SS Alca* for transportation to Bremen, Germany pursuant to a bill of lading showing 400 of such bales to be of "Standard" density and rated "(A)" which relates to the freight rate applied to bales having 22 1/2 and up to 27 lbs. per cu. ft. density. The freight rate to Bremen for such rating is $2.70 per 100 lbs. The correct freight was paid by Hohenberg.

At this point Hohenberg had a clear choice of actions. It could either accept the Inspection Division's report and not contest the freight charges or it could prove that the bill of lading was wrong and obtain a revision of the freight charges based on a correct bill of lading. Instead of either course, the shipper made a conscious choice of method which involved getting a lower freight rate regardless of the true facts, and in disregard of the applicable rates and charges and in disregard of the circumstance that it did not make its own inspection of the bales.

The circumstantial evidence in this case coupled with the direct testimony convinces that Hohenberg's successful campaign to compel States Marine to refund part of Hohenberg's original freight payment was conducted "knowingly and willfully." Hohenberg's Vice President, Rudi Scheidt (as previously quoted) admitted that Hohenberg knew of the inspection report which showed that the rate applicable was the rate originally charged by States Marine. Nevertheless (see the quoted testimony of Mr. de la Pena, previously quoted), Hohenberg continued to press for and eventually secured a lower rate, which is to say, it secured the transportation of the cotton "at less than the rates or charges that would otherwise be applicable". It need not be labored that to stand upon a demand for a lower rate unsupported by factual proof (or even attempted proof) that the cargo is entitled to carriage at the lower rate constitutes a device which is unjust, unfair, and forbidden by the statute.

It is highly significant that Hohenberg has at no time offered any proof as to what the density of the cotton *actually was* - and that is what determines the applicable rate. Its evidence at most indicates that prior to the time but not *at* the time it sought and secured the refund, Hohenberg may have believed that the cotton density entitled it to move at the lower rate Hohenberg sought. There is no evidence that at the time Hohenberg pressed for and secured the refund (or at any time after States Marine and Hohenberg were informed of the inspection results reported December 27, 1957) either Hohenberg or States

Marine believed or had reason to believe that the cotton was entitled to move at the lower rate claimed by Hohenberg.

After the measurement of the bales and the recomputation of the densities by the Inspection Division, Hohenberg's previous uncertainty about the size of the bales became a certainty. It then knew precisely what density was claimed by the carrier as the basis of its bill of lading. Hohenberg was shown to have knowledge about the inspection report and its contents and to have discussed the oversize bales and their effect on tariff rates both before and after the report was issued. Notwithstanding its knowledge about the inspection report, Hohenberg neither offered nor attempted to offer contradictory evidence either in the form of its own measurements or of any change caused by atmospheric conditions and by not successfully impeaching the truthfulness of the bill of lading or the inspection report.

There is other testimony in the transcript of hearings indicating that the reference in a telephone conversation between a Hohenberg employee and a States Marine employee to "oversize" bales may not necessarily have referred to the particular 400 bales. Such testimony, however, came out principally on cross-examination in the form of questions which also contained answers and required the witness to simply agree, or was about what the witness didn't know or what was not mentioned rather than about what the witness did know. Such testimony is not as persuasive as the responses which give the witness's own version of what he did know about his conversation. Moreover, Hohenberg did not meet its burden of overcoming the evidence concerning the telephone conversation about the shipment by bringing in its employee, who was on the telephone, as a witness, as it might have done if it wanted to make the record entirely clear on this point. Also, nowhere in the record does Hohenberg deny or contradict any of the assertions made in the States Marine inter-office letters that indicate Hohenberg's awareness or understanding of the facts. While these letters do not constitute direct evidence of all the facts they recite, they constitute circumstances which corroborate direct testimony in the record of Hohenberg's knowledge of facts which prevents successful argument that its claim for a refund was made believeing it was just. The record without the letters, however, is sufficient to support our conclusions that the conduct of Hohenberg was knowing and willful.

2. *Charges against the common carrier by water under Sec. 16 Second.*

The second paragraph of Sec. 16 provides that it shall be unlawful for any common carrier by water, either alone or in conjunction with any other person directly or indirectly ". . . Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing" or by any other unjust or unfair device or means. The recital in the Board's order is that there is information regarding the foregoing shipment showing that States Marine, common carriers by water in foreign commerce, knowingly allowed Hohenberg to so obtain said transportation at less than the regular rates or charges then established and enforced.

The proofs show States Marine accepted the Hohenberg property for transportation by issuing a bill of lading showing States Marine as the carrier, by receiving the freight charges and by causing the 400 bales of cotton to be transported overseas. States Marine had the inspection report showing the true measurements, weights and densities of the 400 bales and based its freight charges on the tariff provisions applicable to such densities. The report was prepared by a Bureau engaged to assist in enforcing tariff rates and charges of the conference of which States Marine is a member. Even though it knew the true facts about the size, weight and densities of the bales and correctly interpreted and applied the tariff containing the rates and charges then established and enforced, States Marine after several contacts with Hohenberg changed its mind and yielded to the requests of Hohenberg and revised its charges to apply rates which it knew were not applicable, although it had other evidence than the reports of the Bureau on which it based its initial charges. States Marine did this by revising the correct billing as shown in its bill of lading through the substitution of an incorrect billing as shown in the "Notice of Correction to Freight List" over the signature of a States Marine-Isthmian Agency Inc. representative. Such a "corrected" billing based on untrue facts constitutes false billing. States Marine's contacts with Hohenberg and its resulting assent to Hohenberg's claims constituted action in conjunction with another person and was action taken directly. Thereafter States Marine carried out its agreement with Hohenberg by refunding enough of the freight payment to bring the charges to the shipper down to the established tariff

rates applicable to cotton bales having a higher density than those which it transported. The charge of the lesser freight rate was done knowingly as the Board's specification states. The agreement to make a refund based on inapplicable tariff rate, followed by a refund payment is an unfair or unjust means of obtaining less than the regular rates established and enforced by States Marine.

EXCEPTIONS

The exceptions are (1) to the failure to make certain findings, (2) to the admission of certain documents as hearsay evidence, (3) to certain statements made by the Examiner, and (4) to some of the Examiner's findings, as not being supported by the evidence.

States Marine's exceptions as to the failure to find the Howard and States Marine dock receipts conclusive as to the density of the bales were not properly taken in the absence of any showing that the information therein was based on inspection and measurement of the bales, whereas the inspection report, prepared for the purpose of enforcing conference tariff provisions and prepared in the ordinary course of business of the Cargo Inspection Bureau, was based on actual measurements and computations which were not shown to be false or inaccurate. The dock receipts show all six bale lots to measure exactly 1800 cubic feet, which would be a remarkable coincidence for irregularly shaped cotton bales. No evidence overcoming the inspection reports was introduced by respondents to show the bales were measured to obtain information to be written in the dock receipts, nor how the 1800 cu. ft. measurement was obtained.

The failure to find that the measurements shown on the inspection report were made by longshoremen is not an error because this fact does not control the result. Measurement by longshoremen does not of itself impeach the accuracy of the measurements in the absence of any proof that longshoremen are incapable of taking accurate measurements or that other specific means were taken showing innaccuracy. The failure to find that 99% of the cotton exported is high density cotton and to infer therefrom that the density of this cotton shipment is above 27 lbs. per cu. ft. is not controlling in the face of the actual measurement made of this particular shipment which was not shown to be wrong. Other omitted findings requested by respondents consisting of incorrect evidences of density are equally irrelevant. The

failure to use inaccurate or non-controlling premises for the Examiner's conclusions was not error.

The exceptions of both parties as to the admission of the inspection report as hearsay, and its use, is the basis of most of the exceptions. The inspection bureau report was introduced and received in evidence without objection; no demand for its corroboration by cross-examination of the inspector who signed it was made, and it was accepted as valid at the time it was submitted. All evidence in the record relating to the dimensions of the bales was taken to be accurate without question at the time of transactions involved herein as shown by correspondence and by testimony in the record. At no time during the proceedings did the respondents question the authenticity or accuracy of the report, but only the possibility of error by longshoremen or because of the lack of supervision or of the usual results of compression by the Murray gin-press. The inspection report has rational probative value and is corroborated by the entire record. Responsible persons in their business would normally rely on a report of this kind unless clear evidence of inaccuracy or of lack of qualification of the inspector was shown. The report was not contradicted by any substantial evidence. All the evidence here shows, if anything, the authenticity of the inspection report made by an authorized and qualified agency and its appointed inspector. Respondent States Marine also did not refute (a) the clear implication that it relied on the report in furnishing information for its bill of lading and used the bill of lading as the basis for collecting freight shown in its applicable rates and charges before the refund was made, nor (b) the testimony of its vice president that because of the report it would not make any change in its freight billing. The exceptions based on a claim of hearsay as to the inspection report and the data and the computations therein, are not substantiated. A States Marine inter-office letter stating that "Hohenberg was aware that some of the bales were oversized, but were of the understanding" that States Marine "would protect them with the $2.45 rate on the entire 600 bales provided actual measurements were not taken by the inspection bureau" was also properly admitted for consideration as having some probative value to corroborate other testimony in the record.

Respondents cite *United Nations, et al* v. *Hellenic Lines Limited, et al,* 3 F.M.B. 781 (1952) for the proposition that the Commission cannot make a finding of guilt based upon uncorroborated hearsay. The case, however, is not controlling. The shipper of

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the bales of cotton complained that its bales were of high density whereas the freight was computed at an intermediate density rate. The bales were shipped from Brazil to New York by Moore-McCormack Lines under a bill of lading prepared pursuant to a written report of weights and measurements compiled in Brazil but the record was found to lack "details of the time or the place of any measurement of the shipment in Brazil and even the identity of the measurers." At New York the cotton was unloaded and then loaded into a States Marine ship for movement to Trieste. Another bill of lading was issued by States Marine which showed a lower density for the same cotton. Complainant sought to recover the difference between the higher freight rate charged by States Marine based on the density shown on its bill of lading and the lower rate which would have been charged for the density shown on the Moore-McCormack Lines bill of lading based on the density report made in Brazil. In the *United Nations* case the Moore-McCormack Lines bill of lading was contradicted by direct, positive and probative evidence produced by States Marine showing that in New York it had the cotton measured and weighed again resulting in a measurement and density justifying the rate charged by States Marine. In the present case there is no valid evidence to contradict the inspection report as there was in the *United Nations* case. Further, here the authenticity of the inspection report is corroborated by the conduct of all the parties in this proceeding and was accepted as valid at all times. The admissibility, not the validity of the inspection report, was challenged by the respondents herein.

The findings to which the parties except are: (1) that Hohenberg's Fresno manager advised States Marine's vice president some of the bales were "oversized" and would not qualify for the $2.45 per cwt. rate and that Hohenberg knew such facts; (2) that Murray gin-press bales have a density of 27 to 28 lbs. per cu. ft. "if properly operated" machines are used and there is no showing in the record that the gin compress was operated under normal conditions; and (3) the dock receipts do not counteract the inspection report.

Our review of the facts shown by the records and credible testimony indicates that the Examiner's findings are based on facts which are not disproven in this record.

In view of our discussion of the violation of Sec. 16 of the Act we also find that the exceptions to the Examiner's conclusions are likewise not well taken. Exceptions and proposed findings

not discussed in this report nor reflected in our findings have been considered and found not justified.

CONCLUSION

We conclude that the Examiner's findings are consistent with the allegations and proofs.

We conclude that by the preponderance of credible evidence the charges against the shipper Hohenberg have been proven and Hohenberg has been shown to have knowingly and willfully, directly, by an unjust or unfair means, obtained transportation by water for property, consisting of 400 bales of cotton, at less than the rates or charges which would otherwise be applicable.

We conclude further that by the preponderance of credible evidence the charges against the common carrier by water States Marine have been proven and States Marine directly and in conjunction with another person, has been shown to have knowingly allowed a person to obtain transportation for property consisting of 400 bales of cotton at less than the regular rates or charges then established and enforced on the line of States Marine by means of false billing and by an unjust or unfair device or means.

Both Hohenberg and States Marine have violated Sec. 16 of the Act. Our conclusions and this report and order shall be reported to the Department of Justice for such action as it considers appropriate.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at its office in Washington, D.C., on the 6th day of October, 1961.

No. 892

STATES MARINE LINES—HOHENBERG BROTHERS. VIOLATION OF SECTION 16

This proceeding having been initiated by the Federal Maritime Board upon its own motion, and having been duly heard and submitted after investigation of the things and matters involved having been had, and the Federal Maritime Commission, as transferee, pursuant to Reorganization Plan No. 7 of 1961, effective August 12, 1961, of the functions vested in the Federal Maritime Board (abolished pursuant to Sec. 304 of said Reorganization Plan No. 7 of 1961), on the date hereof, having made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is Ordered, 1. That, the following respondents be and each one is hereby notified and required, (a) to hereafter abstain from the practices herein found to be unlawful under Sec. 16 of the Shipping Act, 1916, as amended; and, (b) to notify the Commission within twenty-five (25) days from date of service hereof whether such respondent has complied with this order, and if so, the manner in which compliance has been made, pursuant to Rule 1 (c) of the Rules of Practice and Procedure (46 CFR 201. 3):

States Marine Lines, Inc. (formerly States Marine Corp. of Del.) and Global Bulk Transport Corp. (formerly States Marine Corp.)

Hohenberg Brothers

2. That, the proceeding be, and it is hereby, discontinued.

BY THE COMMISSION.

(Signed) GEO. A. VIEHMANN
Acting Secretary

FEDERAL MARITIME COMMISSION

No. 931

AGREEMENT NO. 8555 BETWEEN ISBRANDTSEN STEAMSHIP COMPANY, INC., ISBRANDTSEN COMPANY, INC., AND AMERICAN EXPORT LINES, INC.

Decided November 27, 1961

F.M.B. Agreement No. 8555 found properly filed pursuant to Section 15 of the Shipping Act, 1916. Said agreement further found not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Further found that said agreement is not in violation of the Shipping Act, 1916; will not operate to the detriment of the commerce of the United States, and is not contrary to the public interest.

F.M.B. Agreement No. 8555 approved, pursuant to Section 15 of the Shipping Act, 1916.

Francis T. Greene, Whitman Knapp, David Simon, and *Robert Arum* for Prudential Steamship Corporation.

Richard W. Kurrus, John W. Castles, III, and *Leonard S. Leaman* for Isbrandtsen Company, Inc. and Isbrandtsen Steamship Company, Inc.

Ralph D. Ray, Frank B. Stone, Alan S. Kuller, and *Eugene R. Anderson* for American Export Lines, Inc.

Robert B. Hood and *Donald V. Brunner* as Public Counsel.

INITIAL COMMISSION DECISION [1]

BY THE COMMISSION:

This case presents two questions (a) is the Commission authorized and required to act with respect to certain agreements which have been filed with it, and (b) if so, what should the Com-

[1] The evidentiary hearing was held before an Examiner. Thereafter opportunity was afforded all parties to file proposed findings, conclusions, and supporting briefs. After such documents were filed, the Commission required the entire record to be certified to it for this initial decision, which is based on our consideration of the entire record, including proposed findings and conclusions, and supporting briefs.

mission's action be? The controlling statute, section 15 of the Shipping Act, 1916 (39 Stat. 733, 46 U.S.C. 814), hereinafter "the Act", reads in pertinent part as follows:

". . . every common carrier by water . . . shall file . . . with the Commission a true copy . . . of every agreement with another such carrier . . . controlling, regulating, preventing, or destroying competition . . . .

"The Commission shall by order, after notice and hearing, disapprove, cancel, or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements . . .".[2]

We find the following facts:

(1) Isbrandtsen Company, Inc., and American Export Lines, Inc., both common carriers by water, and New York corporations, have filed with this Commission, and ask this Commission to approve under section 15 of the Act, an agreement between them dated November 25, 1960, an important part of which (Exhibit "A") is an agreement between Isbrandtsen Company, Inc. and its wholly-owned subsidiary, Isbrandtsen Steamship Company, Inc. (also a New York corporation) dated November 23, 1960.[3]

(2) Isbrandtsen and Export are both primary United States-flag liner operators on Essential United States Foreign Trade Route No. 10[4] which runs between United States North Atlantic ports (Maine—Virginia, inclusive) and ports in the Mediterranean Sea and Black Sea, Portugal, Spain, South of Portugal and Morocco (Tangier to southern border of Morocco).

[2] This quotation is from the Act as amended by Public Law 87-346, 87th Cong., 1st Sess., effective Oct. 3, 1961 (75 Stat. 763). The characterization of this quotation as section 15 "in pertinent part" is not intended to indicate that the balance of the statute is not considered in deciding this case. As later indicated we have carefully considered the entire section and all arguments based on any provision in it. The quotation however, highlights (a) the character of agreements covered by the section, and (b) the statutory rule of decision with respect to them.

[3] Hereinafter "Isbrandtsen" means Isbrandtsen Company, Inc., "Export" means American Export Lines, Inc.

[4] "Essential United States Foreign Trade Route" as used herein, means a route which has been determined pursuant to section 211 of the Merchant Marine Act of 1936 (49 Stat. 1989, 46 U.S.C., 1121), to be an ocean route from ports in the United States to foreign markets essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States.

(3) The percentages of total commercial cargo moving on Trade Route 10 in 1957, 1958, and 1959 carried by Isbrandtsen and Export were approximately as follows:

Outbound	*Export*	*Isbrandtsen*
1957	29.8	4.0
1958	24.9	2.4
1959	20.6	2.4
Inbound		
1957	35.4	—
1958	29.2	—
1959	27.6	—

(4) Isbrandtsen and Export are both primary United States-flag liner operators on Essential United States Foreign Trade Route No. 18, which runs between United States Atlantic and Gulf ports (Maine-Texas, Inclusive) and ports in southwest Asia from Suez to Burma, inclusive, and in Africa on the Red Sea and Gulf of Aden.

(5) The percentages of total commercial cargo moving on Trade Route 18 in 1957, 1958, and 1959 carried by Isbrandtsen and Export were approximately as follows:

Outbound	*Export*	*Isbrandtsen*
1957	11.0	6.7
1958	7.6	5.6
1959	6.9	4.0
Inbound		
1957	11.7	.4
1958	12.4	.2
1959	9.5	.0

(6) The overall effect of the Isbrandtsen-Export arrangement before us (which has been designated F.M.B. Agreement No. 8555 and is hereinafter called "No. 8555") will be for Isbrandtsen, which recently acquired 26.37% of the outstanding Export common stock, to transfer its liner fleet of 14 ships, and its entire business (including good will) as a common carrier by water in the foreign commerce of the United States to Export, agreeing as a part of the transaction not to compete in the services transferred without Export's consent.

> The foregoing findings require us to conclude, as we do, that F.M.B. Agreement No. 8555 in its entirety constitutes an agreement and arrangement between Isbrandtsen and Export, common carriers by water, and citizens of the United States, controlling, regulating, preventing, and destroying competition.

The clear, unqualified language of section 15 of the Shipping Act, 1916 therefore requires us to approve, disapprove, cancel, or modify No. 8555.[5]

The first question is therefore answered in the affirmative: we are required to act with respect to No. 8555. We now turn to the remaining question which is *what* should our action be, and with respect thereto, we find the following additional facts: [6]

(7) In this case there is neither claim nor evidence that No. 8555 is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or as between exporters from the United States and their foreign competitors, or is in violation of the Act.[7]

(8) Prudential Steamship Corporation (hereinafter "Prudential") does not operate on Trade Route 18, but is a primary United States-flag liner operator (subsidized) on Trade Route 10.

(9) Prudential has successfully operated on Trade Route 10 for more than ten years, most of that time unsubsidized, and has steadily increased its outbound carryings of

[5] We hold that Congress means what it says. Congress (by Section 15 of the Act) authorizes and requires us to approve, disapprove, cancel, or modify "*every* agreement . . . controlling, regulating, preventing, or destroying competition". To read this language as authorizing and requiring us to approve, disapprove, cancel, or modify every agreement . . . controlling, regulating, preventing, or destroying competition *except agreements of the nature of the agreement here under scrutiny*, would constitute statutory *amendment* masquerading as statutory *construction*. We are not authorized anywise, with respect to particular types of agreements, (or anything else), to emasculate the Act to the detriment of the public interest, and this (although it might make our task substantially easier) we will not do.

[6] If we found that No. 8555 is unjustly discriminatory or unfair as between (1) carriers (2) shippers (3) exporters (4) importers (5) ports, or (6) exporters from the United States and their foreign competitors, it would necessarily be disapproved, cancelled, or modified as provided by section 15 of the Act, as would also be required if we found that it would operate to the detriment of the commerce of the United States, be contrary to the public interest, or be in violation of the Act. Otherwise, according to the legislative mandate, it must be approved. This test presents questions for highly specialized judgment in the maritime transportation field, for what is "unjustly discriminatory" or "unfair," will "operate to the detriment of the commerce of the United States" or "be contrary to the public interest" in that area, depends in large measure upon considerations not elsewhere applicable.

[7] This leaves for consideration whether No. 8555 is unjustly discriminatory or unfair as between carriers (i.e. as between Export and Prudential), will operate to the detriment of the commerce of the United States, or be contrary to the public interest.

commercial cargo from 1957 to 1959 inclusive from 3.8% to 5.5% while Isbrandtsen's fell from 4% to 2.4% and Export's fell from 29.8% to 20.6%. Inbound, Prudential's percentage-carriage rose from 7.7% in 1957 to 10.4% in 1959, while Export's fell from 35.4% to 27.6%. Isbrandtsen's operating pattern does not permit it to carry substantial inbound cargo on this trade route.

(10) Export, Isbrandtsen, and Prudential, as United States-flag liner operators on Trade Route 10, face strong, increasingly effective competition from more than 30 foreign-flag lines. To prosper, even to survive, United States-flag operation must achieve maximum operating efficiency, and the public interest demands its achievement by all lawful means.

(11) Outbound sailings on Trade Route 10 by United States-flag lines and foreign-flag lines, 1957-1960 were approximately as follows:

	1957	*1958*	*1959*	*1960*
U. S. Flag	210	271	268	246
Foreign Flag	346	426	415	463

For the four-year period, foreign-flag sailings outnumbered United States-flag sailings by an average of more than 160 sailings per year. In 1960 foreign flags outnumbered United States flags by 217 sailings, and made 65.3% of that year's sailings on the route.

(12) Although from 1957 to 1959 the volume of liner-cargo moving outbound on Trade Route 10 has held steady, and the inbound cargo movement substantially increased, the proportion of cargo carried by United States-flag ships both outbound and inbound has steadily and substantially declined. Cargo-carryings under foreign flag have increased proportionately to United States-flag losses.

(13) No. 8555 will result in substantial economies and improved operating-results in the combined Export-Isbrandtsen operation, and increase the efficiency of performance.[8]

[8] Aside from alleged fear of wholly hypothetical injury at some necessarily unspecified future date, this appears to be the primary (if not the only) basis of Prudential's protest against our approval of F.M.B. Agreement No. 8555. Not only is it unsubstantial; to adopt

(14) No. 8555 will result in the performance of Isbrandsen's service competitive with Prudential being performed by a subsidized operator or a subsidized operator's wholly-owned subsidiary.

(15) The operations of subsidized operators and their subsidiaries, competitive with other United States-flag lines as distinguished from Isbrandtsen's present, unsubsidized competition with Prudential, are particularly restricted by law, and subject to constant policing by the Maritime Administration.[9]

(16) There is no reasonable probability that No. 8555 will result in any substantial loss of revenue by Prudential or that Prudential will as a result of No. 8555 be hampered anywise in maintaining and improving its service, or be otherwise injured.[10]

Based upon the findings we have made and the whole record in this case, we find, determine and conclude that No. 8555 is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; that it will not operate to the detriment but will operate to the advancement of the commerce of the United States; that it is not in violation of the Shipping Act, 1916; and that it it is not contrary but beneficial to the public interest.

It follows that we should approve F.M.B. Agreement No. 8555, and we do approve it. An appropriate order will be entered.[11]

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it would in our opinin, be contrary to the dominant public interest, which is the basis of our decision on the merits, and on the jurisdictional point, as well. Prudential may have an interest in preventing its United States-flag competitors from increasing the economy and efficiency of their operations. If so, the private interest must yield to the public interest, which demands that United States-flag steamship lines in foreign trade (especially, subsidized operations) operate as economically and efficiently as possible.

[9] e.g., Section 804 of the Merchant Marine Act of 1936 provides *inter alia*, that it shall be unlawful for a subsidized operator or its subsidiary to operate foreign flag vessels in competition with United States-flag operators (such as Prudential) on essential United States foreign trade routes. And see certain standard provisions in all operating-differential subsidy contracts.

[10] While each and every result of maritime operating pattern changes cannot, of course, be predicted with certainty, it is significant that no evidence in this record would, in our opinion, support a finding that, as a result of this agreement, Prudential will lose a ton of cargo in the foreseeable future.

[11] Except to the considerable extent that the proposed findings and conclusions are substantially embodied herein, they are denied as unsupported by substantial evidence, contrary to the weight of the evidence, or irrelevant to decision under Section 15 of the Shipping Act, 1916.

FEDERAL MARITIME COMMISSION

No. 931

AGREEMENT NO. 8555 BETWEEN ISBRANDTSEN COMPANY, INC., ISBRANDTSEN STEAMSHIP COMPANY, INC., AND AMERICAN EXPORT LINES, INC.

ORDER

Whereas the Commission has this day determined herein that Agreement No. 8555 is subject to the provisions of Section 15 of the Shipping Act, 1916, and meets the standards of said section, which therefore requires the Commission to approve it.

Now therefore, It is ordered, That said agreement be, and it hereby is, approved, and this proceeding is discontinued.

By the Commission November 27, 1961.

(Sgd.) GEO A. VIEHMAN
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 883

UNAPPROVED SECTION 15 AGREEMENTS
WEST COAST SOUTH AMERICA TRADE

Decided: December 7, 1961

Respondents not shown to have been acting pursuant to an unfiled agreement or cooperative working arrangement under section 15 of the Shipping Act, 1916, in the West Coast South America trade during the years 1956 and 1957.

John R. Mahoney and *Robert P. Beshar* for respondent Atlantic and Gulf/West Coast of South America Conference and its member lines.

Leonard G. James and *Robert L. Harmon* for respondent Pacific/West Coast of South America Conference and its member lines.

John E. Cograve and *Edward Aptaker* Public Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman*; JOHN HARLLEE, *Vice Chairman*; ASHTON C. BARRETT, *Commissioner*; JOHN S. PATTERSON, *Commissioner*.

BY THE COMMISSION:

In January 1960, the Federal Maritime Board, the Commission's predecessor, ordered an investigation upon its own motion to determine whether the Atlantic and Gulf/West Coast of South America Conference and the Pacific/West Coast of South Amer-

ica Conference and their members[1] in 1957 or prior thereto had acted under an agreement or agreements relative to rates or rate information that had not been filed for Board approval as required by section 15 of the Shipping Act of 1916.

A hearing was held before an Examiner on March 2, 1961 in San Francisco. At that time there were introduced in evidence a number of letters and telegrams between the two conference chairmen, and both chairmen testified. They were the only witnesses. The documents had been produced by the conferences, under protest, and after a period of delay during which they resisted as improper Public Counsel's motion for the production of such information. Subsequently briefs were submitted by respondents and by Public Counsel and the Examiner issued his Recommended Decision.

In his decision the Examiner recommends that we find that "although the record unquestionably shows a cooperative *spirit,* for the most part, between the two conferences, it discloses no 'agreement' or 'understanding' for a 'cooperative working arrangement' which would destroy competition between them" and that "on this record, . . . respondent's actions during 1956-57 have not been shown to be in contravention of section 15."

No exceptions to the Recommended Decision were filed. Oral argument was neither requested nor held. The matter is accordingly before us for final decision.

Member lines of both conference respondents serve the West Coast of South America and carry cargoes for shippers competing in that area with respect to certain commodities, including wheat, woodpulp, asphalt, dynamite and newsprint. During 1956 and 1957 the chairmen of the two conferences exchanged correspondence concerning rates on such commodities and charges thereon. Principally these communications took the form of inquiries and replies concerning rate changes which one conference or the other had adopted or had under consid-

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[1] Members of the Atlantic and Gulf/West Coast of South America Conference are as follows: Compania Colombia de Navegacion Maritima, S.A. (Coldemar Line), Compania Sud Americana de Vapores (Chilean Line), Flota Mercante Grancolombiana, S.A., Grace Line Inc. (Grace Line), Gulf & South American Steamship Co., Inc., Rederiet Ocean A/S and West Coast Line, Inc. (West Coast Line).

Members of the Pacific/West Coast of South America Conference are as follows: Compagnie Generale Transatlantique (French Line), Compania Chilena de Navegacion Interoceanica, Compania Naviera Independencia, S.A. (Independence Line), Compania Naviera Rosaria S.A. (Peru Line), Flota Mercante Grancolombiana, S.A., Grace Line Inc. (Grace Line), Kawasaki Kisen Kaisha, Ltd., Nippon Yusen Kaisah, Ltd., N.V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn", Royal Mail Line, Ltd., Westfal-Larsen & Company, A/S (Westfal-Larsen Company Line), Wiel & Amundsen A/S (Latin American Line).

eration. Usually the inquiries were prompted by shippers' requests for rate quotations or rate reductions. For the most part, the respondents furnished each other the requested information, but after having reached an independent decision as to whether to change or maintain the rate in question. There were, however, a few exchanges of rate information and opinions before either conference had reached a decision on the matter.

The pertinent parts of section 15 of the Shipping Act of 1916 require common carriers by water and other persons subject to the Act to file with the Commission (formerly the Federal Maritime Board) copies of every agreement with another carrier or other person subject to the act which fixes or regulates transportation rates; controls, regulates, prevents or destroys competition; or in any manner provides for an exclusive, preferential or cooperative working arrangement. If an agreement is oral, a memorandum describing it must be filed. Section 15 further provides that "before approval, or after disapproval, [by the Commission] it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement . . ."

Discussion and Conclusions

The case submitted to us for decision turns primarily on the question whether there was an agreement, understanding or cooperative working arrangement between respondents. On this question we are faced with a want of proof.

The documents in the record do not show any formal agreement between the two conferences to exchange rate or rate making information, and the conferences deny the existence of any such agreement. While a formal agreement is not necessary, the absence thereof obviously increases the difficulty of establishing the nature of any mutual understanding or arrangement between the parties. Though they cannot be as easily proved, practices, understandings and arrangements violative of the law can as easily result from tacit agreements as from formal stipulations. Moreover, the mere existence of the kind of situation we have here, involving a rather frequent interchange of rate information by competitors, is enough to suggest that they may be acting outside the requirements of the statute and warrant inquiry as to whether in fact they are.

The respondents engaged in a series of inquiries concerning rates. These were usually prompted by requests from shippers

for rate reductions or quotations. In most instances, the information which passed between respondents regarding these requests referred to rates already independently adopted, although they might not yet have been made effective. On a few occasions, it appears that there was some discussion of rates and rate considerations prior to the decision on the rate in question by either conference, but this was not shown to be an established practice. Notice of a rate change was not automatically forthcoming from either conference.

As noted, the Examiner concluded that this evidence established only the existence of a cooperative "spirit" between the two conferences and did not show an agreement or understanding for a cooperative working arrangement which would destroy competition between them. A cooperative "spirit" does not quite achieve the status of an agreement or understanding or a cooperative working arrangement that would be included within the scope of section 15.

We concur with the Examiner that there was not sufficient evidence of an agreement or understanding for a cooperative working arrangement. Accordingly, there is no occasion to go into a discussion of anti-competitive questions that might arise where an agreement exists. In so holding, however, we wish to state that we deem it a serious matter for parties subject to the Act to engage in exchanging rate information without our knowledge. In some circumstances, the exchange of rate information may not affect the public interest. But the natural consequences of such activity can clearly be a step toward or the very basis of improper practices, and the activity should therefore be avoided.

The proceeding will be discontinued.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D.C., this 7th day of December, 1961.

No. 883

UNAPPROVED SECTION 15 AGREEMENTS - WEST COAST SOUTH AMERICA TRADE

This proceeding having been instituted by the Federal Maritime Board upon its own motion, and having been duly heard and submitted, and investigation of the things and matters involved having been had, and the Commission, on the date hereof, having made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

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

BY THE COMMISSION.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 948

IN RE: PACIFIC COAST EUROPEAN CONFERENCE

Decided December 21, 1961

The Federal Maritime Commission has the right and duty to be informed of the concerted activities of common carriers and others who are parties to agreements under Section 15 of the Shipping Act, 1916, in order to discharge its statutory responsibility for maintaining continuous supervision and control over such activities. The Commission is compelled to withdraw approval of the section 15 agreements of parties who fail to comply with the Commission's requests for information or otherwise fail in their obligation to keep the Commission fully advised of their concerted activities.

Pacific Coast European Conference and its member lines ordered to furnish the Commission prior to close of business on January 22, 1962 specified information and documents, otherwise the Commission will withdraw approval of their basic conference agreement, No. 5200.

Leonard G. James and *Charles F. Warren* counsel for respondents.

Edward Schmeltzer and *Edward Aptaker* Public Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman*; JOHN HARLEE, *Vice Chairman*; ASHTON C. BARRETT, *Commissioner*; JOHN S. PATTERSON, *Commissioner*

BY THE COMMISSION:

PROCEEDINGS

This proceeding was initiated by an order of the Commission's predecessor, the Federal Maritime Board (the Board), served June 20, 1961, directing that the Pacific Coast European Conference (the Conference) and its member lines show cause on or

before July 20, 1961 why they should not comply with certain requests for information made by the Board and its Office of Regulations, or in the alternative, why FMC Agreement No. 5200 should not be disapproved.[1] The order authorized the filing of affidavits of fact and memoranda of law on or before July 10, 1961, and the filing of replies thereto on or before July 17, 1961. Oral argument before the Board was scheduled for July 20, 1961. Upon request of respondents the above times were subsequently extended to July 20, 1961 for affidavits and memoranda, July 27, 1961 for replies, and July 31, 1961 for oral argument. No affidavits of fact or memoranda of law were filed. The Board heard oral argument on July 31, 1961.[2]

FACTS

The Pacific Coast European Conference is an association of common carriers by water, subject to the Shipping Act, 1916, operating from United States Pacific Coast ports to ports in the United Kingdom, Ireland, the Scandinavian Peninsula, Continental Europe, and North Africa. The operations and activities of the Conference are conducted pursuant to the terms of Agreement No. 5200 which was approved some 24 years ago under the provisions of section 15, Shipping Act, 1916.

On December 15, 1959 the Board's Office of Regulations advised all conferences operating pursuant to agreements approved under section 15, that thereafter all information furnished the Board of actions taken under the approved agreements, whether by way of minutes or other reports, must be certified and subscribed to by the chairman, secretary or other responsible official of the conference submitting the information.

On February 5, 1960, the Office of Regulations, in a letter to Mr. J. F. McArt, Chairman of the Pacific Coast European Conference, noted that certain minutes of Conference meetings received in January of 1960 had not been certified and requested certified copies thereof. Although the Board in subsequent letters followed up this request, the Conference at no time complied

[1] Agreement No. 5200 is the basic agreement authorizing the Pacific Coast European Conference. It was approved by the United States Maritime Commission on May 26, 1937, pursuant to the provisions of section 15, Shipping Act, 1916, and has been amended from time to time since then.

[2] Oral argument to the Board was heard by Chairman Stakem and Member Wilson, shortly before the Commission succeeded to the Board's regulatory functions. Mr. Stakem was subsequently appointed Chairman of the Commission. The other Commissioners joining in this report have carefully and fully considered all of the documents and the transcript of oral argument in this proceeding.

with it. Finally, on May 16, 1960, the Conference chairman wrote the Board that it was the view of the Conference that minutes of its meetings were kept solely for the convenience of the members and there existed no legal requirement for their submission to the Board. He also questioned the authority of the Office of Regulations to issue the December 15 communication relating to certification but said the conference had no objection to continuing the practice of furnishing the Board with copies of such minutes of meetings as the Conference kept.

Article 16 of the Conference agreement expressly requires that the Conference shall furnish to the Board, among other things, copies of minutes of all meetings. It does not, however, mention certification. In view of this and the Conference's position, the matter of certification will be made the subject of separate proceeding and will not be further dealt with in this Report.

On January 25, 1961 the Office of Regulations wrote the Conference chairman about Item 3134 of the minutes of Conference Meeting No. 450 (General) held November 1-3, 1960, which stated:

> Resolved, that entertainment of shippers of the type and kind given to a shipper and his wife on May 28 to June 3, 1960 on the Yacht Westerly of States Marine Lines shall be clearly understood to constitute a gift of substantial value prohibited by Article 3 of the Conference Agreement. Further, to this resolution, it is the sense of the Conference that any entertainment of shippers of extended, overnight duration and/or involving immoderate expense shall be considered excessive and as such prohibited. For purposes of this resolution, the term shippers includes consignees, their respective agents, employees, families, friends and relatives.

The letter requested information as to the action the Conference contemplated regarding this matter and in addition the identity of the shipper involved and the details of any particular shipment that formed the basis of the "gift." On March 28, 1961 the Conference was again requested to furnish this information.

The March 28 letter also requested that the Conference furnish a full and complete record of proceedings on its docket items and specifically asked for a detailed report of the facts on one such item, namely, several incidents involving alleged violations of the Conference Agreement by States Marine Lines. Request was further made for a statement of the basis of any action taken by the Conference with respect to these alleged violations, and for copies of the pertinent documents. This matter had come to the attention of the Office of Regulations through an indication

in the minutes of Conference Meeting No. 419 that the Conference had continued on its docket for the next general meeting an item relating to violations of the Conference Agreement by States Marine and through a document introduced in evidence in another Board proceeding which bore the Conference letterhead and was entitled "Docket Item No. 8", subject "States Marine Lines agreement violations reported at Celler Committee hearings."

In connection with the foregoing, it should be noted that agreement No. 5200 binds the Conference to the maintenance of the agreed uniform rates and practices (Article 1), prohibits the members from engaging directly or indirectly in transportation under terms, conditions or rates different from those agreed upon (Article 2), and provides for the Conference's assessment of "liquidated damages" of from $500 to $10,000 for a member's nonobservance of the agreement or any of the Conference rules, regulations or tariffs, and also possible expulsion of the offending member from the Conference (Article 15).

In two letters dated April 7, 1961, the Conference chairman, Mr. McArt, responded to the requests of the Office of Regulations by asking it to state the specific purpose for which the information had been requested. To these letters the Secretary of the Board, at the Board's direction, replied on May 4, 1961 in part as follows:

> The Board has a duty to detect possible violations of the Shipping Act, 1916, as well as possible violations of the approved agreement under which your member lines operate. The Board must be informed with respect to your Conference activity in order to determine whether such activity is within the scope of your approved agreement (No. 5200). The Board must also determine whether, on a continuing basis, the agreement meets the standards of section 15 and merits continued approval, or, conversely, whether it should be modified or disapproved as no longer meeting those standards. The Board has a duty to be informed in addition of the efficacy of the conference agreement as a respected and meaningful contract between members.
>
> To date you have filed minutes of meetings so sketchy and incomplete that the activities and actions of the member lines are effectively withheld from proper review of the Board. You have refused to certify minutes of meetings as being true and complete reports of the actions of the member lines, although your conference agreement requires that minutes of your meetings—presumably true and complete—will be filed with the Board, and you have refused to admit the District Representative of the Office of Regulations to Conference meetings. Your actions in this regard indicate a willful withholding of information from the agency responsible for the enforcement of the Shipping Acts under which your Conference is permitted to exist.

We reiterate the requests set forth in our letters . . . calling for information required by the Board in the administration of the Shipping Act, 1916, in order that it may be informed as to whether the agreement of your Conference continues to meet the standards of section 15, Shipping Act, 1916. Your reply furnishing the requested information and documents must be made by May 19, 1961. Failure to comply herewith will result in appropriate Board action to modify or cancel Agreement No. 5200, as amended, pursuant to the Shipping Act, 1916.

The Conference did not furnish the requested information. Instead, Mr. McArt by letter dated May 15, 1961 informed the Board in relevant part as follows:

We cannot agree that this Conference has withheld any information from the Board that it is legally entitled to receive. Your letter speaks of the Board's "duty to detect possible violations of the Shipping Act, 1916" but does not refer to any particular violations which the Board is seeking to detect so far as the members of this Conference are concerned. We know of no violations of the Shipping Act or of possible violations and are completely at loss to understand the reason for your demand for further and additional information with regard to the decisions of the members of this Conference.

Counsel for this Conference has given his legal opinion that there is no statutory requirement for the filing of Conference minutes, nor for Conferences to admit non-members to Conference meetings, nor for the Conference members to furnish to the Board a full and complete report, in detail, of actions with respect to breaches of the Conference Agreement by member lines. Counsel has advised that if such information should be called for by the Board in connection with an investigation of any violation of the Shipping Act, and if such information were pertinent and relevant to such investigation, then under such circumstances such information might become subject to subpoena, but is not otherwise subject to demand.

Following receipt of this explanation of the Conference's position, the Board served its Order to Show Cause. In that order the Board stated, so far as here pertinent:

(1) That the Board was under a continuing duty to maintain a constant surveillance over the activities of conferences operating in the foreign commerce of the United States pursuant to agreements approved under the provisions of section 15 of the Act;

(2) That the respondent Conference had failed, in whole or in part, to comply with specific requests for information by the Board and its Office of Regulations;

(3) That the Conference by its action had precluded the Board from effective review of the activities of respondent, thereby preventing it from carrying out its duties under the Act; and

(4) That respondents were directed to appear before the Board and show cause why they should not comply with the requests for information, or in the alternative have their basic conference agreement, No. 5200, disapproved.

As hereinbefore noted, counsel for the respondents appeared before the Board at the hearing on the order to show cause and argued respondents' position with respect to the issue framed by the order. However, respondents filed no affidavits, written memoranda, or replies, although granted the right to do so.

DISCUSSION AND CONCLUSIONS

Respondents' position is that the Commission has no duty or authority under the Shipping Act to maintain a continuing surveillance of their concerted activities, and that they have no obligation to furnish the Commission with information concerning such activities unless it is subpoenaed in connection with, and is relevant to, an investigation of a specifically charged violation of the Act. They also question the propriety of the show cause procedure utilized by the Board in this case. Stated another way, respondents' position is that they will furnish such information as they see fit to furnish concerning their conference activities and anything more the Commission may want it must attempt to obtain through compulsory process issued in a formal proceeding wherein violations of the Act are charged.

In our view, respondents are laboring under a gross misconception of their obligations and the Commission's duties. Their position must be rejected. Section 15 of the Shipping Act, 1916, which is reproduced in the margin,[3] does not confer upon steamship conferences and others subject thereto the right to conduct any of the concerted activities within its broad sweep, unless with the Commission's approval and under its continuing supervision and control. By the same token, it seems to us clear that the respondents may not frustrate the Commission's right and its duty to be informed at all times as to the nature of their conference activities.

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[3] Section 15 of the Shipping Act, 1916, as amended October 3, 1961 by Public Law 87-346 (75 Stat. 762, 763-4) reads as follows:

"SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regu-

Section 15 is a grant of limited legislative permission for carriers and others operating in this Nation's foreign water-borne commerce to engage in certain forms of concerted activity which would otherwise be unlawful under the antitrust laws, but only if and to the extent approved by the Commission and only so long as approved by it. The section expressly confers on the Commission the power of disapproval "whether or not previously ap-

lating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

"The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adapt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

proved" and thus necessarily imposes a continuing duty upon the Commission to insure that the parties to section 15 agreements are at all times complying with the Act and their approved agreement and that their operations are not detrimental to the commerce of the United States or contrary to the public interest. This appears from the face of the statute. In addition, the legislative history of section 15 makes plain that Congress granted an antitrust exemption only because it envisioned that the permitted activities would be subjected to constant and effective government control and regulation.

The House Merchant Marine and Fisheries Committee in the report of its Investigation of Shipping Combinations, the legislative study underlying the Shipping Act, 1916,[4] made an exhaustive analysis of the problems presented by anticompetitive combinations in our water-borne foreign commerce. The Committee pointed out that Congress had but two courses. It could either restore unrestricted competition by prohibiting the anticompetitive agreements and understandings then widely used, or it could recognize these agreements and understandings along lines which would eliminate the evils flowing therefrom. While admitting the advantages of allowing steamship agreements and conferences in our foreign commerce,[5] the Committee was not disposed to recognize them "unless the same are brought under some form of effective government supervision." The Committee pointed out that to permit such agreements without this supervision would mean giving the parties an unrestricted right of action, which it definitely did not favor. (Alexander Report Vol. 4, pp. 415-17.)

This philosophy took shape and was enacted as section 15 of the Shipping Act, 1916, confiding to the agency administering the Act extensive powers of supervision and control as the condition precedent to any of the concerted activities covered by the section's rather all-inclusive language. As was pointed out by the court in *Isbrandtsen Co., Inc.* v. *United States,* 211 F. 2d 51 (D.C.

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[4] Committee on the Merchant Marine and Fisheries, House of Representatives 63rd Congress, Report of Investigation of Shipping Combinations under House Resolution 587 in 4 volumes, hereinafter referred to as the "Alexander Report."

[5] Among the advantages claimed for conferences were, greater regularity and frequency of service, stability and uniformity of rates and better distribution of sailings.

Cir. 1954), in discussing the authority to permit antitrust exemptions under section 15:

> The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does no invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute. (211 F. 2d, at page 57.)

Only recently in Public Law 87-346 (75 Stat. 762), amending the Shipping Act, 1916, Congress has reasserted the original philosophy that exemptions from the antitrust laws must be accompanied by effective governmental supervision and control of the concerted activities covered by section 15. By the enactment of that statute, moreover, Congress has provided new safeguards against the abuses which such activities make possible and has indicated that there is a need for even closer surveillance of the operations of conferences under their section 15 agreements.

Implicit in respondents' position is the notion that these statutory requirements for effective supervision and control were satisfied for all time when their agreement was originally filed and approved; thereafter, some sort of an immunity from our surveillance, as well as from the antitrust laws, set in. This is plainly erroneous. Section 15 quite clearly demands that we constantly inspect and if necessary regulate the activities of persons subject thereto. It imposes upon us, as it did upon our predecessors, the duty and authority of insuring that those who are permitted to engage in activities which would otherwise be unlawful, satisfy the statutory standards not only at the time they file for initial approval of their agreement but continuously thereafter. The section expressly does this by providing that we shall "disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved" that we find to be contrary to the Act's provisions.

It is manifestly not enough under the language of section 15 that we are apprised merely as to the terms of respondents' agreement. It is essential also that we know at all times the nature of their activities under the agreement, for how else can we determine whether it is being complied with, and is not being carried out in a way that violates the Act, is detrimental to commerce, or incompatible with the public interest.

Despite the plain thrust of section 15, respondents have denied the legal obligation to furnish the Commission any information

respecting their conference activities.[6] They say we can find out what they are doing, if at all, only by subpoena issued in connection with a formal hearing or investigation which charges a specific violation of the Act. In advancing this contention respondents are apparently alluding to section 27 of the Act, which gives us subpoena power in formal complaint and violation proceedings. This, however, in no way impairs or relates to our power to demand information in other ways and for other purposes. We have the right, for example, to require the submission of information simply because we want to know whether the law is being complied with. Thus, in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), the Court in language particularly appropriate here had the following to say:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law. (338 U.S. 642–643).

The courts, moreover, have specifically upheld the power of the agency administering the Shipping Act to demand information for any of the purposes so well described in *United States* v. *Morton Salt Co., supra,* and have in this regard recognized the obligation to comply imposed on persons subject not only to section 15, but to the proscriptions embodied in the Act generally. See *Kerr Steamship Co.* v. *United States and FMB,* 284 F. 2d 61 (2nd Cir. 1960) with respect to our right to require information from persons subject to section 15, and the *Kerr* case, *Montship Lines, Ltd., et al.* v. *FMB and United States,* 295 F. 2d 147 (D.C. Cir. 1961), and *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139 (1937), with respect to our right under section 21 to require information in aid of our enforcement powers generally under the Act.

[6] We are unable to reconcile this denial with article 16 of respondents' agreement, which requires them to furnish the Commission copies of minutes of all meetings, rates, charges, classifications, rules and/or regulations.

Aside from the fact that they are plainly wrong as to our legal authority, respondents have taken a position that would undermine the Act by rather completely thwarting our efforts to discharge our section 15 responsibilities. The technical argument they urge would relegate the discovery and correction of prohibited conduct to chance—the chance that the Commission might learn, not from the persons regulated under section 15 but from some accidental source, information adequate to draft a charge and institute a formal hearing thereon. Absent this, of course, nothing could be done, since the Commission cannot take action of the sort respondents propose in a vacuum. But the respondents could continue what they have been doing, namely, deciding for themselves whether and to what extent they will reveal the nature of their conference activities.

Nor is there any merit to respondents' contention that there is a distinction between the Commission's authority regarding breaches of the Conference agreement and its authority regarding violations of the Act. Respondents' conference agreement is not some sacrosanct private arrangement but a public contract, impressed with the public interest and permitted to exist only so long as it serves that interest. The purpose of the agreement was to spell out the ground rules under which the respondents could lawfully operate in concert if the agreement was approved, and it was wholly ineffective without approval. If the Conference departs from the approved rules, it is violating the Act, and if individual members do, it is more than likely that they too are violating the Act. But even if a member's conduct happens to involve only a breach of the agreement, this would not justify the Conference's refusal to furnish the Commission information. It is for the Commission to decide, in all cases, whether a given course of conduct under a section 15 agreement is violative of the Act, detrimental to commerce, or contrary to the public interest. We cannot discharge our duties under the Act by allowing conferences to substitute their judgment for ours in determining what activity violates the statute and what information they will furnish.

We should note moreover, that the respondents' agreement provides for Conference policing of breaches, *i.e.*, non-observance of the agreement or of Conference rules, regulations or tariffs, and it authorizes levies of from $500 to $10,000 against the offending member as well as the member's possible expulsion. The information which respondents refused to furnish the Board related, *inter*

alia, to the manner in which they were implementing this provision of their approved agreement. Obviously, this is an important provision, directly bearing upon the Conference's vitality as an instrument whose continuance is in the public interest. Congress itself emphasized this fact in its recent amendments to the Act, Public Law 87–346, *supra,* which added to section 15 the requirement that we disapprove any agreement "on a finding of inadequate policing of the obligations under it."

As matters now stand in this case, respondents have refused even to convey information that they took policing action on a series of alleged agreement violations, much less information which would show us that their action was adequate. It is, perhaps, unnecessary to point out that this new requirement for the parties to adequately police their section 15 agreement would alone suffice to support our right to be fully and continuously informed as to their concerted activities.

We need not dwell on the questions respondents raise as to the propriety of this proceeding. They are but a corollary of respondents' contention that the Commission can only demand information by subpoena issued out of a formal evidentiary-type hearing. The complaint is that such a proceeding is necessary to provide proper notice and hearing, and an evidentiary record on which to base findings. Respondents also claim an order to show cause is unauthorized by the Act.

This procedural argument is but a play on form and words. The order to show cause was expressly provided for by the Board's rules,[7] it fully specified the charges against the Conference and alleged that respondents' actions had prevented the Board from carrying out its statutory duties, and it was well within the powers vested in the Board by the Act.[8]

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[7] The order to show cause was issued by the Board pursuant to Rule 5(g) of its Rules of Practice and Procedure, later also adopted by the Commission. Rule 5(g) entitled "Order to show cause" provides:

> "The Board may institute a proceeding against a person subject to its jurisdiction by order to show cause. The order shall be served upon all persons named therein, shall include the information specified in rule 10(c), may require the person named therein to answer, and shall require such person to appear at a specified time and place and present evidence upon the matters specified."

Rule 10(c) provides that persons entitled to notice of hearings will be duly and timely informed of "(1) the nature of the proceeding, (2) the legal authority and jurisdiction under which the proceeding is conducted, and (3) the terms, substance, and issues involved, or the matters of fact and law asserted as the case may be."

[8] For example, section 22 of the Act provides that the Commission may, upon its own motion, investigate any violation of the Act "in such manner and by such means, and make such order as it deems proper."

The order gave respondents notice of the issues involved and time to prepare to meet them. Respondents asked for and received more time. The questions raised by the order, and by the correspondence between respondents and the Board which preceded the order (see our statement of facts), were purely legal. There was no factual issue and hence no occasion to compile an evidentiary record in a hearing. The Board had before it as background documents copies of the correspondence referred to, and the Conference agreement. Being privy to these documents, the respondents were, of course, fully aware of their contents. They were given ample opportunity to submit additional material, on both the facts and the law, but they at no time offered anything else. They were apparently content to stand on their position as advanced in oral argument and in their prior letters to the Board. Be that as it may, the proceeding in our view quite adequately satisfied the requirements of due process.

Through their continued refusal to supply the requested information, the respondents have shown a complete unwillingness to cooperate with the Federal Maritime Commission, the agency responsible for administering the Shipping Act. It is manifest that our predecessor, the Board, extended to them in a spirit of cooperation every opportunity to honor its requests, but they have preferred to shield their activities and stand on a technical legal argument of the sort we should think steamship conferences and others who must survive under section 15, would be the last to advance. We are accordingly left with no choice but to direct that respondents furnish the information specified in the accompanying order prior to close of business January 22, 1962, otherwise we shall withdraw approval of Agreement No. 5200.

APPENDIX A

PACIFIC COAST EUROPEAN CONFERENCE

Regular Members:

Anglo Canadian Shipping Company Limited

Blue Star Line, Limited (Blue Star Line)

Canadian Transport Company Limited

Compagnie Generale Transatlantique (French Line)

De Vries Pazifik Linie (Schiffahrtsgesellschaft De Vries & Co., m.b.H.)

The East Asiatic Company, Ltd. (A/S Det Østasiatiske Kompagni East Asiatic Line)

Fruit Express Line A/S (Fruit Express Line)

Furness, Withy & Co., Ltd. (Furness Line)

Global Transport, Ltd. (Global Transport Lines)

Hamburg-Amerika Linie (Hamburg American Line)

(Hanseatic-Vassa Line)—Joint Service (as one member only) of Hanseatische Reederei Emil Offen & Co.
Vaasan Laiva Oy

"Italia" Societa Per Azioni di Navigazione (Italian Line)

Italnavi Societa de Navigazione per Azioni (Italnavi Line)

Mitsui Steamship Co., Ltd. (Mitsui Line)

Norddeutscher Lloyd (North German Lloyd)

N.V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij (Holland-America Line)

Osaka Shosen Kaisha, Ltd. (O.S.K. Line)

Fred. Olsen & Co. (Fred. Olsen Line)

Rederiaktiebolaget Nordstjernan (Johnson Line)

Royal Mail Lines, Limited

Seaboard Shipping Company, Limited

(States Marine Lines)—Joint service (as one member only) of States Marine Corporation
States Marine Corporation of Delaware

Wegal A. B. (Totem Line)

Westfal-Larsen & Co. A/S (Interocean Line)

Western Canada Steamship Company, Limited

Associate Member:

American President Lines, Ltd. (American President Lines)

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held in its office in Washington, D. C., on the 21st day of December 1961

No. 948

PACIFIC COAST EUROPEAN CONFERENCE

This proceeding having been initiated by an Order to Show Cause issued by the Federal Maritime Board upon its own motion, and having been duly heard and submitted, and the Federal Maritime Commission, as successor to the Board, having fully considered the matter including the transcript of oral argument and having this date made and entered of record a Report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, (1) That pursuant to sections 15, 21 and 22 of the Shipping Act, 1916, respondents, the Pacific Coast European Conference and its member lines (specified in Appendix A), prior to the close of business on January 22, 1962, shall submit to the Commission information which the Commission deems necessary to the discharge of its responsibility under section 15 of the Act for exercising continuing and effective supervision and control of respondents' activities under their section 15 agreement, identified as FMC Agreement No. 5200, in order to insure that such activities are not in violation of the Act or said agreement, and are not detrimental to the commerce of the United States or contrary to the public interest, as follows:

1. A complete report on the entertainment of a shipper and his wife on May 28 to June 3, 1960 on the Yacht Westerly of States Marine Lines referred to in Item No. 3134 of the Minutes of Conference Meeting No. 450 held on 1-3 November 1960, including the identity of the shipper and the details of any particular shipment or shipments forming the basis of such entertainment, and a statement of any action contemplated or taken by the Conference in this matter and the facts affording the basis for such action;
2. A complete report of the facts, including the action taken by the Conference and the basis therefor, with respect to each incident listed in the document bearing the Conference letterhead dated February 10, 1960, entitled "Docket Item No. 8" subject "States Marine Lines agree-

ment violations reported at Celler Committee hearings," and listing the following items to be considered by the Conference:

"(a) Automobile Transportation—Star Kist Foods
(b) Yacht 'WESTERLY'
(c) Volkart Brothers interest Claim
(d) Volkart Brothers Predated Bills of Lading
(e) Shaw Cotton Company, Inc.
(f) Hohenberg Bros. False Rate Application
(g) Automobile Transportation—Bissinger & Co.
(h) Passenger Transportation—Calcot"

3. Copies of all correspondence or other documents relating to the matters referred to in 1 and 2 above;

It is further ordered, That in the event respondents fail to furnish the foregoing information and documents within the time specified the Commission shall by further order withdraw its approval of Agreement No. 5200; and

It is further ordered, That this preceding is continued pending further order of the Commission.

By the Commission:

(Sgd) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 904

PUGET SOUND TUG AND BARGE CO.
v.
FOSS LAUNCH & TUG CO., ET AL.

No. 914

PUGET SOUND TUG AND BARGE CO.
v.
WAGNER TUG BOAT COMPANY, ET AL.

Decided January 4, 1962

Foss Launch & Tug Co. held a common carrier with respect to general cargo carried under agreements with Northland Freight Lines, and said agreements held subject to Section 15 of the Shipping Act, 1916.

Further held that Northland Freight Lines is a non-vessel-owning common carrier subject to the jurisdiction of the Federal Maritime Commission.

Allegations of damages found not to have been sustained.

Mark P. Schlefer and *John Cunningham* for complainant.

Wallace Aiken, James T. Johnson and *Alan F. Wohlstetter,* for respondents.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman*; JOHN HARLLEE, *Vice Chairman*; ASHTON C. BARRETT, *Commissioner*; JOHN S. PATTERSON, *Commissioner.*

BY THE COMMISSION:

This case results from complaints filed by Puget Sound Tug and Barge Co., hereinafter "Puget Sound".

775-794 O-65-5

There is no dispute as to the facts of the case or the primary issue, which is if Foss Launch & Tug Company (hereinafter "Foss") is a common carrier by water in the (now interstate) Alaskan trade. We find the relevant facts to be as follows:

(1) Foss for at least 10 years has been carrying cargo between Seattle (and other Washington ports) and Alaska by towed barge.

(2) Foss's chief shipper, without which it is doubtful if it would be in business, is Permanente Cement Company (hereinafter "Permanente"), whose bulk cement Foss carries from Seattle to Anchorage. The Permanente cement is Permanente's property and moves under a contract which began in 1950 and has been continued in effect (with some modification) since that time.

(3) Between January 7, and September 30, 1960, Foss towed from Washington ports to Alaska ports 72 barges in 51 tows.

(4) 11 barges of the 72 carried Permanente cement only, and 1 (Foss 206 which sailed from Seattle on April 6, 1960) carried Permanente cement and general cargo dispatched by T. F. Kolmar, Inc., doing business as Northland Freight Lines (hereinafter "Northland").

(5) On some voyages (when barges were not filled to capacity by the primary shipper's cargo) Foss has carried "filler" cargo, employing such devices as purchasing the cargo from the shipper in Seattle and reselling to the shipper in Alaska at a "profit" calculated to yield Foss the same amount it would have received as payment for carrying the cargo from Seattle to Alaska. On others, Foss has given the principal shipper the privilege of loading cargo other than his own along with his, and very little filler cargo has been directly secured by Foss.

(6) Foss has moved general cargo (ostensibly for Northland as shipper, and ostensibly as a contract rather than a common carrier) as follows:

(a) On Foss 206 which sailed from Seattle April 6, 1960, and arrived at Anchorage April 15, 1960, there was carried approximately 3,600 tons of Permanente cement, and approximately 400 tons of general cargo received by Foss from Northland. The general cargo was not owned by Northland but was covered by an agreement (apparently oral) between Foss and Northland under which Northland paid Foss fixed sums of approximately 50% of the sum received from the cargo owners by Northland for moving the cargo to Alaska.

(b) On each of 4 subsequent sailings Foss towed a barge carrying nothing but general cargo gathered from many sources by Northland, from Seattle to Anchorage. These barges moved under separate agreements between Northland and Foss.[1] Although there is no specific provision with respect to Alaska-to-Washington trips, the agreements do provide that "it shall be Northland's obligation to load and lash the cargo at Seattle, Washington, *and perform the same service at Anchorage, Alaska*" (emphasis supplied), and Foss has carried Northland's vans, containing small amounts of cargo on four southbound trips. Foss has received from Northland 50% of payments received by Northland on account of southbound cargo.

The four agreements provide, *inter alia,* that Northland shall have the exclusive use of the barges, be obligated to load and lash the cargo at Seattle and Anchorage; assume all berthage, wharfage, and accessorial charges; insure the lading with Foss as a co-insured; and fully protect Foss with respect to claims by the owners of the cargo. Actually, the primary action required of Foss, which is to transport the loaded barges from Washington ports to Alaska ports, *is not specifically stated in any of the agreements.* The closest things to it are (a) the provision that Foss "will make its steel barge Foss * * * available for Northland's capacity", (b) the provision that "Foss shall also have the privilege of towing said barge in conjunction with any other barges which may be destined to Anchorage or way ports", and (c) the provision in the "Force Majeure" clause, referring to "transportation of cargo hereunder". It is a necessary inference, however, that this is Foss's primary "operation and obligation", which Foss has fully performed. The barges are not manned, but the master and crew of the Foss towing vessel are Foss employees. Notwithstanding the provisions in the agreements that say that

[1] The Foss-Northland sailing dates April 6, May 22, July 31, and September 16, suggest an attempt to maintain regular monthly service. The identical language contained in the second "whereas clauses" of the four agreements providing for the May, June, July and September sailings, stating that "Northland and Foss desire to enter into an appropriate agreement covering their respective operations and obligations under *said arrangement*" (emphasis supplied) is interesting and significant. The word "arrangement" does not precede (or succeed) the quoted language. It may, of course, have been stricken from a preliminary draft. What does precede it is the statement that "Northland is a common carrier by water engaged in the business of transporting goods and merchandise between ports in the State of Washington and places in Alaska, and has appropriate tariffs on file with the Federal Maritime Board for the movement of such goods". This common carrier business then must constitute the "arrangement" (and cooperative working arrangements are specifically covered by Section 15 of the Shipping Act, 1916) under which Foss and Northland have respective operations and obligations.

Northland is obligated to load and lash the cargo at Seattle, Foss has loaded and unloaded at Seattle.

(7) The general cargo solicited from the general public and secured by Northland but owned by many individual shippers is received at Foss's wharf; loaded on the Foss barge by Foss at Seattle (southbound cargo is similarly unloaded); covered by bills of lading issued by Northland under the statement "In witness whereof, the master or agent of the ship has signed this bill of lading", and by manifests issued by Northland with copies to Foss.

(8) Northland solicits general cargo from the public for transportation to Alaska by water at rates stated in its tariff on file with the Commission, and it is general cargo so secured that Foss tows in its barges to Alaska under the agreements referred to in finding (6) above, and handled as described in finding (7) above.

Based upon the foregoing findings of fact[2] and the whole record, we conclude that with respect to the general cargo carried by Foss pursuant to the agreements (oral and written) covering sailings of April 6, May 22, June 28, July 31, and September 16, 1960, Foss is a common carrier by water in interstate commerce (Alaskan trade) and as such, subject to the jurisdiction of this Commission.

Two cases decided by our predecessor, the United States Maritime Commission, *New Automobiles in Interstate Commerce,* 2 U.S.M.C. 359 (1940), and *New York Marine Co.* v. *Buffalo Barge Towing Corp.,* 2 U.S.M.C. 216 (1939), were relied upon by the examiner in declining to hold Foss a common carrier, stating that these decisions are "decisive". Neither of these cases involved a wholly comparable situation. Here, in effect, two companies have established a service for all who care to ship general cargo at tariff rates on file with the Commission. One solicits and secures the cargo and the other furnishes and tows the barges which carry the cargo from port to port, each of the participants receiving 50% of the charge made for carrying the cargo.

Therefore, neither of the decisions cited can be regarded as decisive of this case, but to the extent they may be considered applicable, they are hereby overruled. To a great extent they are based upon what we consider over-emphasis of two points. The first is that the carrier did not hold itself out to be a common carrier. Where as here there is an obvious prearrangement that

[2] No findings or conclusions other than ultimate conclusions substantially in statutory language were proposed.

"A" will gather the cargo, and "B" will *actually carry it*, the holding-out by "A" that the cargo will move to its destination is attributable to "B" to the extent necessary to make "B"'s operations pursuant to the "A-B arrangement" common-carrier operations. We paraphrase *Globe Cartage Co., Inc., Common Carrier Application*, 42 M.C.C. 547, 550, as follows:

> We are satisfied that in the circumstances here present, the relation between Foss and Northland is not the same as that between ordinary shipper and carrier. Northland is not like an ordinary shipper which tenders its own goods to a carrier for transportation. Northland merely tenders for transportation freight belonging to the general public, which it has accepted and assembled as the result of an understanding with many shippers that it will undertake to have the same transported to ultimate destinations. Northland has tendered to Foss, and Foss has transported, not traffic belonging to Northland but freight belonging to the general public, which Northland accepted and assembled as the result of the understanding with the shippers thereof that it would undertake to have the same transported. The facts which satisfy the requirement, insofar as Foss is concerned, that to be a common carrier there must be a holding out to transport for the general public are, first, that Northland dealt with the shipping public in general, and did not limit its activities to selected shippers, and second, that Foss transported traffic of the shipping public in general which was assembled by Northland as a result of the latter's undertaking to have the same transported. Under these circumstances, we think Northland must be treated not as an ordinary shipper but as an intermediary agency through which Foss held itself out to the general public to engage in the transportation of property by towed barges.

The force of the foregoing analysis is in no wise weakened by the fact pointed out by the examiner that the common carrier classification does not have the same significance (i.e. results) under the Interstate Commerce Act and the Shipping Acts, or by his comment as to a "liberal attitude" of the Interstate Commerce Commission.

The second over-stressed point is that as stated in *New Automobiles*, "such transportation * * * as they undertake [for others] . . . is the subject of special and individual contracts or arrangements between them and such other carriers". 2 U.S.M.C. 359, at 361-2. This has been soundly discounted not only by the Interstate Commerce Commission, as in *Charles Bleich Common Carrier Ap-*

plication, 27 M.C.C. 9 (1940), but by the Supreme Court in several terminal cases, notably *United States* v. *Brooklyn Eastern District Terminal,* 249 U.S. 296, 305-307 (1918).

It is quite clear that in the Foss-Northland arrangement, Foss has felt that by utilizing an agreement naming one company, Northland, as the sole *technical* shipper, it has prevented itself from becoming a common carrier. While we hold to the contrary, it is only fair to point out that we can perceive in Foss's and Northland's conduct no conscious law violation. "Common carrier", however, is not a rigid and unyielding dictionary definition, but a regulatory concept sufficiently flexible to accommodate itself to efforts to secure the benefits of common-carrier status while remaining free to operate independent of common carriers' burdens. In practice, this means that where, as here, the "holding out" to carry cargo for the public is *indirect,* this holding out will nevertheless be attributed to the carrier, and considered to bring it within the scope of the ancient phrase saying that a common carrier is a carrier which "holds *itself* out" as willing to carry for the public. *Union Stockyards Co. of Omaha* v. *United States,* 169 F. 404 (1909). Similarly, the Supreme Court has held that common carrier status cannot be avoided by the device of acting as *agent* for a common carrier. *Union Stockyard and Terminal Co.* v. *United States,* 308 U.S. 213, 220 (1939). Where as here the service is essentially the carriage of cargo for the general public; *it is none the less common carriage* because the carrier adopts a device, such as the Foss-Northland contracts, to make it appear that the vessels are serving one shipper, whereas they actually are serving many.

Our decision is based upon the particular facts of this case, and nothing in this opinion is to be construed to mean that Foss's carriage of filler cargo or multiple-towing make Foss a common carrier, or that in its carriage for approximately twenty principal shippers[3] (even when filler cargo[4] was carried) Foss was *anything but a contract carrier.*

We further conclude that the oral agreement between Northland and Foss with respect to the April 6, 1960, sailing, the written agreements between Foss and Northland relative to the barges which sailed May 22, June 28, July 31, and September 16, 1960, and any oral agreements supplementing them were, and similar

[3] Northland is not considered one of these.

[4] The 400 tons of general cargo carried April 6, 1960, on Foss 206 is not considered filler cargo.

agreements will be, agreements between common carriers apportioning earnings and providing for a cooperative working arrangement and subject to the provisions of Section 15 of the Shipping Act, 1916.

The only suggestion that Northland is not a common carrier comes from the complainant, Puget Sound. Puget Sound argues that Section 8 of Public Law 86-615, 86th Cong., 1st Sess., changed Northland from a non-vessel-owning common carrier in the Alaskan trade, subject to this Commission's jurisdiction, to a forwarder subject to the jurisdiction of the Interstate Commerce Commission. We disagree. So (on the legislative record of P.L. 86-615) does the Interstate Commerce Commission, a fact which alone should decide the point against complainant, even without the firmly-fixed Congressional policy evidenced by Section 27 of the Alaska Statehood Act (P.L. 85-508, 85th Cong.) and elsewhere to preserve Maritime Commission jurisdiction in the Alaska trade. Considered together the statement and policy are conclusive that Northland remains a non-vessel-owning common carrier, subject to our jurisdiction. In a report dated August 11, 1959, to Hon. Oren Harris, Chairman of the House Committee on Interstate and Foreign Commerce, the Committee on Legislation of the Interstate Commerce Commission said the following about Section 8, which section is the sole support of complainant's argument:

> Section 8 of S. 1509, which was added to the bill at the time it was passed by the Senate, would amend section 303(e) of the Interstate Commerce Act by adding to that section a new paragraph "3" providing as follows:
>
> > "Notwithstanding any other provision of this Act, any common carrier by motor vehicle which was engaged also in operations between the United States and Alaska as a common carrier by water subject to regulation by the Federal Maritime Board under the Shipping Act of 1916, as amended, and the Intercoastal Shipping Act of 1933, as amended, prior to January 3, 1959, and has so operated since that time, shall as to such operations, remain subject to the jurisdiction of the Federal Maritime Board."
>
> The purpose of this provision, according to the Senate committee report, is to preserve the status of motor carriers operating as non-vessel common carriers by water under the jurisdiction of the Federal Maritime Board. In recommending this amendment, the committee stated in its report that it had noted the manner in which motor carriers, in conjunction with water and rail lines, have provided shippers a through bill of lading, a single-factor through rate, and single carrier responsibility from store door in Seattle to store door in Alaska, and that it was of the opinion that such service should be continued. The committee report also states that the new section would make it clear that motor carriers which do not operate vessels, but which enter into agreements under section 15 of the Shipping Act of 1916 as

common carriers by water with steamship companies so as to establish single-factor through rates in their own name for movements between Alaska ports and other U.S. ports are not freight forwarders subject to part IV of the Interstate Commerce Act. As explained in the report, if such carriers were placed in the category of a freight forwarder they would be precluded from carrying on the described operations since it would prevent the continuation of joint rates and interchange between land and water carrier.

It should be noted in this connection that section 27(b) of the Alaska Statehood Act specifically provides for the preservation of the exclusive jurisdiction of the Federal Maritime Board over common carriers engaged in transportation by water between ports in Alaska and other ports in the United States. It further provides that nothing in that act or any other act shall be construed as conferring upon this Commission jurisdiction over such transportation by water. As indicated above, the operations described in section 8 are now under the jurisdiction of the Federal Maritime Board, and under section 27(b) of the statehood act would remain there. Since there is nothing in any provision of S. 1509, or any other provision of law of which we are aware, that would disturb that jurisdiction, or have the effect of converting such operations to those of a freight forwarder subject to part IV of the Interstate Commerce Act, we do not see that section 8 of S. 1509 would serve any useful purpose. It appears to be merely duplicative of the effect of section 27(b) of the statehood act insofar as the described operations are concerned, and should probably be eliminated in order to avoid confusion. (*House Report No. 1914, 86th Cong., 2d Sess., p. 8*).

This disposes of the substantial issues other than approval, disapproval, etc. of Agreement No. 8492 between Northland and Wagner Tug Boat Company, (which the parties agree, as we do, should be administratively processed) and the issue of damages. Complainant alleges that it was damaged by losing cargo as a result of the Northland-Foss agreements and Northland's charging less than tariff rates. The evidence is insufficient to support the damage claim.

An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

No. 831

PRACTICES AND AGREEMENTS OF COMMON CARRIERS BY WATER IN CONNECTION WITH PAYMENT OF BROKERAGE OR OTHER FEES TO OCEAN FREIGHT FORWARDERS AND FREIGHT BROKERS

Decided January 18, 1962

The compensation provisions of Public Law 87–254, amending the Shipping Act, 1916 to provide for licensing independent ocean freight forwarders, and for other purposes, are permissive. The statute does not require common carriers by water to pay brokerage to freight forwarders nor forbid carrier agreements prohibiting or limiting brokerage payments to freight forwarders.

Though not forbidden by Public Law 87–254, carrier agreements prohibiting brokerage or limiting the amount thereof to less than 1¼% of freight charges in the outbound foreign commerce of the United States, are detrimental to the commerce and contrary to the public interest, in violation of section 15 of the Shipping Act, 1916, as amended. Conferences or associations of common carriers by water engaged in such commerce, including the Pacific Coast European Conference, directed to comply.

The prior Report and Order in this proceeding are set aside and superseded to the extent inconsistent with this Supplemental Report.

J. Richard Townsend, for Pacific Coast Customs and Freight Brokers Association, intervenor

Gerald H. Ullman, for New York Foreign Freight Forwarders and Brokers Association, Inc., intervenor

Herman Goldman, Elkan Turk, and *Seymour H. Kligler,* for Customs Brokers and Forwarders Association of America, Inc., intervenor

Mark P. Schlefer and *John Cunningham,* for A. H. Bull Steamship Co., Lykes Bros. Steamship Co., Inc., and United States Atlantic & Gulf-Puerto Rico Conference, respondents

Robert L. Harmon and *Leonard G. James*, for Capca Freight Conference, Pacific Coast/Caribbean Sea Ports Conference, Pacific Coast European Conference, Pacific Coast/Mexico Freight Conference, Pacific Coast/Panama Canal Freight Conference, Pacific Coast/River Plate Brazil Conference, and Pacific/West Coast of South America Conference, respondents

John T. Rigby and *Arnold, Fortas & Porter*, for The Commonwealth of Puerto Rico, intervenor

T. R. Stetson and *Edwin A. McDonald, Jr.*, for United States Borax & Chemical Corporation, intervenor

James M. Henderson, Sidney Goldstein, F. A. Mulhern, Arthur L. Winn, Jr., Samuel H. Moerman, J. Raymond Clark, Burton Fuller, Louis J. Lefkowitz, Dunton F. Tynan, J. Bruce MacDonald, Walter J. Myskowski, Leo A. Larkin, Samuel Mandell, and *Sidney Brandes*, for The Port of New York Authority, The State of New York, and The City of New York, intervenors

Robert J. Blackwell as Public Counsel.

SUPPLEMENTAL REPORT BY THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner*

BY THE COMMISSION:

BACKGROUND

On June 29, 1961 our predecessor, the Federal Maritime Board (the Board), rendered its decision in consolidated Dockets 765 and 831. The Board therein found (p. 46) that payments of "brokerage" by common carriers by water to freight forwarders result in indirect rebates to shippers in violation of section 16 of the Shipping Act, 1916 (the "Act"), and constitute unjust and unreasonable practices in violation of section 17 of the Act. In accordance with this decision the Board finalized and issued new forwarder regulations (General Order 72, Revised, 46 CFR Part 244), under which such payments would have been completely prohibited. However, on September 19, 1961, prior to the effective date of these regulations, Public Law 87-254 (75 Stat. 522) was enacted to provide for the licensing of freight forwarders and to authorize carriers to compensate forwarders if duly licensed by this Commission and if they have performed certain specified services. The statute incorporates these provisions into a new section 44 of the Shipping Act.

Numerous petitions for reconsideration of the Board's Report were filed, and on October 4, 1961 the Acting Commission [1] cancelled General Order 72, Revised, since Congress had overruled the Board's ban on brokerage and new regulations based on P.L. 87-254 were necessary. That body also stayed the proceedings in Docket 831 pending further consideration of the petitions for reconsideration.

So far as here relevant, the purpose of Docket 831 was to reconsider the extent to which common carriers by water, in the outbound foreign commerce of the United States and in the domestic offshore trades, may by concerted action prohibit, control or limit brokerage paid to freight forwarders. Prior to institution of the proceeding the Board and its predecessor, the U. S. Maritime Commission, had held in several cases that carrier agreements prohibiting brokerage or limiting the amount thereof to less than 1¼% of freight, violated section 15 of the Act. However, having concluded to order a ban on all brokerage, the Board in its decision of June 29, 1961, reversed these earlier cases by making the following finding (Finding 8, p. 47):

That the findings in the prior decisions cited in the order of Docket 831, to the effect that agreements between common carriers by water subject to the Act prohibiting the payment of brokerage, or limiting the payment of brokerage to less than 1¼ percent of freight charges, are or would be detrimental to the commerce of the United States in violation of section 15 of the Act, are no longer valid orders and the proceedings cited carrying such findings into effect will no longer be considered effective.

In view of the enactment of P. L. 87-254, we entered an order November 20, 1961, authorizing interested parties to submit briefs to us limited to the issue "whether agreements between common carriers subject to the Shipping Act, 1916, prohibiting the payment of brokerage or limiting the payment of brokerage to less than 1¼% of freight charges are, or would be in violation of said Act, as amended." Nine briefs were filed by interested parties and on December 12, 1961, we heard oral argument.

DISCUSSION AND CONCLUSION

On this reconsideration of this proceeding, two essentially different questions are presented. The first involves the impact, if any, of the forwarder statute, P. L. 87-254, on carrier agree-

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[1] See sec. 302 of Reorganization Plan No. 7, H. Doc. 187, 87th Cong., 1st Sess.

ments prohibiting brokerage or limiting it to less than 1¼% of freight. The second is whether on this record such agreements may be approved under section 15 of the Shipping Act, 1916, as amended.

The forwarders and the intervenor New York authorities supporting them, make a series of arguments as to why carrier agreements prohibiting brokerage or limiting it to less than 1¼% of freight violate the Shipping Act, as amended, some of which we mention here. It is contended that in the amendments provided by the forwarder statute, P. L. 87-254, Congress said that an individual carrier "may compensate" forwarders and a carrier agreement prohibiting brokerage is contrary thereto because it would preclude a party to the agreement from acting independently if it desired to pay brokerage. It is said that Congress intended brokerage "should be" paid, and at the rate of 1¼% of freight. To support this position much reliance is placed on a statement in the House Merchant Marine Committee's report on the legislation, set out in the margin.[2] The argument is also made that such carrier agreements are unlawful because destructive of competition and outside the scope of section 15 of the Act.

As to section 15, which sets forth the criteria for approval of concerted carrier activities, the forwarders alternatively argue that agreements prohibiting or unduly restricting brokerage are detrimental to commerce in violation of that section. Along with Public Counsel they also point to the "public interest" clause which was added to section 15 by the so-called "dual rate" statute, Public Law 87-346 approved October 3, 1961 (75 Stat. 762), and contend that such agreements are "contrary to the public interest" under the Act as thus amended. The serious effect which the loss of brokerage revenue would have on an industry of recognized importance to the commerce of the United States, is urged in support of these arguments.

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[2] The following statement appears on page 3 of the report of the House Committee on Merchant Marine and Fisheries (House Rept. No. 1096, 87th Cong., 1st Sess.):

"To summarize the feeling of the Committee, we might say that services which have been performed by forwarders for shippers should be compensated for by the shippers and that where brokerage fees have been earned by the forwarders or brokers, then the carriers in turn should pay for those services at the historical rate [1¼%]. Both the carrier and the shipper should be expected to pay and the charge to each by the forwarders should be the reasonable value of the forwarder's service to each."

On the other hand, the conferences, supported by intervenor United States Borax & Chemical Corporation and also, on this issue, by Public Counsel, argue that the compensation provisions of P.L. 87-254 are clearly permissive, giving carriers the option to pay or not pay, consequently they say an agreement to prohibit or restrict brokerage cannot be violative of this statute. In their view, the sole question is whether such compacts are approvable under section 15. The conferences contend the record herein shows they are, whereas Public Counsel says, as previously noted, that a conference prohibition of brokerage must now be regarded as contrary to the public interest.

We agree that the statute is permissive. In enacting it Congress did not direct that brokerage be paid. By the same token it did not proscribe agreements among carriers not to pay it or to restrict it to less than 1¼%. Hence there is no basis for an argument that such agreements, in their impact upon an individual member with contrary desires respecting brokerage, run counter to the statute. The Committee Reports accompanying P.L. 87-254 contain no comment on such carrier agreements, although Congress unquestionably was aware of the matter and had undertaken to deal with it in some of the earlier legislative materials. Obviously, we cannot infer that Congress intended us to read into the statute important exceptions to the language it employed.

Basically, P.L. 87-254 was designed to overcome the Board's regulations, which would have eliminated carrier payments of brokerage to freight forwarders in the export foreign commerce of the United States as being the source of much malpractice. Congress disagreed that the remedy should be a complete ban on brokerage. It concluded that brokerage could be authorized if forwarder licensing and other safeguards were provided to take care of malpractices. It also found "most persuasive" testimony by carriers who were supporting the forwarders that the forwarders' services were in fact of value to them and they were willing and desired to continue to pay a reasonable fee therefor, if permitted to do so.[3]

[3] Thus, the Senate Commerce Committee (Senate Rept. 691, 87th Cong., 1st Sess., p. 3, 4, 5-7) reported that the carriers supporting the forwarders felt "the work of the forwarders was of value to them, well worth the 1¼ percent brokerage they now pay and would gladly continue to pay." In the House Committee Report, House Rept. 1096, *supra*, p. 3) it was phrased this way: "Testimony before the committee by the carriers was to the effect that this [1¼ percent brokerage] was a justifiable fee to be paid by them and that this arrangement would be entirely satisfactory to the various conference lines."

Congress accordingly consented to the payment of brokerage. But it did not see fit to require a carrier to make such payment and it set no rate therefor if paid. The language Congress employed in the statute (section 44(e)) is that a carrier "may compensate" a forwarder. The forwarders themselves concede that this is permissive, at least as to an individual carrier, who they admit is free to compensate a forwarder or not (assuming of course the statutory conditions for payment are met). While disputing a like freedom for group action *not* to pay, the forwarders further admit that conferences may agree to pay brokerage, may agree to set the upper limit of brokerage so long as it is at least 1¼% of the freight charge, and may agree to prohibit brokerage altogether in the domestic offshore trades, although P.L. 87-254 expressly applies to these trades. The interpretation the forwarders seek to give the statute is therefore manifestly inconsistent.

Congress' handling of the brokerage rate question lends further support to our construction of P.L. 87-254. Although it considered specifying the rate for brokerage if paid, or an upper limit on what could be paid, no attempt was made in the statute as finally written to fix any figure. Instead, P.L. 87-254 by its language permits the carrier to determine "the extent of the value rendered" by the forwarder. Commenting on this language, the House Committee said it did not intend that it "should act as a diminution of the historical 1¼ percent as brokerage," and the forwarders stress this in their argument. However, the following statement by the Senate Committee does not express the same view but one which shows that brokerage if paid may vary in amount and is thus compatible with the permissive nature of the statute's compensation provisions: [4]

> Before deciding to delete the provision limiting brokerage to 5 percent, your committee considered reducing that maximum percentage or even specifying 1¼ percent. However, the amount of brokerage which carriers or conferences thereof pay is a matter which, like the fixing of ocean freight rates, has been and we think, should continue to be left to free enterprise determination. Such determination must be subjected to the Board's vigilant enforcement of pertinent provisions of the Shipping Act, 1916, as amended by this Act, and all other applicable laws. In our opinion, an element of elasticity is necessary in order to meet ever-changing needs of international shipping serving the foreign commerce of the United States.

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[4] House Rept. 1096, *supra*, p. 3; Senate Rept. 691, *supra*, p. 5.

Brokerage agreements among carriers regulate competition and it is well settled that they are within the plain compass of section 15.[5] That section, we think, must furnish the answer to our problem, since such agreements are not proscribed by P.L. 87-254. As amended by the "dual rate" statute, P. L. 87-346, *supra*, section 15 requires the disapproval, cancellation or modification of carrier agreements which we find, *inter alia*, to be detrimental to the commerce of the United States or contrary to the public interest. We see no occasion here to determine what the "public interest" amendment may add to section 15. Throughout the long-standing brokerage controversy "detriment to the commerce" has been interpreted and applied in a manner that encompasses the public interest, and we are satisfied that it must control our present course.

It will be helpful in illuminating the result we reach to briefly review at this juncture the law concerning carrier agreements affecting brokerage as it existed at the time of the prior report herein. Until 1957 the Board and its predecessor had consistently held that carrier agreements prohibiting brokerage or limiting it to less than 1¼% of freight are detrimental to the commerce of the United States. *Pacific Westbound Conference Agreement*, 2 U.S.M.C. 775 (1946); *Agreements and Practices Pertaining to Brokerage*, 3 U.S.M.C. 170 (1949); *The Joint Committee of Foreign Forwarders Assn., et al.* v. *Pacific Westbound Conference, et al.* 4 F.M.B. 166 (1953). The *Agreements and Practices* case, like the instant proceeding, was a general investigation into the subject. The named respondents were all outbound conferences and their member lines having prohibitions on the payment of brokerage, except the Pacific Coast European Conference which for some reason, presumably inadvertence, was not named. However, this conference appeared in the proceeding and offered evidence.

As expressed particularly in the *Agreements and Practices* case, the substance of the above holdings was that the forward-

[5] The forwarders argument that carrier agreements regulating brokerage are beyond the scope of section 15 of the Act, cannot be taken seriously. Put forth in the alternative, one facet of the argument is bottomed on the premise that the carriers are in competition with the forwarders for forwarding business and conspire to refuse brokerage in order to destroy the forwarders and take over their business. Another facet is discussed at page 36 of the prior Report herein. The argument is at odds with the facts, with precedent, and with much of the forwarders' principal position.

ing industry makes a valuable contribution and is essential to the United States commerce, that a considerable portion of its revenue is derived from brokerage, and that it is determental to the commerce to allow concerted carrier action that would, in its ultimate over-all effect, seriously impair the industry's ability to function by depriving it of such revenue. The respondent conferences were accordingly ordered, in March 1950, to remove from their agreements or tariffs prohibitions against the payment of brokerage and limitations on the amount thereof to less than 1¼% of freight. This they did but not until they had unsuccessfully challenged the order in two separate three-judge district courts, one on the east coast and one on the west. Both courts specifically upheld the finding of detriment to the commerce.[6]

In October 1954 the Board commenced an action against the Pacific Coast European Conference, aimed, *inter alia*, at bringing its brokerage practices into line with the foregoing decisions, since they did not in some instances conform thereto. The conference took the position that it was not a named respondent in the *Agreements and Practices* case, *supra*, hence the order therein was inapplicable to it. So far as here relevant, the result of the proceeding was inconclusive. The Board decided not to require the conference to modify its practices as per the prior holdings, pending the outcome of a new general investigation which the Board announced it would conduct for the purpose among others of reconsidering "the extent to which conferences may properly prohibit or limit brokerage payments without detriment to the commerce of the United States." The Board explained that certain of the premises underlying the *Agreements and Practices* decision "may not generally be true today" though it could not so find on the record then before it. *Pacific Coast European Conference—Payment of Brokerage*, 5 F.M.B. 225, at 237 (1957).

The instant proceeding, Docket 831, is the general investigation the Board thus announced it would undertake. It was instituted in January 1958 and was subsequently consolidated for hearing

[6] *Atlantic & Gulf/W. Coast of Central America and Mexico Conf., et al.* v. *United States*, 94 F. Supp. 138 (USDC, S.D.N.Y., 1950); *Pacific Westbound Conf., et al.* v. *United States*, 94 F. Supp. 649 (USDC, N.D. Calif., 1950). In the latter case the court said: "We agree with the New York court that the record sustains the conclusion that the activities of the freight forwarders have had a substantial proximate bearing upon the development of American maritime commerce and that the challenged provision of the conference agreements results in detriment to the commerce of the United States."

with Docket 765, which had been commenced some years earlier as a general investigation into the practices of ocean freight forwarders with a view to amending the Board's General Order 72 pertaining to freight forwarders. In its Report of June 29, 1961 on these consolidated dockets, the Board's major conclusion, as previously noted, was that brokerage payments were the source of malpractices and therefore should be totally prohibited. This conclusion having been reached on the larger issue of permitting brokerage at all, subsidiary questions as to the propriety of carrier agreements that regulate brokerage were rendered academic, and the findings in the prior cases concerning such agreements became, as the Board said, "of no further material effect" (p. 42).

The premise for this action of the Board—that brokerage would not thereafter be paid—was of course reversed by Congress. The practice of paying brokerage in the outbound foreign commerce has continued uninterruptedly, and is very widespread. The situation in this and other significant respects is thus exactly what it was at the time of the Board's Report, and what it had been for a decade or more prior thereto under the added impetus given the practice by the aforesaid agency and court decisions condemning certain conference activity against brokerage.

In its Report the Board found, as the earlier decisions had, that United States exporters are largely dependent upon forwarders to perform essential services and "the forwarding industry is an integral part of the commerce of the United States, and makes a valuable contribution to foreign trade" (p. 7–8). The industry's substantial revenue from brokerage was detailed (p. 10–11), and the importance thereof recognized—the impact of losing such revenue "would undoubtedly be severe" (p. 21, 35).[7] The Board believed, however, that the loss of brokerage revenue could and should be wholly recovered through increased forwarding charges to the shippers, a position much disputed by the forwarders and others, and now settled, we think, by the action of Congress authorizing brokerage payments. The Board did not dispute, and seems to have acknowledged, that if its solution to the problem of lost brokerage revenue were wrong, then the record herein confirmed, as the earlier cases had held, that it would be detrimental to the commerce for carrier agreements to deny brokerage or restrict it below 1¼% of freight (p. 41).

[7] The Senate Commerce Committee also noted these facts and stressed them as reasons for passing legislation that would permit brokerage to be paid. Senate Rept. 691, *supra*, pp. 3-4.

In our view the foregoing circumstances point clearly to a finding on this reconsideration of Docket 831 that carrier agreements of the type described are detrimental to commerce. We are reinforced in this view by the fact that Congress in permitting brokerage undertook to provide its own remedy, in the form of licensing, conditions precedent to payment, and increased regulatory authority, for dealing with the malpractices the Board had found and which had influenced its decision so heavily. In effect, the grounds for the Board's actions, including its overturning of the prior cases, were eliminated. We have found no other ground for upsetting the prior cases in this record or in the conferences' argument, and the Board's findings, read in the light of the radically changed situation that actually evolved, appear to support adherence to those cases. If, therefore, there is to be a revision of the prior holdings, as respects either prohibitions or the 1¼% minimum rate, it will have to come in a future proceeding as the result of some new and compelling factors which can stand the test under the several requirements of section 15, as amended.

We conclude and find on this record that agreements between common carriers by water in the export foreign commerce which prohibit brokerage or limit the amount thereof to less than 1¼% of freight charges, operate to the detriment of the commerce of the United States and are contrary to the public interest, in violation of section 15 of the Shipping Act, 1916, as amended. All conferences or associations of common carriers by water in the outbound trades in the foreign commerce of the United States, including the Pacific Coast European Conference, are respondents herein and required to conform their brokerage practices to this ruling. An appropriate order accompanies this Supplemental Report.

Agreements concerning brokerage in the offshore domestic trades are excluded from this ruling since the conditions in those trades are materially different and brokerage is not normally paid, as more fully set forth at pages 29-30 of the Board's Report.

Finding 8 of the Board's Report and Order is set aside and, to the extent inconsistent with this Supplemental Report, the Board's Report and Order are superseded.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D. C., this 18t hday of January, 1962 1962

NO. 831

PRACTICES AND AGREEMENTS OF COMMON CARRIERS BY WATER IN CONNECTION WITH PAYMENT OF BROKERAGE OR OTHER FEES TO OCEAN FREIGHT FORWARDERS AND FREIGHT BROKERS

Petitions having been filed for stay and for reconsideration and reargument of the Report and Order of the Federal Maritime Board entered in this proceeding on June 29, 1961, the proceeding having been stayed pending further consideration, pursuant to such petitions, and the Federal Maritime Commission, as successor to the Board, having fully considered the matter including briefs and oral argument submitted to the Commission by the parties, and having entered of record a Supplemental Report containing the Commission's findings and conclusion thereon, which Supplemental Report is by reference incorporated herein;

It is Ordered, That Finding 8 of the Board's Report and Order of June 29, 1961 is set aside and, to the extent inconsistent with our Supplemental Report, said Report and Order of the Board are superseded; and

It is Further Ordered, That all conferences or associations of common carriers by water in the outbound trades in the foreign commerce of the United States, including the Pacific Coast European Conference, shall prior to March 23rd, 1962 modify their conference agreements, regulations and tariffs so as to eliminate therefrom any provisions which are not in compliance with the findings and conclusion contained in the said Supplemental Report.

By the Commission.

(Sgd.) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 243

Y. HIGA ENTERPRISES, LTD.

v.

PACIFIC FAR EAST LINE, INC.

Decided January 18, 1962

Pacific Far East Line found to have violated section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844), by charging and collecting compensation for the transportation of vans, knocked down, from Honolulu, Hawaii, to Agana, Guam, between July 21 and August 8, 1961, at less than the rate specified in its tariff schedule on file with the Federal Maritime Commission.

Permission granted to PFEL to abstain from collecting undercharge.

John Cunningham for Pacific Far East Line, Inc.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner*

BY THE COMMISSION:

On October 20, 1961, Pacific Far East Line, Inc. (PFEL) filed an application pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure, seeking an order granting permission to waive the collection of undercharges with respect to a shipment of vans, knocked down, from Honolulu, Hawaii, to Agana, Guam.

No oral argument or briefs were submitted. The presiding examiner in an initial decision served on December 5, 1961, found the rate as filed to be unjust and unreasonable and granted the waiver sought by PFEL. On January 4, 1962, we served notice of our determination to review the examiner's decision.

Prior to the shipment involved here, the applicable filed tariff [1] of PFEL contained no classification for "vans, knocked down" and that cargo should have moved under the classification of "Cargo, NOS, W/M, $80.00". PFEL found that it could not obtain the carriage of vans, knocked down, from Hawaii to Guam at the $80.00 rate. PFEL learned from discussions with Y. Higa Enterprises that such carriage could be secured if PFEL would reduce its rate to $43.00.

Thereafter, PFEL, pursuant to section 2 of the Intercoastal Shipping Act, 1933, applied for permission to establish in its tariff on less than the required thirty days' notice a new classification, to wit: "Vans, Knocked Down and Packing Material, W/M, $43.00, local rate." Permission to do so on not less than three days' notice was granted by the Federal Maritime Board on July 1, 1961 (Special Permission 3936). Pursuant to that grant, PFEL published the new classification in its tariff FMB–F No. 3, as Item No. 2172, on second revised page No. 85, issued July 14, 1961, effective July 19, 1961. However, PFEL neglected to file the new tariff with the Board, as required by section 2 of the Intercoastal Shipping Act, and consequently, the change did not become legally effective.

On July 20, 1961, PFEL transported a shipment of vans, knocked down, for Y. Higa Enterprises from Honolulu to Agana. PFEL charged and collected freight in the amount of $1,526.00 computed on the newly established but unfiled tariff. The rate legally in effect at that time would have produced an additional charge of $1,795.00. It is the collection of the undercharge that PFEL seeks permission to waive. When PFEL became aware of its failure to file the new rate, it again sought permission to establish the new rate on less than thirty days' notice. Permission to do so was granted and the new rate and classification properly filed with the Board on August 4, 1961.

DISCUSSION

PFEL admits that the rate ($43.00) charged was not the legally effective rate, and that it should have charged and collected freight charges at the $80.00 rate. PFEL further admits "that the freight charges applicable [$80] when this shipment moved were unlawful in violation of section 18 of the Shipping Act, 1916, as amended."

[1] Pacific Far East Line, Inc., Guam Freight Tariff No. 3, FMB–F No. 3.

We agree with PFEL that the legally applicable rate for the shipment under consideration was $80.00, not $43.00. The shipment under consideration is subject to the provisions of the Intercoastal Shipping Act, 1933, which makes it unlawful to charge or demand or collect or receive a greater or *less* or different compensation for the transportation of property than the rates, fares, and/or charges which are specified in its schedules *filed with the Board and in effect at that time.* PFEL therefore has violated section 2 of the Intercoastal Act. The facts before us do not indicate that the violation was a deliberate or intentional act by PFEL. Had PFEL promptly filed the tariff revision of July 14, 1961, with the Board, there would have been no violation, and the $43.00 rate charged and collected would have been legally in effect.

PFEL circulated a tariff supplement to the shipping public showing that the $43.00 rate was to become effective on a date prior to the shipment by Y. Higa Enterprises, Ltd. The $43.00 rate had been determined after discussions with shippers and in view of the fact that the legal effective rate—$80.00—was too high to economically warrant any movement of vans. The failure of PFEL to file the rate with the Board was an unjust and unreasonable practice, the results of which however should not be placed upon a seemingly innocent shipper. Accordingly, we will grant the waiver sought.

We need not here determine whether the $80.00, Cargo NOS, rate was unjust or unreasonable, nor are we required to exercise our powers under either section 18 of the Shipping Act or section 4 of the Intercoastal Act. The rate has now been properly changed pursuant to the permission granted by the Federal Maritime Board.

An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D. C., this 18th day of January, 1962 1962

SPECIAL DOCKET No. 243

Y. HIGA ENTERPRISES, LTD.

v.

PACIFIC FAR EAST LINE, INC.

Whereas, the Commission, on the 18th day of January, 1962, having made and entered a report stating its conclusions and decision herein, which report is hereby referred to and made a part hereof:

It is ordered, That the application of Pacific Far East Line, Inc., to waive collection of certain undercharges be, and hereby is, granted.

By the Commission.

(Sgd.) THOMAS LISI,
Secretary.

(SEAL)

FEDERAL MARITIME COMMISSION

No. 927

WEST INDIES FRUIT COMPANY AND DOW JENKINS SHIPPING COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Decided January 22, 1962

Respondent's rate on bananas from Ecuador to Galveston, Texas, found not to be unduly preferential or prejudicial between shippers or ports in violation of Section 16, Shipping Act, 1916, nor unjustly discriminatory between shippers or ports in violation of Section 17, Shipping Act, 1916.

Robert N. Kharasch, William J. Lippman, and *Samuel W. Shapiro,* for complainants.
Renato C. Giallorenzi, for respondent.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner*

BY THE COMMISSION:

This proceeding arises out of a complaint filed by the West Indies Fruit Company and Dow-Jenkins Shipping Company (complainants) alleging that the rate charged by respondent, Flota Mercante Grancolombiana, S. A. (Flota) for the carriage of complainants' bananas from Ecuador to Galveston, Texas, subjects complainants and the Port of Galveston to an undue and unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act,[1] 1916 (the Act) and results in a rate

[1] 46 U.S.C. 815 and 816.

which is unjustly discriminatory between shippers and ports in violation of Section 17 of the Act for the following reasons: (1) the rate charged complainants by Flota for the carriage of their bananas from Ecuador to Galveston is the same as that charged other shippers for the carriage of bananas from Ecuador to North Atlantic ports, particularly Baltimore; (2) Galveston is closer to Ecuador than North Atlantic ports; (3) the vessels used by Flota in its Gulf service are older and slower than those used in its North Atlantic service; (4) the Gulf service is irregular; and (5) the difference in service to the respective areas has "profound competitive effects." Hearing was held before an examiner and in his initial decision he concluded that no violation of Sections 16 or 17 had been shown. Exceptions to the initial decision were filed and oral argument was heard. Exceptions and proposed findings not discussed in this report nor reflected herein have been considered and found not justified by the facts or not related to material issues in this proceeding.

Complainants, with their principal place of business in Miami, Florida, have imported bananas into Galveston from Ecuador since 1951, and the predecessor of complainant, West Indies, began using Flota's vessels in 1957 on a contract basis. As of August 1959 the rates to Galveston ranged from $26.00 to $27.00 a ton, or between 9 and 16 percent lower than Flota's rates to the North Atlantic from Ecuador. Under Flota's pro forma forward-booking contracts, dated September 1, 1959, which were offered to all qualified shippers of bananas, a rate of $34.00 a ton was established from Ecuador to both Baltimore and Galveston. Both before and subsequent to the signing of the forward-booking contracts, complainant West Indies made repeated efforts to get the Galveston rate reduced, and on each of these occasions Flota agreed that the Galveston rate was too high and should be lower than the Baltimore rate. Despite the efforts of complainant and the agreement of respondent, the rate remained $34.00 a ton.

Galveston is 408 miles closer than Baltimore to Guayaquil, the principal banana port in Ecuador—the equivalent of about one day's steaming time. The vessels used by Flota in its Galveston service are older and slower than the vessels used in the Baltimore service. Between September 1959 (the date of the present forward-booking contracts) and the middle of February 1961 (one month prior to hearing), there were 50 voyages in Flota's Galveston service as compared to 73 voyages in its Baltimore

service. There are three sailings a month in the Galveston service but the booking contracts contain no provision as to the scheduling of arrivals. Of the 50 Galveston arrivals, only 18 (or 36 percent) were within one day of a regular schedule. In contrast, 60 of the 73 Baltimore arrivals (or 82 percent) were within one day of a regular schedule. Compainants used Galveston as a distribution center and some shipments are made as far north as Winnipeg and Toronto, Canada, as far east as Ohio, and as far west as Colorado, Arizona, and New Mexico. Prior to September 1959, the market price of bananas at Gulf ports had been, generally, a half cent a pound ($10 a ton) below the market price at North Atlantic ports;[2] and through absorption of the inland freight differentials and by the expanded use of trucks, Gulf importers were able to compete to some extent in the above northern and eastern areas with importers at North Atlantic ports. The parity of the Gulf and North Atlantic rates lessened the ability of Gulf importers to compete.

Complainants' total sales in the so-called common market area are 6% of their total imports through Galveston, but only 3% of the fruit carried on Flota's vessels goes to this common market. Complainants' principal competition comes from bananas imported into New Orleans. Only 18 of the hundreds of buyers in the common market have purchased bananas from both complainants and North Atlantic importers. Houston is the regular port of call for Flota for the loading and unloading of general cargo, and a short deviation is made to Galveston to discharge complainants' bananas.

Complainants have alleged two separate violations of Sections 16 and 17 of the Act, the relevant portions of which read as follows:

Section 16 . . . That it shall be unlawful for any common carrier by water . . . either alone or in conjunction with any other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage . . .

Section 17 . . . That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports . . .

[2] In the opinion of the witnesses, United Fruit Company sets the market price of bananas at both North Atlantic and Gulf ports.

Complainants contend that (1) it is not necessary to prove competitive injury from a preferred *shipper* to establish a *port* discrimination violating Sections 16 and 17 of the Act, and (2) it is not necessary to prove loss of specific sales to a preferred shipper in order to prove competitive injury from a discrimination.

On the one hand complainants have charged that Flota's rate of $34.00 a ton on bananas to Galveston subjects complainants to undue and unreasonable prejudice; confers an undue or unreasonable preference upon banana importers into Baltimore; and is unjustly discriminatory as between complainants and Baltimore importers. Complainants also charge that Flota's rate to Galveston confers an undue or unreasonable preference upon the *Port* of Baltimore; subjects *Port* Galveston to undue or unreasonable prejudice and is unjustly discriminatory as between the Port of Galveston and the Port of Baltimore. Thus, complainants allege discrimination as between *shippers* and discrimination as between *ports* both in violation of Sections 16 and 17 of the Act. Complainants have confused their arguments in support of these two separate and distinct violations. We deal with them separately herein.

The manifest purpose of the Sections, 16 and 17, is to require common carriers subject to the Act to accord like treatment to all shippers who apply for and receive the same service. *American Tobacco Co.* v. *Compagnie Generale Transatlantique,* 1 U.S.S.B. 53, 56 (1923). Prejudice to one shipper to be unjust must ordinarily be such that it constitutes a source of positive advantage to another. *Port of Philadelphia Ocean Traffic Bureau* v. *The Export S.S. Corp., et al.* 1 U.S.S.B. 538 (1936). There must be at least two interests involved in any case of preference, prejudice or discrimination, and it is essential that there be established an existing and effective competitive relationship between the two interests. *Huber Mfg. Co.* v. *N.V. Stoomvart Maatschappij "Nederland", et al.* 4 F.M.B. 343 (1953), *American Peanut Corp.* v. *M. & M. T. Co.,* 1 U.S.S.B. 78 (1925), *Boston Wool Trade Assn.* v. *M. & M. T. Co.,* 1 U.S.S.B. 24 (1921), *Eagle-Ottawa Leather Co.* v. *Goodrich Transit Co.,* 1 U.S.S.B. 101 (1926). This competitive relationship is necessary not only to show the extent to which the complaining shipper was damaged by the alleged preference, prejudice or discrimination; its establishment is also necessary to prove the violation itself. *American Peanut Corp.* v. *M. & M. T. Co., supra; Boston Wool Trade Assn.*

v. *M. & M. T. Co., supra.* Complainants have confused proof of the competitive relationship itself with proof of the character, intensity and effect of that relationship. In order to prove a violation of Sections 16 and 17, it is necessary to first establish the competitive relationship itself. Proof of the character, intensity and effect of the competitive relationship is necessary to prove the amount of damages and sustain an award of reparations.

It is for complainants to establish the existence of an effective competitive relationship between themselves and banana importers into Baltimore. On the record before us they have failed to do so. Of the hundreds of buyers in the common market only 18 purchase Galveston bananas from complainants, and there is no substantial evidence in the record to show that complainants' bananas compete with bananas imported into Baltimore. It is worthy of note that the evidence of record leads just as reasonably to the conclusion that complainants' primary competition in the so-called common market comes from North Atlantic ports other than Baltimore. Complainants' principal witness stated that he had no conception of the percentage of fruit imported into Baltimore on Flota's vessels actually purchased by the 18 buyers in question. Rule 10 (o) of this Commission's Rules of Practice and Procedure places the burden of proving the fact of the necessary competitive relationship upon complainants as the proponents of the order in this proceeding. This burden cannot be satisfied by mere assertions of competition unsupported by substantial evidence of record.

In order to sustain an award of reparations for damages resulting from a discrimination, complainant must show specific pecuniary loss. This principle was recognized by our predecessor in *Waterman* v. *Stockholms,* 3 F.M.B. 248 where the Board said at page 249:

> It has long been established by the courts and Government agencies having jurisdiction in such matters that (a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself *without proof of pecuniary loss* resulting from the unlawful act does not afford a basis for reparation. Citing *Pennsylvania R.R. Co.* v. *Int'l Coal Co.,* 230 U.S. 184, 203, 206. (Emphasis supplied.)

See also *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.,* 1 U.S.S.B. 41, and *Cudahy Packing Company* v. *Atchison, Topeka and Santa Fe Railway Company et al,* 234 I.C.C. 569 (1939).

In attempting to show pecuniary loss complainants point to the "historical" differential of half a cent a pound between the market

price of bananas at Gulf ports and the market price of bananas at North Atlantic ports, with the Gulf price the lower. Complainants contend that this differential is due to the fact that transportation costs to the Gulf are half a cent a pound less than transportation costs to North Atlantic ports. As authority for this assertion complainants cite the testimony of Mr. Fulks, Vice President of Marketing, Standard Fruit and Steamship Company, which is engaged in the business of importing and distributing bananas. Mr. Fulks, admitting that he was not a "shipping man," testified in a general way that as a "rule of thumb" his company used half a cnet a pound as the difference in cost between operating chartered ships into New Orleans (the only Gulf part served by Standard) and operating chartered ships to New York or Charleston. Evidence regarding the operation of chartered ships into New Orleans, New York, and Charleston does not support a charge of discrimination against common carrier vessels operating into Galveston and Baltimore, and we find that such testimony does not support complainants' assertion that the $10.00 a ton differential in market price is due to a corresponding differential in transportation costs.

After pointing to the historical differential in market prices at Gulf ports and Atlantic ports, and equating this differential with an alleged corresponding differential in transportation costs in favor of Gulf ports, complainants argue that Flota abolished the differential by raising both the Baltimore rate and the Galveston rate. The Galveston rate was raised from $26 to $27 a ton to $34 a ton, and at the same time the Baltimore rate was raised to $34. The complainants argue that their pecuniary loss is half a cent a pound, or $10 a ton, but they are willing to accept $7.00 a ton, or the difference between the old Galveston rate and the present Galveston rate of $34.00. Fatal inconsistencies appear in complainants' arguments. Complainants, in their brief, state that Flota in 1958 established its Gulf rates 15 percent below its Baltimore rates, citing a table appearing at page 6 of their brief. We need only point out that the table to which complainants refer compares the Galveston rates with rates into Philadelphia; no mention is made of Baltimore. Various ships are involved, and the percentage of differential between Philadelphia and Galveston ranges from 9% to 16%.

Charges that Flota has discriminated against complainants and the Port of Galveston and preferred banana importers into Baltimore and the Port of Baltimore are not sustained by evidence

showing rates, cost of service, etc. to New York, Philadelphia, Charleston, or New Orleans.

It is the contention of complainants that it is unnecessary to show a competitive relationship between the prejudiced and preferred port to establish discrimination as between localities and ports in violation of Sections 16 and 17. We do not agree. As in cases of discrimination between shippers, it is essential to establish an existing and effective competitive relationship in cases of port discrimination. In *New York Port Authority* v. *A. B. Svenska,* 4 F.M.B. 202 (1953), our predecessor, the Federal Maritime Board, discussing proof of unjust discrimination under Sections 16 and 17, said at page 205:

> In order to sustain the charge of unjust discrimination, under these provisions of the Shipping Act, complainant must prove (1) that the preferred *port,* cargo or shipper *is actually competitive with the 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. *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.,* 1 U.S.S.B.B. 538, 541, (1936); *H. Kramer and Co.* v. *Inland Waterways Corp. et al.,* 1 U.S.M.C. 630, 633 (1937). (Emphasis added.)

The need for such a competitive relationship is obvious for the evil which Congress sought to correct when it included localities and ports in the prohibitions of Sections 16 and 17 was the unnatural diversion of cargo from one port to another by common carriers by water through the medium of unjustly discriminatory rates or charges. Thus, to the extent that cargo is diverted from one port to another, the two ports occupy a competitive relationship with respect to the diverted cargo. *Port of Philadelphia Ocean Traffic Bureau* v. *Export S.S. Co., et al., supra.*

Complainants cite two cases, *Sun Maid Raisin Growers Assn.* v. *Blue Star Line,* 2 U.S.M.C. 31 (1939) and *Grays Harbor Pulp & Paper Co.* v. *A. F. Klaveness & Co.,* 2 U.S.M.C. 366 (1940), as supporting their proposition that it is not necessary to show a competitive relationship to establish port discrimination. In the *Sun Maid Raisin* case the Commission found violations of Section 16 and 17 because there was substantial competition among the ports in question. As stated by the Commission at page 37:

> As hereinbefore indicated, as between Stockton, Oakland, Alameda and San Francisco *there is substantial competition.* Various shippers competing with shippers using the terminal ports on San Francisco Bay are desirous of routing their traffic through the port of Stockton, but due to the existing rate adjustment, they cannot do so except to their prejudice. (Emphasis supplied.)

We agree, as in the *Gray's Harbor* case, that a carrier's action which precludes the movement of cargo through a port constitutes discrimination; however, the competitive relationship being present, the removal of the discrimination would result in a resumption of actual competition. That is not the case here, however. All of the shipments here at issue moved pursuant to two year forward-booking contracts. All of Flota's space suitable for the carriage of bananas to both Galveston and Baltimore was contracted for during the period in question. Complainants admit that under such conditions there was no diversion of cargo from Galveston to Baltimore, but at the same time they contend that such a diversion was merely delayed and would take place in the future. There are two deficiencies in complainants' argument.

First, complainants seek reparations and allege port discrimination for a period in which we have found that there had been no diversion of cargo. Secondly, there is no evidence in the record showing that should such a diversion occur it would be to Baltimore. In failing to establish the required competitive relationship between the Port of Baltimore and the Port of Galveston and in failing to show by substantial evidence of record that Flota's rates resulted in a diversion of cargo from Galveston, complainants have failed to sustain their allegation of discrimination between ports in violation of Sections 16 and 17 of the Act.

On the record before us, we find that complainants have failed to show a violation of either Section 16 or Section 17 of the Act.

The complaint shall be dismissed.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D. C., on the 22nd day of January, 1962

No. 927

WEST INDIES FRUIT COMPANY AND DOW JENKINS SHIPPING COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

This proceeding being at issue upon complaint and answer on file, having been duly heard, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made 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 this proceeding is dismissed.

By the Commission.

(Sgd) THOMAS LISI
Secretary

(SEAL)

FEDERAL MARITIME COMMISSION

NO. 898

CALIFORNIA STEVEDORE & BALLAST CO., ET AL.

v.

STOCKTON PORT DISTRICT, ET AL.

Decided January 25, 1962

Agreements between Stockton Elevators, Inc., and Stockton Port District held subject to Section 15 of the Shipping Act, 1916.

Further held that by said agreements and acting thereunder respondents Stockton Elevators, Inc., and Stockton Port District have put into effect a practice related to and connected with receiving, handling, and delivering property, which practice is unjust and unreasonable, operates to the detriment of the commerce of the United States, and is contrary to the public interest. By putting into effect and carrying out that practice said respondents have failed to establish the just and reasonable practices required by Section 17 of the Shipping Act, 1916.

Cease and desist orders entered.

Richard W. Kurrus for complainants.

J. Richard Towsend for Stockton Port District, respondent.

H. Stanton Orser and *Joseph Martin, Jr.* for Stockton Elevators, Inc., respondents.

John Hays for Stockton Bulk Terminal Company of California, respondent.

J.Kerwin Rooney and *Lloyd S. MacDonald* for California Association of Port Authorities, intervener.

John F. McCarthy and *Willard Walker* for Port of Longview and Port of Vancouver, interveners.

Norman Sutherland for Commission of Public Docks of the City of Portland, Oregon, intervener.

775-794 O-65-7

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner.*

BY THE COMMISSION:

Complainants are stevedores who attack an arrangement and agreements between the respondents Stockton Elevators, Inc. (hereinafter "Elevators"), and Stockton Port District (hereinafter "the Port").[1]

By said arrangement and agreements Elevators grants to the Port the exclusive right to perform all the usual or necessary dockside and other wharfinger and stevedoring services in connection with the mooring, loading to and unloading from water craft of bulk grain and other bulk commodities. It is the "exclusive" which is to say the monopolistic character of the arrangement to which the excluded complainant stevedores object.

Relevant facts in some detail were found upon substantial record evidence by our Chief Examiner who heard the testimony, and we adopt those findings (set out in the six numbered sections which follow) as our own. The Chief Examiner's footnotes have been changed to underscored statements within brackets, so as to avoid confusion with our own footnotes.

"1. Complainants hold themselves out, and are ready, able and willing to perform stevedoring work of all types at Stockton, as well as in the San Francisco Bay area. Generally, they are employed by the vessel owner or operator and work under the direction or control of the master of the vessel. In loading grain the functions of the stevedore begin only after grain leaves the loading spout.

"2. The Port of Stockton, located 75 nautical miles from the Golden Gate, is a public corporation operating terminal facilities at Stockton, California, and as such is admittedly an 'other person (subject to the 1916 Act) carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facili-

[1] Complainants are California Stevedore and Ballast Co., Marine Terminals Corporation, The San Francisco Stevedoring Co., Schirmer Stevedoring Co., Ltd., Seaboard Stevedoring Corporation, and Yerba Buena Corporation.

As defined in Section 15 of the Shipping Act, 1916, and as used in this opinion the term "agreement" includes understandings and arrangements.

ties in connection with a common carrier by water.' (See section 1 of the 1916 Act.) It publishes a terminal tariff which sets forth the exclusionary stevedoring practice. The tariff does not apply to bulk milled rice since the Port contends that the rice operation is not subject to the Board's jurisdiction, inasmuch as it is not in connection with a common carrier by water. As of now, the exclusionary practice extends only to grain, rice, logs and Army cargo. The Port sub-contracts its stevedoring work to private stevedoring companies, which load the grain onto the vessel under supervision of port personnel.

"3. Respondent Elevators is a private corporation which owns and operates, as a public utility, grain elevators and terminal facilities at the Port. It owns or leases the land on which the facilities are located. It has facilities for unloading rail cars, trucks and barges. Originally, it had a capacity of two (2) million bushels for grain and pelletized feed, which was enlarged considerably by the construction of four additional silos for the exclusive storage and handling of the rice of Rice Growers Association of California. When a ship is to be loaded, employees of Elevators run the elevator operation which moves the grain and rice to the end of the spout aboard ship. An employee stationed in one of the towers receives signals from the stevedore on the ship as to when to pour or stop pouring grain. The grain is conveyed by belts to two spouts which swing fore and aft on the ship and which can be extended or retracted in and out of the ship. The rice facility is used only for handling rice of the Association, which ships the rice to Puerto Rico on the *Marine Rice Queen*, a ship converted for the carriage of bulk milled rice. This vessel does not hold itself out as a common carrier, but transports only the rice of the Association, which is the owner, shipper and consignee thereof.

"4. In performing stevedoring services on grain, i.e., trimming, the stevedore hires the necessary personnel who load the ship either by direct pour or by a mechanical grain trimmer which, by means of a high speed belt, throws the grain into the desired location. [*The Port owns two trimmers costing $9,000 each.*] The stevedore contacts the ship's agent in advance of loading to prepare for the proper stowage of the vessel so that it will be seaworthy, and the compartments will be utilized in accordance with the terms of the charter party. Prior to loading, the stevedore must obtain from the vessel a certificate from the National Cargo Bureau stating that the fittings [*The fittings are installed by ship-*

wrights and not by the stevedore.] are in compliance with Coast Guard regulations for loading bulk grain. However, the inspector of the Bureau, who watches the loading, enforces loading requirements and thereafter issues a loading certificate which is *prima facie* evidence of compliance with the regulations. Any stevedoring company at Stockton would obtain all of its men, except its own superintendent, from the union hiring hall, including a walking boss. For direction of the men, the superintendent turns to the walking boss who watches the loading during the entire operation. All of the work is performed within the vessel, and the only use made of wharf facilities is electricity to operate the trimming machines, and use of the pier for movement of men and equipment to and from the ship.

"5. Many vessel operators and charterers have requested the services at Stockton of the various complainants, which they could not provide due to the exclusionary practice in question. Steamship company officials testified that the vessel operator has the responsibility and legal obligation to deliver the cargo; that the selection and hiring of the stevedore is not only normally done by the vessel operator, but as one witness said: 'it is practically a universal right'; and that if they (the steamship witnesses) could exercise such right, they would not employ the stevedoring services of the Port, but would rather employ one of the complainants because, as in any other business activity, competition produces more reasonable rates. However, there is no evidence that the companies concerned suffered in any way by not having a choice of stevedores at Stockton, or that any of the complaining stevedores would charge lower rates than the Port.

"6. The agreements which define the relationship between respondents, and which grant to the Port the exclusive right to perform wharfinger and stevedoring services on grain and rice have not been filed with the Board for approval under section 15 of the 1916 Act. [*The original agreement conferring this exclusive right as to grain, dated October 4, 1955, expired on November 7, 1960, with an additional 90-day period in which to negotiate a new contract. These negotiations were being carried on at the time of hearing.*] The Port did not file the agreements because it contends that Elevators is not an 'other person subject to the Act.' This, because (a) Elevators' delivery of grain at the end of the spout is a matter of convenience and is simply a delivery out of storage and the completion of the storage functions, and (b) Elevators' rice operation is not in connection with a common carrier by

water. It is also contended that Elevators operates only as a warehouseman and is subject only to the jurisdiction of the Secretary of Agriculture under the United States Warehouse Act (7 U.S. Code 241).

"The agreement covering grain provides that the Port shall pay certain sums of money for the exclusive right to stevedore bulk grain cargoes, which have ranged from approximately $150,000 to $250,000 per year since November 1958. Furthermore, this agreement, dated October 4, 1955, grants to the Port the preferential right to use Elevators' wharf; provides for the method by which the Port shall fix rates to be charged against the vessel, and stipulates that Elevators will deliver the grain at end of spout on ship, and will maintain and operate the belts, conveyers, boxes, tower and tower houses necessary for use in the loading and unloading of vessels to or from elevator and/or wharf.

"The agreements covering rice consist of (a) an agreement dated September 15, 1959, which grants to the Port for 20 years the exclusive wharfinger and stevedoring rights as to rice, bulk grain and other bulk cargoes, including packages, loaded to or from deep draft vessels; provides that Elevators will deliver rice to end of spout on ship; provides for the method of fixing rates against the vessel; fixes the rates to be paid by the Port to Elevators on the above-named commodities, except rice owned by the Association (which exception will be void if the Association transfers its rice operations to Sacramento); and provides that Elevators shall maintain the facilities; (b) an operating agreement dated October 13, 1959, between the Port and Elevators providing that the latter will perform 'the terminal services of receiving, storing and delivering' of rice to end of spout which the Port has agreed to handle for the Association, and fixing the rates to be paid by the Port to Elevators for said terminal services, with provision for an annual distribution of finances between the parties; and (c) a lease dated October 19, 1959, of the facility by Elevators to the Port for 20 years, at a specified rental, which grants to the Port an easement to use the conveyor system through the facilities of Elevators to the end of spout on the vessel.

"An official of Elevators testified that the reason for giving the Port the exclusive stevedoring right was the inexperience of his company in stevedoring work, a desire to avoid possible labor troubles, and the fact that its competition for grain would come

from the Bay area. [*Apparently this statement has reference to the fact that complainant Marine Terminals has a fifty percent interest in Islais Creek Grain Terminal in San Francisco which competes with Elevators.*] The Port's witness testified that it was necessary for the Port to control the operational features of the grain facility in order not only to ensure its success, but to protect the Port against competition from terminals in the Bay area. [*All of the complainants, except San Francisco Stevedoring, either operate or have an interest either directly or indirectly in the terminal business at San Francisco.*] It is customary in the Bay area for terminals to reserve to themselves the right to perform accessorial services in connection with the wharfinger business. But, as a general rule, they allow outside stevedoring companies to perform stevedoring work on their facilities."

The facts stated above are undisputed by exception or otherwise, except that respondents question the traditional right of a vessel's master to select stevedores, and deny that Elevators operates terminal facilities. Upon both points respondents are overwhelmed by the evidence. As to the first, it is clear that proper loading of grain is an essential element in the ship's seaworthiness for which the master is responsible, and see the uncontradicted testimony of J. W. M. Schorer, Pacific Coast Manager of Holland-America Lines (Tr. 82). With respect to the second, the elevator here is in and of itself a terminal facility in that it contains grains going aboard ships and which flow from the elevator to ships moored at the elevator's wharf. The elevator functions as an important unit in loading common carriers by water at the port of Stockton. Respondents' chief witness, C. W. Phelps, Traffic Manager of the Port, testified to the interest of the Port and Elevators in seeing that Elevators' facility "performs a service to the grain trade [moving through the terminal] and a success to the Port of Stockton."

Elevators itself testified through Exhibit 10 that its facilities, which are utilized by common carriers by water, include dock and wharf facilities suitable for docking of deep draft vessels and facilities for storage and elevation of bulk grain and other bulk commodities, and also loading facilities for loading bulk commodities from its storage facilities to vessels. We come now to determine if in the light of these facts, the arrangement between Elevators and the Port is (and the exclusionary agreements included in it are) subject to the provisions of section 15 of the

Shipping Act, 1916.[2] Our answer must be in the affirmative. Every agreement between persons subject to the Shipping Act, 1916, if (as here is undeniably the fact) such agreement gives special privileges or advantages, controls, regulates, prevents or destroys competition, or in any manner provides for an exclusive, preferential, or cooperative working arrangement is subject to section 15.

Respondents first claim that section 15 does not apply because, while the Port is admittedly a person subject to the 1916 Act, Elevators is not such a person, because Elevators is licensed and operates under the United States Warehouse Act (7 U.S.C. 241). This contention was considered and denied by the Federal Maritime Board in *D. J. Roach, Inc.* v. *Albany Port District*, et al., 5 FMB 333, 334 (1957), and by the Board and the Court of Appeals for the Fifth Circuit in the *Cargill* case, 5 FMB 648, 287 F. 2d 86. We hold here as was held in those cases that a grain elevator carrying on the business of furnishing terminal facilities in connection with common carriers by water, as Elevators does, is a person subject to our regulation under the Shipping Act, 1916, although in its grain storage functions it can be regulated by the Secretary of Agriculture under the United States Warehouse Act.

Respondents' second claim that section 15 does not apply, and that we lack power to strike down an unjust and unreasonable practice setting up a stevedoring monopoly, because we lack power to regulate the stevedoring business, is also without merit, and a plain *non sequitur*. Our action in condemning and preventing such unjust and unreasonable practices does not constitute regulation of stevedoring.

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[2] Section 15 reads in pertinent part, as follows:

"That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements."

As the agreements of September 15, 1959, and October 13, 1959, between Elevators and the Port are subject to section 15, and have not been approved by this Commission or a predecessor, they are made unlawful by the plain langauge of section 15, and carrying them out has been and will continue to be unlawful.[3]

We must now decide if the agreements and their performance constitute an unjust or unreasonable practice within the meaning of section 17 of the Shipping Act, 1916.[4] We have already found that Elevators and the Port are persons subject to the Act, and carrying out the arrangement and agreements undeniably constitutes a practice relating to and connected with the receiving, handling, storing, or delivery of property. The basic question remaining then, is if the practice is unjust or unreasonable. We hold that it is both unjust and unreasonable; that as such, it operates to the detriment of the commerce of the United States, and is contrary to the public interest. The essence of this practice is that it sets up a stevedoring monopoly at a United States port (Stockton, California) serving common and contract carriers which operate in the foreign and domestic commerce of the United States, and prevents such carriers from selecting stevedores of their choice to serve their ships.

Such a practice runs counter to the anti-monopoly tradition of the United States, upsets the long-established custom by which carriers pick their own stevedoring companies, deprives complainants and other stevedoring companies of an opportunity to contract for stevedoring work on ships using Elevators' facilities,

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[3] Carrying them out would, of course, become lawful, if and when we approve them, but it is clear from the balance of this opinion that they will not be approved. The plain language of section 15, referred to, reads:

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation."

[4] Section 17 reads in pertinent part as follows:

"Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

and opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs.[5]

Such a practice is *prima facie* unjust, not only to stevedoring companies seeking work, but to carriers they might serve, and the general public which is entitled to have the benefit of competition among stevedoring companies serving ships carrying goods in which the public is interested as shipper or consumer. for the same reasons it is *prima facie* unreasonable.

The principles just stated are well recognized. The *Roach* case, and the *Cargill* case, *supra*, and this case are all decided upon those principles. In *Cargill*, Judge Wisdom, speaking for the Fifth Circuit, pointed out the necessity for "a close relation between the stevedores and the vessel," something scarcely attainable when the stevedores owes his employment not to the vessel but to a monopoly conferred by a third party. Judge Wisdom also said that our "national policy favors free and healthy competition; monopoly is the exception."

We have as is our duty weighed and considered the meager argument offered to justify this monopolistic practice, and find it singularly lacking in weight. It seems to be primarily that the terminal facilities would be safer in hands selected by respondents (there is no *proof* of this), and that only the monopoly prevents the employment of stevedores operating terminals in San Francisco, which employment would bring about a conflict of interest which "would be detrimental to the welfare and investment" of respondents. Assuming the validity of both propositions, any "benefits" they point out in the monopoly are, in our judgment, of value to respondents entirely too insignificant to justify the disadvantage to complainants, carriers, and the public inherent in the existence of a stevedoring monopoly.

Respondents also argue that "it does not make any practical difference who performs the stevedoring," primarily because whoever does the stevedoring must obtain from the National Cargo Bureau a certificate that the fittings comply with the Coast Guard Regulations for loading bulk grain, and an inspector of the Bureau specifies the manner of loading the grain and issues a loading certificate which is *prima facie* evidence that the stevedore has complied with loading regulations.

These facts do not relieve the owner and master of their re-

[5] It is not significant that these evils have not been proved to actually exist yet at Stockton. Healthy competition for business which is the best known insurance against such evils has been destroyed.

sponsibility for well-trimmed cargo and seaworthy ship, and the selection of the stevedore remains a matter of importance and concern to the master and shipowner.

Another reason, so respondents argue, why "it makes no difference" who stevedores, is that the Port, any of complainants, or any other stevedoring company would secure personnel *except for the superintendent* from the same hiring hall. The importance of the superintendent, and even more, the importance of the master being able to choose a company in which he and his principals have confidence and whose charges are determined by free competition deprives this argument of any weight.

Respondents take the position that a decision by us that respondents' practices are unjust or unreasonable can be justified only if (a) we are bound by a holding in *Cargill* that all monopolistic stevedoring agreements must be unlawful, notwithstanding economic benefits which may accompany them, or (b) if the facts in *Cargill* and this case are in every particular the same. We do not agree with this position.

First, it was not held in *Cargill* and we do not hold here that all monopolistic stevedoring agreements are necessarily and inevitably unjust and unreasonable practices which must be prohibited at any cost.[6]

In *Cargill,* in *Roach,* and in this case, respondents failed to advance evidence of economic or other advantages flowing from monopolistic arrangements, sufficient to justify them notwithstanding the evils and detriment to the public interest inherent in monopoly. Our national policy makes free competition the rule, and monopoly the exception which must be justified, and here (as in *Roach* and *Cargill*) respondents have failed to justify the desired monopoly.

Respondents argue also that if the Commission prohibits a stevedoring monopoly as an unjust or unreasonable practice, this prohibition takes respondents property without just compensation in violation of their rights under the Fifth Amendment to the Constitution of the United States. The argument is unsubstantial. The cited cases do not support it. None of them would even remotely relate to prohibition of unjust and unreasonable practices by a party subject to a regulatory statute. Nothing herein will prevent respondents from making fair and non-discriminatory charges for the use of any of their facilities.

[6] It is clear however that the burden of sustaining such practices as just and reasonable is a heavy one.

Premises considered, and basing our action on the foregoing findings and conclusions, the whole record, and the applicable statutes, it is held:

(1) The agreements between Elevators and the Port, dated September 15, 1959, and October 13, 1959, are subject to section 15 of the Shipping Act, 1916, and have not been approved by this Commission or a predecessor. Said agreements have always been and now are unlawful; it has always been and it now is unlawful to carry them out. Elevators and the Port have been carying them out since their effective dates.

(2) Said agreements, and respondents' actions thereunder, constitute a practice by persons subject to the Shipping Act, 1916 (Elevators and the Port) which is related to and connected with receiving, handling and delivery of property, and the said practice is unjust and unreasonable, operates to the detriment of the commerce of the United States, and is contrary to the public interest. By putting said practice into effect and carrying it out, respondents have failed to establish, observe, and enforce just and reasonable practices required by section 17 of the Shipping Act, 1916.

(3) Respondents Elevators and the Port will be required to cease and desist from carrying out the practice above described, including without limitation the agreements between them of September 15, 1959, and October 13, 1959.[7]

An appropriate order will be entered.

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[7] Elevators and the Port are now the only respondents. Stockton Bulk Terminal, originally named a respondent, was eliminated at the hearing by amendment to the complaint.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D. C., this 25th day of January, 1962.

No. 898

CALIFORNIA STEVEDORE & BALLAST CO., ET AL. v.
STOCKTON PORT DISTRICT, ET AL.

Whereas, the Commission, on the 25th day of January, 1962, having made and entered a report stating its conclusions and decision herein, which report is hereby referred to and made a part hereof:

It is ordered, That respondents herein cease and desist from carrying out agreements between them, dated September 15, 1959, and October 13, 1959, and practices thereunder referred to in said report.

(SEAL) (Sgd) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 807

ATLANTIC & GULF-PUERTO RICO GENERAL INCREASE IN RATES AND CHARGES

Decided February 1, 1962

Rates between North Atlantic and Gulf ports of the United States and Puerto Rico, as increased 15 percent or 6 cents per cubic foot or 12 cents per 100 pounds, whichever produces the greater increase in revenue, and as further increased 12 percent, found just and reasonable.

Odell Kominers, Mark P. Schlefer, and *Sterling F. Stoudenmire, Jr.*, for respondents.

Eduardo Garcia, Walton Hamilton, William D. Rogers, Abe Fortas, Seymour Berdon, and *William L. McGovern* for Commonwealth of Puerto Rico, intervener.

John Regan for Administrator of General Services, intervener.

Mitchell J. Cooper, Frank M. Cushman, Vernon C. Stoneman, and *John B. Street* for Asociacion de Industriales de Puerto Rico (Manufacturers Association of Puerto Rico) and Commonwealth Manufacturers Association, interverners.

John B. Street, Frank M. Cushman, and *Vernon C. Stoneman* for Paula Shoe Company, intervener.

John B. Street and *Vernon C. Stoneman* for Caribe Shoe Corporation, intervener.

Mitchell J. Cooper and *Frank M. Cushman* for Coastal Footwear Corp., intervener.

L. Merrill Simpson for Bata Shoe Company, Inc., intervener.

William M. Requa for Association of Sugar Producers of Puerto Rico, intervener.

J. W. Harnach for Cooperative Grange League Federation, Inc., intervener.

Harold L. Copp for Atlantic Industries, Inc., interverner.

T. A. Smith for Louisiana State Rice Milling Company, Inc., intervener.

Wm. M. Reid for The Rice Millers' Association, intervener.

Alan F. Wohlstetter for Trailer Marine Transportation, Inc., intervener.

Alfred K. Kestenbaum for Cigar Manufacturers Association of America, Inc., intervener.

Edward Aptaker as Public Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner.*

BY THE COMMISSION:

On December 4, 1956, the United States Atlantic & Gulf-Puerto Conference (the Conference), then comprised of Bull Insular Line, Inc., Lykes Bros. Steamship Co., Inc., Waterman Steamship Corporation, and Alcoa Steamship Company, Inc. (Bull, Lykes, Waterman, and Alcoa), filed with the Federal Maritime Board (Board) Tariffs FMB F-No. 14, Homeward Freight Tariff No. 7, and FMB F-No. 13, Outward Freight Tariff No. 7, naming increases in commodity rates over the applicable rates then in effect, to become effective January 5, 1957, between United States Atlantic and Gulf of Mexico ports and ports in Puerto Rico.

On December 20, 1956, J. W. de Bruycker, Agent for the Conference, filed special permission application to modify on short notice the increases in rates to reflect an adjustment not in excess of 15 percent or 6 cents per cubic foot or 12 cents per 100 pounds, which ever produces the greater increase in revenue, over the applicable rates then in effect. This increase will be referred to as the 15 percent increase.

On January 4, 1957, pursuant to section 18 of the Shipping Act, 1916, as amended, 46 U.S.C. 817 (the 1916 Act), and the Intercoastal Shipping Act, 1933, as amended, 46 U.S.C. 843 et seq. (the 1933 Act), the Board ordered an investigation into the reasonableness and lawfulness of the rates, charges, regulations, and practices stated in the tariff schedules filed December 4, 1956, and ordered the operation of these schedules suspended until midnight January 8, 1957, unless otherwise ordered.

On January 8, 1957, the Board amended its order of January 4, 1957, and granted the special permission to publish the rate increases, as modified, to be effective on one day's notice but not earlier than January 9, 1957.

After hearing on the 15 percent increase, but before briefs of the parties were due, the respondents published on July 18, 1957, a 12 percent general rate increase (the 12 percent increase), to become effective September 14, 1957. On August 14, 1957, Pan-Atlantic Steamship Corporation (Pan-Atlantic), an affiliate of Waterman, filed revisions to its Homeward Tariff No. 1, FMB F-No. 1, to become effective September 18, 1957, naming local commodity rates from Puerto Rico to United States Atlantic ports based on the same pattern as the Conference rates.

By supplemental order of September 5, 1957, the Board (a) expanded the proceeding to include an investigation into the lawfulness of the rates as further increased by 12 percent; (b) suspended the operation of the Conference and Pan-Atlantic schedules naming the 12 percent increase until January 14, 1958; (c) made Pan-Atlantic a respondent; and (d) ordered a further hearing in the proceeding.

Further hearings were held.[1] An initial decision was issued by the hearing examiner and exceptions thereto filed with the Board. One of the principal issues raised in the exceptions was whether the examiner had erred in not requiring the carriers to produce books and records to substantiate certain financial statements which they had offered in evidence. On June 13, 1958, the Board remanded the proceedings to the examiner for further hearings with a direction to the carriers to produce substantiating records for financial exhibits submitted at the previous hearings. Following further hearings, the examiner issued a decision in which he found both the 15 and the 12 percent rate increases to be just and reasonable.

Exceptions were filed and oral argument held by the Board. Thereafter, the Board issued a Report and Order dated April 28, 1960, in which it found the aforesaid increased rates just and reasonable. (6 F.M.B. 14).

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[1] Interveners who appeared during the course of the proceedings were the Commonwealth of Puerto Rico (the Commonwealth), the Administrator of General Services, Asociacion de Industriales de Puerto Rico (Manufacturers Association of Puerto Rico), Commonwealth Manufacturers Association, Paula Shoe Company, Caribe Shoe Corporation, Coastal Footwear Corp., Bata Shoe Company, Inc., Association of Sugar Producers of Puerto Rico, Cooperative Grange League Federation, Inc., Atlantic Industries, Inc., Louisiana State Rice Milling Company, Inc., The Rice Millers' Association, Trailer Marine Transportation, Inc., and Cigar Manufacturers Association of America, Inc.

The Board's order was appealed to the United States Court of Appeals for the District of Columbia Circuit, which in an opinion, stated:

> The Board's order is . . . vacated and the case remanded for the Board to reconsider and clarify the rate base question. The Board should also pass upon the Commonwealth's argument that it is not fair to rate payers to let an accumulated depreciation reserve be depleted and depreciation charges thereby increased. *Commonwealth of Puerto Rico* v. *Federal Maritime Board*, 288 F. 2d 419, at 421. (D.C. Cir.—1961).

The Board thereafter reopened the proceeding for reconsideration of all matters bearing upon the justness and reasonableness of the increased rates, and supplemental briefs and memorandums of law were filed, and oral argument held.

THE CARRIER RESPONDENTS

1. *Alcoa.*—Alcoa offers weekly service from the North Atlantic ports of New York and Baltimore, Md., and weekly service from the Gulf ports of Mobile, Ala., and New Orleans, La., to ports in Puerto Rico. Each of the sailings serves all ports in Puerto Rico. The vessels in the North Atlantic service, after discharge at Puerto Rico ports, proceed into other trades, generally contract services. In the Gulf service, the vessels return from Puerto Rico to the Gulf ports, a service inaugurated in March 1958.

2. *Bull.*—Bull provides three sailings per week from North Atlantic ports to Puerto Rico. One sailing proceeds from Baltimore and Philadelphia, Pa., to Puerto Rico and return. Another sailing proceeds from New York to Puerto Rico and return (the Thursday sailing), and the third from New York to Puerto Rico, thence to the Dominican Republic and return (the Friday sailing). Basically, the services are provided with six C-2 type vessels, operated on a strict two-week turnaround. In addition, Liberty-type vessels are also employed to lift stators, generators, ammunition, and other specialized cargo destined to Puerto Rico which cannot be handled on the regular C-2 vessels. Liberty ships were also utilized in some instances to carry full cargoes of bagged raw sugar under the tariff, but this movement declined rapidly in 1957 due to conversion of the raw sugar movement to bulk movement under contract, and has since come to a virtual halt. Caribbean Dispatch, Inc., an affiliate of Bull, is a major contract carrier of bulk sugar.

3. In a transaction closed December 18, 1956, characterized in the brief for the Conference as "an irrefragibly [sic] arm's-

length transaction between completely unrelated interests," Olympia Corporation, incorporated in Delaware, acquired substantially all of the stock of A. H. Bull Steamship Co., a New Jersey corporation (A. H. Bull New Jersey). Prior to the transaction, the purchaser and the sellers had no stockholders, directors, or other interests in common, or any similar relationship. Olympia had been organized by its parent company American Coal Shipping, Inc., (ACS), as the instrument designed to facilitate the consummation of the transaction. ACS paid $100,000 for all of Olympia's outstanding stock. ACS and its own stockholders also loaned to Olympia about $5 million, at interest of 5 percent. Between December 18, 1956, and January 21, 1957, Olympia's name was changed to A. H. Bull Steamship Co. (A. H. Bull Delaware). The transaction contemplated purchase by Olympia of all of the outstanding stock of A. H. Bull New Jersey for a total consideration of $40 million (which was not finally accomplished until February 28, 1957), the liquidation of A. H. Bull New Jersey, and the transfer of all of its assets to A. H. Bull Delaware.

4. On December 18, 1956, A. H. Bull New Jersey had over $18 million in cash, obtained from surplus, liquidation of quick assets representing in part depreciation funds, release of vessel replacement funds, and receipt of repayments of advances and dividends from subsidiary companies, among others. On the closing date of the stock purchase, this $18 million was declared by A. H. Bull New Jersey as a dividend, paid principally to Olympia, and the remainder of the purchase price of $40 million was met from the proceeds of the loans from ACS and its stockholders of $5 million mentioned above, and bank loans of some $17 million at interest rates ranging from 4¼ to 5 percent, guaranteed by ACS.

5. The net purchase price paid by Olympia for A. H. Bull New Jersey was therefore about $22 million. The book net worth of A. H. Bull New Jersey at the time of closing was about $12,330,000. Incident to the purchase, the physical assets of A. H. Bull New Jersey and its subsidiaries had been independently appraised. About January 21, 1957, in partial but almost complete liquidation of A. H. Bull New Jersey, its assets were transferred to the books of A. H. Bull Delaware, and in the process the vessel book values were raised from $5,160,421.85 to $12,892,610.21, effective as of the closing date, the latter figure representing about 70 percent of the appraised values of the vessels. The ascribed values of certain other assets were changed also for

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consolidated statement purposes, but on the corporate books only the vessel values were changed. Thus, on the books of A. H. Bull Delaware the vessel book values are carried presently at amounts, less accrued depreciation since the closing date, representing a pro rata share of the total purchase price paid by A. H. Bull Delaware for the assets of A. H. Bull New Jersey.

6. Corporate entities affiliated with respondent Bull, so far as is here pertinent, include A. H. Bull Delaware of which respondent Bull is a subsidiary; A. H. Bull & Co., which provides continental United States overhead services for Bull and others in the corporate family in return for management and operating commissions composed principally of a percentage of revenues and a per diem husbanding charge; several separate corporations which own and operate pier facilities in Puerto Rico; Caribbean Dispatch, Inc., mentioned above; and Dafton Realty Co., owner of office facilities in New York utilized by Bull.

7. For 65 days between August 19 and October 22, 1957, Bull's operations were immobilized by a strike arising out of a jurisdictional dispute between seafaring unions. The strike was not unrelated to the fact that ACS, the new owner of the Bull properties, was in part owned by the United Mine Workers. Other strikes which have affected the operations of Bull at various ports, for varying reasons, and for periods of time ranging from 2 to 44 days, totaled 33 days in 1951, 1952, and 1956; 12 days in 1953; 101 days in 1954; 78 days in 1955; 14 days in February 1957; and 20 days in the first 6 months of 1958.

8. *Lykes.*—Lykes operates its weekly service between the Gulf ports of Lake Charles, La., and Houston and Galveston, Texas, and occasionally other western Gulf ports, and Puerto Rico, as a part of its subsidized service on Trade Route 19 (Line A service) between Gulf ports of the United States and Cuba, Haiti, the Dominican Republic, Venezuela, Columbia, and Panama. No voyages are operated to or from Puerto Rico exclusively.

9. *Waterman.*—At the outset of this proceeding Waterman operated a weekly service between New Orleans and Mobile and Puerto Rico, utilizing two vessels on a 14-day turnaround, with additional vessels for relief purposes and when extra cargo demanded. Beginning in October 1957, Waterman also inaugurated weekly sailings, utilizing two vessels on a 14-day turnaround in regular breakbulk service, between New York, Baltimore, and Puerto Rico. Waterman intended to provide a permanent North Atlantic-Puerto Rico service, at first with regular breakbulk ves-

sels, and later converting to trailership service. Waterman is a subsidiary of McLean Industries, Inc.

10. Effective February 4, 1958, Waterman withdrew from the Conference and simultaneously ceased all operations in the Puerto Rico trades, which were taken over without break in service by Waterman Steamship Corporation of Puerto Rico (Waterman P. R.). The latter is a wholly-owned subsidiary of Waterman, is not a respondent, and is not a member of the Conference, although its rates are in all respects the same as those of the Conference. When filing its initial tariffs with the Board, and in subsequent pleadings herein, Waterman P. R. has agreed to be bound by the results of this proceeding so far as its rates are concerned. Statistical and financial data reflecting the combined Waterman and Waterman P. R. operations are of record, although no recent data were presented forecasting operating results for the entire year 1958 as was the case with the other Conference respondents.

11. On February 28, 1958, Waterman P. R. inaugurated its North Atlantic-Puerto Rico trailership service, with the sailing of the *Bienville*. This vessel, upon arrival in Puerto Rico, was prevented from discharging its cargo because of labor difficulties. After some delay the *Bienville* proceeded to New Orleans, where her cargo was discharged and that which had not spoiled was transferred to a ship regularly employed in the Waterman P. R. Gulf-Puerto Rico breakbulk service. The *Bienville* voyage consumed in all 34 days. After this experience, Waterman P. R. discontinued its North Atlantic-Puerto Rico service, which has not since been resumed either on a breakbulk or trailership basis.

12. *Pan-Atlantic.*—Pan-Atlantic is an affiliate of Waterman, and as such was required to maintain the same rates as the Conference by the terms of the Conference agreement to which Waterman was a party. Between April 1957 and early 1958, Pan-Atlantic provided a northbound service from Puerto Rico to Miami and Jacksonville, Fla., in conjunction with its intercoastal and West Coast-Puerto Rico services, which was suspended at the end of this period and has not been resumed. The tariff under which such service was operated was canceled effective August 22, 1958. So far as the record discloses, this service was minimal, since the cargo carried averaged only 51 tons per voyage, with gross revenue per voyage of $1,506. These data are not important enough to warrant their inclusion in our consideration, although the rates under investigation will remain subject to the findings.

13. Pan-Atlantic instituted a trailership service between New

York and Puerto Rico on July 30, 1958, which is presently being operated. On October 27, 1958, the Board denied a petition by the conference requesting that this investigation be broadened by naming Waterman P. R. as a respondent, and bringing in issue the current tariffs of Pan-Atlantic and Waterman P. R.

THE PUERTO RICAN ECONOMY AND THE TRADE

14. Puerto Rico is a small island, 100 miles long and 25 miles wide, separated from the nearest point in the United States by over 1,000 miles of open water. The economy of the Island has never been self-sustaining, and it has few natural resources. It is one of the most densely populated areas of the world. Puerto Rico's external trade is almost entirely with the United States. About 40 percent of all goods produced, and about 54 percent of all goods consumed, by the people of Puerto Rico are destined to, or originate in, the United States. Average income per capita in Puerto Rico in 1954 was $446, as compared with $1,770 in the United States. The percentage of the labor force of Puerto Rico unemployed or only partially employed has consistently exceeded that in the United States. These data indicate that increases in the cost of shipping such as are here involved affect the economy of Puerto Rico and the living standards of its populace more sharply than would similar increases elsewhere in the nation.

15. The Conference rates in the Puerto Rico trade are determined by three-fourths majority vote of the members. Therefore, no one carrier can dominate the making of rates. Waterman P. R., presently operating in the Gulf-Puerto Rico trade, is not a member of the Conference, and its rates can be made by individual action, subject only to the competitive impact of the rates maintained by the Conference. As is indicated by the revenue statistics shown in Table I below, Bull is the largest carrier in the trade, receiving approximately fifty percent of the trade revenues even in the year 1957 whn Bull's operations were immobilized by strike for more than 65 days.

TABLE I

GROSS TRANSPORTATION REVENUES OF THE RESPONDENTS

Carrier	1956	1957	First half 1958
Bull	$24,993,850	$21,646,383	$11,682,207
Waterman	6,534,389	9,416,267	4,651,468
Alcoa	6,244,864	9,175,949	4,215,049
Lykes	3,843,368	3,774,843	1,940,279
Totals	$41,616,471	$44,013,442	$22,489,003

16. The available traffic and revenue projections of the respondents, where given, are based on an extension of their most recent experience, that for the first half of 1958, subject to adjustments for known or contracted cost increases. Although there is testimony of record to the effect that a gradual increase may be expected in the movement of general cargo between Puerto Rico and the mainland, the statistics of record disclose a decline in tonnage carried of cargo subject to the tariffs here involved. This decline is attributed in large part to the conversion of the raw sugar movement from bagged movement under the tariffs to bulk movement under contract, and to the construction of a fertilizer plant in Puerto Rico, which virtually eliminated the movement of prepared fertilizer and substituted therefor the movement of fertilizer raw materials in tramp vessels. Table II below shows the tonnage data submitted for the year 1955-1957 and the first half of 1958, and the projections for the full year 1958 where given. Weight tons are computed on the basis of the weight of the cargo carried, and freight payable tons on the basis on which the freight charges were paid, either weight or measurement. The data for the full year 1957 in Tables I and II reflect the impact of the long strike in that year against Bull, and the consequent diversion of substantial amounts of traffic normally carried by it to Alcoa and other carriers.

TABLE II

TONNAGE CARRIED IN FREIGHT PAYABLE TONS, EXCEPT WHERE INDICATED

Carrier	1955	1956	1957	First Half 1957	First Half 1958	1958 Projected
Bull	1,876,964	1,828,275	1,151,993	710,877	558,880	1,117,760
Alcoa	429,470	312,710	418,509	186,422	169,363	340,000
Waterman	239,535	238,895	298,831	148,526	132,202	—
Lykes	—	—	203,438	—	107,822	215,644
Lykes	245,334*	262,389*	186,220*	102,522*	102,918*	205,836*

*Weight tons

17. Taking into consideration the factors mentioned in paragraph 16 above, and the entry into the trade of Pan-Atlantic with its new and attractive trailership service, which will no doubt succeed in diverting some traffic from the services maintained by the other respondents, it is found that the projections of the respondents as to the year 1958 are reasonable.

SPECIFIC COMMODITY RATES

18. In the first initial decision issued herein, the examiner found as follows:

60. The shipper interveners, generally, are those who ship commodities under so-called "promotional rates." These rates have been maintained by the carriers, prior to the proposed increases, at comparatively low levels designed to promote the movement of the commodities so rated. The promotional rates apply primarily to northbound traffic, and most of them have been used since 1946 in cooperation with and at the request of the newly-developing industries in Puerto Rico. This traffic, in gross tons, in 1955, amounted to approximately 20,000 tons northbound and 1000 tons southbound. In 1956 it amounted to approximately 25,000 tons northbound and 2000 tons southbound. The revenue from this traffic in relation to total revenue was perhaps less than ½ of 1 percent.

61. Selected commodities from those transported at promotional rates, stated by the carriers to be typical, were northbound: shoes, paperboard, chinaware, coffee, cigars, rugs, artificial flowers, boxes kd, scrap metal, scrap tobacco and confectionary; and southbound: tin cans, iron and steel articles, glass jars, bottles n.o.s., paper and paper products, and tiles. Two shippers, understood to be representative of shippers of such commodities, testified at the first hearing. One was a shipper of candy and the other of shoes, both shipping from Puerto Rico to the United States mainland. Their main objections were that the first rate increases on the commodities were greater than 15 percent. This is so because of the 6 cents per cubic foot or 12 cents per 100 pounds aspect of the first increase.

62. The shippers gave important consideration to the relatively low shipping rates for their products, it is stated, in their decisions to establish business in Puerto Rico, since transportation charges are vital factors in their business prospects. The record shows that the 15 percent rate increase raised footwear costs 1.13 percent of the value of the product, and candy 1.78 percent. These increases, it is stated, seriously limit the possibilities of expanding mainland business, and discourage people from establishing business in Puerto Rico.

63. The record shows that the promotional rates are too low, and appear to be noncompensatory, even with the 15 percent increase, and there is some question as to whether the further 12 percent increase renders said promotional rates compensatory.

19. No exceptions were taken to the findings quoted above. They are borne out by the record, and no additional evidence was presented at the second further hearing relating to these issues. We adopt the findings set forth above.

COST INCREASES

20. The cumulative rate increases under investigation herein aggregate about 29 percent. The last prior general rate increase in the Puerto Rican trade was made effective November 12, 1951.

Since that date, the expenses of the respondents have increased substantially. For example, Bull shows that stevedoring wages in the United States have increased 46 percent and in Puerto Rico about 63 percent; fuel oil costs have increased 23 percent; vessel operating costs as a whole 54 percent; crew wages 62 percent; vessel repair costs 50 percent; and insurance 52 percent. Comparable cost increases are shown for the other three carriers in the trade.

21. There is evidence that the carriers, through increased efficiency of operations, have endeavored to minimize the impact of the stated cost increases. Stevedoring expenses account for a substantial proportion of total operating expenses. Bull shows that from 1951 to the end of 1957 loading costs in New York increased from $4.06 per ton to $4.69 per ton, and discharge costs at the same port from $4.80 per ton to $5.74 per ton, increases of 15.5 percent and 19.6 percent respectively, far lower than the wage increases shown. This favorable result is attributed to increased efficiency in loading and discharge operations, the leasing of modern improved terminal facilities, and in some degree to the use of containers and vans. Loading and discharge costs at San Juan, P. R., however, reflected more closely the wage increases, attributed to the lesser efficiency of port arrangements and labor. Loading costs at that port in the same period increased from $2.02 to $3.07 per ton, and discharge costs from $2.79 to $4.71 per ton, increases of 52 percent and 68.8 percent, respectively.

22. Waterman shows, in addition to the cost increases stated above, that effective in October 1958 longshore wage increases at Puerto Rican ports will increase stevedoring expenses by about 92 cents per ton, and that known prospective wage increases will by the end of 1958 increase crew wage cost by $160,000 annually.

ALLOCATION METHODS

23. Of the principal respondents, Waterman is the only carrier which operates an exclusive Puerto Rican service. The remaining respondents, as shown in paragraphs 1-9, *supra,* operate their services to and from Puerto Rico either wholly or partially on a joint basis with other services. This has necessitated allocation of the joint service expenses of the respondents, and of the assets devoted to these services, so as to ascertain as nearly as possible the proper apportionment of expenses and assets between the regulated and non-regulated trades in order to determine the

adequacy of revenue in the regulated trade. For this purpose, the respondents have made their allocations principally on ton-mile prorate formulae.

24. Where possible, such as in the case of port and cargo handling expenses incurred in Puerto Rico, the expenses were directly assigned. Most other expenses, including vessel operating expenses, cargo and port expenses in the United States, vessel depreciation, and overhead, were subject to allocation. The need for allocation does not alter the basic factors contributing to vessel operating expenses, the tonnage and the distance carried. In applying the ton-mile prorate, the respondents used the straight-line distances between ports of loading and discharge, since a vessel sailing toward Puerto Rico is also sailing toward the foreign ports of call. Vessel operating expenses and certain other expenses were then allocated to the Puerto Rican service in the proportion that Puerto-Rican ton-miles bore to total ton-miles operated in the joint services.

25. Where the ton-mile prorate involved a heavy burden, as where the allocation was between the Puerto Rican trade and the entire company operation, a revenue prorate was substituted therefor, using as factors the proportion that Puerto Rican revenue bore to total revenue. In the case of loading costs, distance is not a relevant factor, and allocations were generally made on the basis of the number of tons handled, except in the case of Bull's substantially equi-distant Puerto Rican and Dominican destinations, the use of a ton-mile prorate in the allocation of loading and stevedoring costs in the United States resulted in an approximately equal allocation of loading expense per ton.

26. Strike expenses incurred by Bull in 1957 were allocated by it on the basis of a revenue prorate, because the development of a ton-mile formula would have made necessary a port-to-port analysis of tonnage and distances for a minimum of 155 sailings. Since the Dominican revenue is substantially higher per ton than Puerto Rican revenue for approximately the same distance, as shown below, this actually allocated a higher proportion of strike expenses to the Dominican traffic, and a lower proportion to Puerto Rican traffic, than would have resulted from the use of a ton-mile prorate.

27. Vessel assets were assigned to the Puerto Rican services or the respondents on the proportion of the vessel operating days in those services, allocated where necessary on the basis of a ton-mile prorate. Assets in Puerto Rico were directly assigned to the

Puerto Rican service, and terminal property in the United States was generally allocated on a revenue prorate.

28. At the request of other parties, the respondents in most instances, in addition, computed their expenses on the basis of revenue prorate formulae. The interveners contend that for the purposes of this proceeding revenue prorate allocations should be used. For example, the Commonwealth argues that segregation of the joint voyage results on the Friday sailings of Bull gave inordinately excessive profits to the Dominican portion and exceptionally large losses to the Puerto Rican portion in 1957, as to which on a ton-mile prorate Bull shows a combined net revenue on the joint sailings, after depreciation and overhead but before taxes, of $46,345, with allocation of a loss of $244,973 to the Puerto Rican portion and a profit of $291,318 to the Dominican portion.

29. In 1957 total tonnage carried by Bull on the joint voyages was 311,699 tons, of which 36,784 tons were Dominican cargo. In the same year total joint voyage freight revenue was $5,367,625, of which Dominican revenue was $924,140. The Commonwealth characterizes as anomalous the results of the ton-mile prorate which attributes to the Dominican trade net revenue equal to 30 percent of each dollar of revenue. Bull's revenue per ton in the Dominican trade in 1957 was 36 percent higher than in the Puerto Rican trade ($27.04 v. $19.94), and costs of discharge in the same year in the Dominican Republic were only 22.5 percent of like costs in Puerto Rico ($1.06 v. $4.71). These data indicate that the profit results derived through use of ton-mile prorate formulae reflect with a reasonable degree of accuracy the inherent differences as between the Dominican and Puerto Rican trades. The Commonwealth also argues that the use of the ton-mile prorate results in somewhat higher unit costs on the joint service voyages than on the Thursday sailings of Bull which serve only Puerto Rico. These results are fully explained by the facts that there were more sailings in 1957 in the joint service with about the same amount of total tonnage, and consequently lower tonnage per voyage and higher costs per ton, and also that the joint voyages were subject to overtime costs because of late sailings not incurred on the Thursday sailings.

30. The Manufacturers Association of Puerto Rico contends that allocation of expenses for the Friday joint service sailings of Bull should be made on a so-called "known-cost-per-ton" method. By this method, allowable expenses on the joint service voyages

would be confined to the unit costs incurred on the Thursday sailings which serve Puerto Rico exclusively, which costs can be computed without the necessity for further allocations. Such a method bears no relation to the realities of the situation.

31. The Commonwealth alternatively suggests that in the case of Bull's Friday sailings, the total profit results on the joint voyages should be included, on the grounds that the Dominican operation is a by-product of the Puerto Rican trade which could not stand on its own feet; that only 13 percent of the cargo on the joint voyages is Dominican; that Dominican cargo is less than one-half of one percent of the total Bull Puerto Rico tonnage; and that the carrier itself recognizes the incidental nature of the Dominican operations by failing to allocate out of its asset statements any portion of vessel and other property values attributable to the Dominican operation. The issue here is not the profit accruing to Bull as a result of its joint service operations, but the justness and reasonableness of the rates under investigation, which in the nature of the case must be decided on the basis of the adequacy of the revenues derived therefrom. There is no suggestion that allocation is not necessary in the case of the other respondents which operate joint services, and no good reason appears why Bull should be accorded special treatment in this respect. The authorities cited clearly support agency action in general rate proceedings in adopting appropriate means of effectuating a separation of the regulated and non-regulated portions of an integrated enterprise. See *Cities Service Gas Co.* v. *Federal Power Com'n,* 155 F. 2d 694, 704-5 (10th Cir. 1946) *cert. den.* 329 U. S. 773 (1946); and *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 586-92 (1945). The facts of record clearly indicate that dissimilar rates and cost factors as between the Puerto Rican and Dominican operations make allocation necessary in order to avoid distortion of the operating results in the Puerto Rican trade.

32. In the light of the findings in paragraphs 23-31, *supra,* we agree with the examiner that the use of the ton-mile prorate formulae, where utilized, and the other allocation methods adopted by the respondents, are reasonable and acceptable for the purposes of this proceeding.

VALUATION AND RATE BASES

33. *General.*—The Conference advocates rate bases calculated as of June 30, 1958, notwithstanding that the first increase here

involved became effective in January 1957. Waterman individually contends for rate bases compiled as of December 31, 1957. Public Counsel and the Manufacturers Association of Puerto Rico contend that rate bases should be constructed as of December 31, 1957, applicable to the 1957 rate increase, and as of June 30, 1958, applicable to the 1958 rate increase. The Commonwealth assigns values based on a composite analysis of the evidence of record.

34. This proceeding involves two separate rate increases, the second superimposed upon the first. The record includes data concerning the actual operations of the respondents for almost a full year under the first of these increases, and for almost six months under the combined increases. In the usual rate increase case, determination of the lawfulness of the increases proposed is necessarily predicated upon projections of revenues and expenses expected in the future, and the property values for the purpose of calculating the expected rate of return are most readily determinable as of the time the rate increases are proposed. Here, however, particularly with regard to the 15 percent increase, the results of operations under the increased rates can be ascertained with some degree of certainty. The most precise method of resolving the issues presented by this proceeding would be to determine average values of the property of the respondents employed during 1957, applying operating results for the year 1957 to the resulting figures to determine rates of return actually earned during that year. Then, ascertain the values as of December 31, 1957, the approximate date when the 12 percent increase became effective, and apply projected operating results for the year 1958, based on actual operations during the first six months of that year, to ascertained values as of December 31, 1957, so as to compute expected rates of return for the year 1958. Such extreme precision, however, is not required, and for the purposes of this proceeding, therefore, property values will be determined as of December 31, 1957, and the resulting rate bases applied to the actual operating results so far as they can be determined on the record for the year 1957, and the projected results for the year 1958. While this may have a tendency to lessen somewhat the values applicable to the year 1957 because of depreciation accrued during that year, it is deemed that the results will not be unreasonable.

35. In Table III below are set forth the rate bases claimed by the Conference; in Table IV the rate bases claimed individually by Waterman.

TABLE III

RATE BASES CLAIMED BY THE CONFERENCE

Bull:	Vessels	$12,048,584*	
	Working Capital	2,000,000	
	Brooklyn Terminal (non-owned)	5,000,000	
	Philadelphia Terminal (do.)	3,064,916	
	Baltimore Terminal (do.)	6,000,000	
	Puerto Rico Terminals	4,062,194	
	Other Property	747,387	
	Claims Pending	22,584	
	Total		$32,945,665
Alcoa:	Vessels	$ 5,183,638	
	Working Capital	1,233,955	
	New York Terminal (non-owned)	2,015,400	
	Baltimore Terminal (do.)	1,117,000	
	Mobile Terminal (do.)	1,901,800	
	New Orleans Terminal (do.)	825,700	
	Puerto Rico Terminal (do.)	1,500,000	
	Terminal Equipment (do.)	356,600	
	Structures	98,371	
	Equipment	231,957	
	Spare Parts	67,734	
	Total		$14,532,155
Lykes:	Vessels	$ 3,784,230	
	Working Capital	445,212	
	Terminal Property	3,589	
	Other Property	92,801	
	Statutory Reserve Funds	2,022,488	
	Total		$ 6,348,320
Waterman:	Vessels	$ 4,170,856	
	Working Capital	1,208,091	
	Mobile Terminal (non-owned)	1,000,000	
	New Orleans Terminal (do.)	750,000	
	Puerto Rico Terminal	1,242,716	
	Furniture, Fixtures and Other Equipment	167,604	
	Office Building, Mobile	289,491	
	P.R. Stevedore Equipment	23,863	
	P.R. Wharf Equipment	1,239	
	Total		$ 8,853,860
	Grand Total		$62,630,000

* This figure does not include any value assigned for Liberty ships, and because of an error in calculation in the Conference brief, should be $12,288,581 on the basis claimed by the Conference.

TABLE IV

RATE BASES CLAIMED BY WATERMAN

Method 1:	Vessels, Average of Reproduction Cost Depreciated and Net Book Value	$ 4,666,171*
	Other Property	3,474,913
	Working Capital	1,892,107
	Total	$10,033,191
Method 2:	Vessels, Market Value	$ 3,070,500
	Other Property	3,474,913
	Working Capital	1,892,107
	Total	$ 8,437,520

* This figure, although labeled average of reproduction cost depreciated and net book value, embraces as an element the depreciated value of replacement vessels rather than reproduction cost depreciated of the vessels employed.

36. The items listed in Table III designated as other property, structures, equipment, spare parts, terminal property, furniture, fixtures and other equipment, office building, and stevedore and wharf equipment represent allocations of owned property carried into the claimed rate bases at net book value, and there is generally no dispute concerning the propriety of including such asset values. The item called claims pending in the rate base claimed for Bull is disallowed. It does not constitute a specific investment in property required in performing the service.

37. Lykes alone among the respondents does not claim as a part of its rate base the values of any non-owned terminals, on the ground that its vessels utilize a number of different public terminals, and the ratio of its use of any particular terminals would be minimal and difficult to determine. Accordingly, it claims as expense items in its profit and loss statements the full rentals paid for terminal use. Lykes includes in its claimed rate base statutory reserve funds amounting to $2,022,488, made up of capital reserve funds of $1,734,919 representing accumulated depreciation on the portion of its vessels allocated to the Puerto Rican services, and special reserve funds amounting to $287,569. Both of these reserve funds are required to be maintained by Lykes in connection with its subsidized foreign operations under section 607 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1177. To the extent they represent depreciation on vessels, they are not allowable as part of the rate base property. Amounts other than

depreciation cannot be said to be devoted to the Puerto Rican trade in light of the statutory provisions under which the funds are maintained. Therefore, they will not be included in the rate base.

38. Table V below shows, after allocation, the original and reproduction costs, depreciated as of December 31, 1957, the averages thereof, and the market values of the vessels employed by the respondents. The record shows the domestic market value in April 1957, for C–2 vessels, exclusive of extras, as $1,350,000, which by October 1958, had declined to $875,000. The 1957 value reflects the result of the Suez Canal crisis which created a sudden shortage of vessels. The 1958 value reflects the decline resulting from the recession in shipping which occurred between the given dates. For C–1 vessels corresponding values shown on this record were $1,100,000 for April 1957, and $575,000 for October 1958. The market values are averages of the said domestic market values, taken so as to eliminate extremes of value occasioned by the special circumstances detailed. As in the case of Table III, the vessel values in the case of Bull do not include assigned values for Liberty-type vessels which the record indicates will occupy a diminishing role in its operations.

TABLE V
VESSEL VALUES

	Original Cost Depreciated	Reproduction Cost Depreciated	Average	Domestic Market Values
Bull	$2,922,317	$16,890,740	$ 9,906,529	$ 7,620,900
Alcoa	1,421,166	7,487,081	4,454,124	3,913,972
Lykes	993,200	5,409,969	3,201,585	2,359,806
Waterman	1,152,132	6,535,356	3,843,744	3,167,275
Totals	$6,488,815	$36,323,146	$21,405,982	$17,061,953

DISCUSSION AND CONCLUSIONS

Under the 1933 Act we are required to determine whether the increased rates are "just and reasonable".

The carriers are entitled to a fair return on the reasonable value of the property at the time it is being used in the service of the public.

The Conference respondents contend that the operating ratios experienced by the carriers (ratio of expenses to gross revenues) should be utilized as the controlling test in determining the reasonableness of the rates under investigation.

We agree with our predecessors that the fair-return-on-reasonable-value standard is proper in judging rates in the domestic offshore trades. *General Increase in Hawaiian Rates*, 5 F.M.B. 347, 354 (1957); *General Increases in Alaskan Rates*, 5 F.M.B. 486, 495 (1958). They have invariably followed the rate base approach, and have rejected the contention advanced in previous rate investigations that the operating ratio theory should be adopted as a measure for determining the reasonableness of rates in the offshore trade.

We find nothing in this record that warrants departure from the rate base method. In any event the use of the operating ratio theory would not affect our ultimate conclusions arrived at by applying the standards employed by our predecessors and most Federal regulatory agencies.

Various parties urge that Bull be considered as the ratemaking line. Those so contending argue that Bull is the most important carrier in the trade; that its activities are primarily devoted to this service; that it is the only North Atlantic carrier providing turnaround service; and that the operations of other carriers are so diverse that no meaningful composite picture can be drawn for ratemaking purposes.

In this proceeding there are five carrier respondents serving the Puerto Rico trade, some from the Gulf and some from the North Atlantic. The rates are the same from the North Atlantic and Gulf ports. Bull provides Puerto Rico service only from the North Atlantic. To make findings determinative of the issues herein, based solely on the operating results of Bull, would fail to give consideration to operations from the Gulf. If separate findings were made with regard to North Atlantic and Gulf rates, a disparity of rates which might result would be disruptive to the trade. Moreover, Bull did not overwhelmingly dominate the trade. Bull's gross revenues for the first six months of 1958 were some $11,682,207, as compared with the combined gross revenues of $10,806,796 for Lykes, Waterman, and Alcoa. On this record we hold that neither the strongest nor the weakest lines control rate determinations, but our findings are based on average conditions confronted by respondents as a group. This is the long-standing practice of the Interstate Commerce Commission. *Increased Freight Rates, 1947*, 270 I.C.C. 403 (1948); *Increased Freight Rates, 1951*, 284 I.C.C. 589 (1952); *Increases, Calif., Ariz., Colo., N. Mex., and Tex., 1949*, 51 M.C.C. 747 (1950).

In its decision of April 28, 1960, the Board found that "the value of the vessels on the domestic market at or about the time the rate increase was requested, with adjustments to eliminate short-term peaks in vessel values", is the proper method for determining the reasonable value of the property being used for the public.

The United States Court of Appeals for the District of Columbia Circuit in remanding the Board's order of April 28, 1960, stated:

> The Board did not say why it adopted market value as a rate base or why it rejected Puerto Rico's contention that this base is grossly excessive and rates should be based on prudent investment less depreciation. *Commonwealth of Puerto Rico* v. *Federal Maritime Board, supra.*

The following methods of valuing the vessels used in the trade were proposed in this case: (1) prudent investment, (2) market value, and (3) average of original and reproduction costs depreciated.

The so-called "prudent investment" standard for measuring the rate base is widely used in the regulation of public utilities on the authority of Supreme Court approval. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

"The rate base is a figure representing the money prudently invested in the properties and equipment utilized in the . . . business" and "prudent investment" has become the traditional "rate base approach" for most Federal regulatory agencies. *City of Detroit, Michigan* v. *Federal Power Commission*, 230 F. 2d 810, at 813 (1955), cert. den. 352 U.S. 829 (1956).

There is, in our opinion, no sound reason why the prudent investment standard is not equally applicable in the determination of just and reasonable rates in the domestic offshore trades and, in fact, there is much in favor of its use.

A market value rate base would produce erratic rates which are in the interest of neither the shipping public nor the owning companies. Market values fluctuate widely. For example, the market value of C–2 vessels was $1,350,000 in April 1957 and $875,000 only 18 months later in October 1958. C–1 vessels showed an even more striking fluctuation, $1,100,000 in April 1957 and $575,000 in October 1958. This variation was due to factors totally unrelated to the utilization of the vessels involved herein, which was the same on both dates. More often than not in the case of ships, market value is based largely on opinions and predictions, and the same would be true of rates derived therefrom. Logically, market value should lead to an increase or a decrease in rates as vessel prices rise and fall, but obviously, such rate instability

would not be practical. It would disrupt the trade to the detriment of the shippers, the carriers, and the general public.

Nor can we accept reproduction cost as proper for ratemaking purposes. This assumes that a carrier has reproduced or will reproduce its vessel. Those devoting their property to the public service are entitled to a fair return on their actual investment, not on some speculative amount which they have not invested and may never invest. If and when a vesesl is replaced, or amounts are expended for capital improvements, then the carrier is entitled to a fair return on the new vessel or the improvements. Until that is done the shipping public should not be forced to pay rates based to any extent on speculative vessel values.

We therefore utilize the prudent investment standard to determine the fair value of property being devoted to the service of the public in the domestic offshore trades. Thus, amounts which have been invested prudently in ships, terminals, lands, other facilities and property as of the time they are first devoted to the particular trade, plus amounts prudently invested in betterments, all depreciated to the period for which the rates are being tested, will be included in our determinations of the rate base of respondent carriers.

An incidental but important advantage in the use of this method is that the ready availability of data on original costs and capital improvements will contribute to speedier, less expensive disposition of rate cases.

An important element bearing on the reasonableness of the rates under investigation is the determination of the proper depreciation of the carrier's property. The Conference claims that depreciation for the purposes of this proceeding should be based on the valuation placed on Bull's vessels when A. H. Bull New Jersey assets were transferred to A. H. Bull Delaware. ACS purchased the stock of A. H. Bull of New Jersey in, they say, an arm's length transaction. It is contended that the transfer of the assets from New Jersey to Delaware should be viewed as a part of a single transaction, i.e., the acquisition of Bull by ACS, and that the values placed on the vessels were reasonable, only 70 percent of the appraised value.

To allow depreciation based on values assigned to the vessels at the time they were transferred to A. H. Bull Delaware, would disregard and eliminate from consideration the 10 years of depreciation which shippers have already paid. These large sums of depreciation were completely liquidated by the payment of the

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$18 million dividend previously described in paragraph 4, *supra*. The inauguration of an entirely new depreciation cycle based on increased book values would be unfair to the public. It could result in the public being forced to pay two or three times for the same property. Every time some occasion arose which was thought to justify the assignment of new values to the property, existing depreciation reserves could be ignored and the depreciation cycle commenced anew on some new valuation base. Obviously, this would be inequitable. There was no additional investment in new assets created by the purchase of the stock by ACS. Exactly the same assets continued to serve the trade.

The Commonwealth contends that vessel depreciation should be computed on the difference between original cost and the amount which it is estimated Bull will realize at the end of the depreciation period rather than the difference between such cost and scrap value. The vessels, they say, have already been depreciated below their market values. The Commonwealth conjectures that when the vessels are retired they will bring not merely the residual scrap value, but instead will be disposed of at prices considerably in excess of scrap value.

This record discloses graphically the extreme fluctuations which occur in the market prices of vessels, by reason of political upheavals and economic changes in world-wide market conditions. In these circumstances, it is impossible to forecast, even in the relatively near future, the probable disposable value of vessels at the end of the depreciation cycle. The residual values utilized by the respondents accord with the conventional long-standing practice of vessel owners, are the basis of depreciation allowable to compute income tax liability, are the only certain standard upon which we can rely, and in our opinion are not unreasonable.

We find the amount the several respondents prudently invested in the vessels devoted to the trade after allocation, depreciated to December 31, 1957, to be—Bull, $2,922,317; Alcoa, $1,421,166; Waterman, $1,152,132; and Lykes, $993,200. There is no suggestion in this record that the sums originally paid for the vessels, or any other property we have included in each respondent's rate base, were not prudently invested.

We further find that, of the amounts claimed by Bull as depreciation on its vessels, $532,627 for 1957, $170,084 for the first of 1958, and $340,168 for projected 1958, should be disallowed.

The examiner found that a fair and reasonable allowance for working capital as an element of the rate bases would be approxi-

mately one-twelfth of the annual operating expenses experienced in 1957 of the respective carriers, exclusive of depreciation, or $1,800,000 for Bull, $860,000 for Alcoa, $360,000 for Lykes, and $615,000 for Waterman.

The Conference excepts to this finding, contending that the carriers are entitled to (1) a buffer fund equivalent to one-twelfth of annual operating expenses, exclusive of depreciation, plus (2) an amount sufficient to cover the lag in revenue collections behind the related disbursements, citing *Alaskan Rates,* 2 U.S.M.C. 558, 566 (1941) and 2 U.S.M.C. 639, 645 (1942).

In *General Increases in Hawaiian Rates, supra,* the Board used General Order 71[2] as the method for the computation of working capital as an element of the rate base. In *General Increases in Alaskan Rates and Charges, supra,* working capital computed by the formula detailed in *Alaskan Rates, supra,* was disallowed. Working capital is required to meet the need which "arises largely from the time lag between payment by the Company of its expenses and receipt by the Company of payments for service in respect of which the expenses were incurred." *Alabama-Tennessee Nat. Gas. Co.* v. *Federal Power Commission,* 203 F. 2d 494, at 498 (1953). The Conference tariff specifies that freight must be prepaid. There would appear to be, therefore, no substantial lag between payment of expenses and receipt of revenues. To the extent there is any such lag, the working capital allowed by the Board—an amount approximately equal to one round voyage expense of each vessel in the service—is ample to take care of the carrier's needs (6 F.M.B. 14).

We agree with the Board's prior decision in this case and find that the fair and reasonable allowance for working capital would be $1,087,000 for Bull, $264,100 for Alcoa, $222,100 for Lykes, and $260,000 for Waterman.

As is indicated in Table III, Bull, Alcoa, and Waterman claim as elements of their rate bases substantial amounts representing the value of terminals and terminal equipment used by them in their Puerto Rican services which are owned by others. In conjunction with these claims, Bull has adjusted its operating expenses to substitute owners' expenses, detailed on the record in the case of the Brooklyn and Philadelphia terminals, for terminal rentals, and has credited its revenues with the profits derived

[2] 46 C.F.R., part 291.

from the operation of the Puerto Rican terminals by its subsidiaries; Alcoa has adjusted its operating expenses to eliminate rental costs for terminals; and Waterman has adjusted its operating expenses to eliminate profits from the operation of its Puerto Rican terminal owned by Waterman P. R. However, Waterman claims as operating expenses the rentals paid for terminals at Mobile and New Orleans, and the record affords no basis for determining the amount of such rental payments. The Baltimore terminals used by Bull and Alcoa are leased to them free by the owners as an inducement to increase the amount of traffic moving over the piers, and Bull's rental payments for its Philadelphia pier are substantially less than owners' costs.

In the earlier decision in this case (6 F.M.B. 14), the Board determined, correctly we think, that the value of terminal facilities used but not owned by the carriers should not be included in the rate base. The carriers are not devoting their capital to the public use insofar as such property is concerned.

It is proper to include as expenses the rentals paid and other expenses of the carriers which arise by reason of the use of the facilities. However, to include the value of non-owned property in the rate base and owners' expenses, instead of rentals as expenses, results in a windfall to the carriers at the expense of the shipping public.

Bull owns certain Puerto Rican terminals having a net book value of $2,144,572 as of December 31, 1957, which are used in the trade. It is contended by some that this value should not be included in Bull's rate base, and by others that the amount should be reduced by some $475,000 representing the total acquisition cost of certain property adjoining one of the terminals on which is located a building which occupies about one-twelfth of the area, and which is leased for purposes not related to the Puerto Rican trade. The remainder of the property is admittedly used for terminal services and the building rentals are credited to the Puerto Rican services of Bull. The property is owned by Bull and devoted to the trade and should be included in Bull's rate base. Rentals from the building will be credited to Bull's Puerto Rican service, as well as any profits realized from the operation of the terminal.

Separate amounts for going concern value are claimed. The amounts based on a percentage of the physical assets devoted to the trade are speculative estimates. We have valued the property as successful going enterprises. The carriers have been in busi-

ness a long time and the costs of development have long since been paid out of rates collected from the public. *Alaskan Rates, supra,* 568.

Table VI, below, sets forth the total values of the property of the respondents devoted to their Puerto Rican services. They reflect the findings specifically made above concerning the valuation of vessels, working capital and terminals, as of December 31, 1957. In the case of other property, they reflect the net book values as of December 31, 1957, as found in the record, except as to Lykes, which values are the average of net book values shown in the record as of June 30, 1957, and as of June 30, 1958. The December 31, 1957 values for Lykes are not a matter of record.

TABLE VI

Bull	$ 6,901,276
Alcoa	2,083,328
Lykes	1,311,690
Waterman	3,137,045
Total	$13,433,339

As stated above, in the present posture of this proceeding it is possible to determine with reasonable accuracy the actual operating results experienced by the respondents during 1957 in the performance of their Puerto Rican services, and thus to make findings concerning the lawfulness of the 15 percent increase. Reasonable projections for the future may be made based upon revenue and expense data submitted by the respondents covering the first six months of operations in 1958 under the combined 15 percent and 12 percent increases, by which lawfulness of the combined increases may be gauged. Numerous issues are raised by the parties concerning the revenues to be assigned to the Puerto Rican trade, and the expenses allowable. Certain of these, relating to allocation methods employed by the respondents, depreciation claimed by them, and the adjustment of expenses to eliminate rental costs for non-owned terminals or to substitute owners' costs therefor, have been treated separately above, and need not be restated here. In stating the assignable revenues and allowable expenses, the findings there made will govern.

It is contended that the revenues of the respondents for 1957 should be restated so as to give effect to a full year's operations under the 15 percent increase, which became effective on January

10 of that year. It is also contended that the expenses of Bull for that year should be adjusted so as to eliminate the expenses incurred during the strike mentioned in paragraph 8 above, of which $643,037 of general operating expenses and $146,483 of depreciation are allocable to the Puerto Rican services, on the ground that this strike was unique in character, and occurred for reasons not related to the Puerto Rican trade. The strike was unrelated to the ordinary labor management controversies, and the general operating expenses incurred during the strike should be excluded from Bull's expenses for 1957, but no sound reason is shown for the elimination of depreciation expenses incurred during that period. With respect to the restatement of revenues to cover a full year of the 15 percent increase, since the operating results for 1957 do not enter into projections for the future, a restatement of revenues to cover a full year of the 15 percent increase would serve no useful purpose.

1957 revenues and expenses.—Bull shows operating revenues for 1957 of $21,646,383 which are adjusted to include amounts of $117,954 covering interest revenue from a mortgage on the Brooklyn terminal held by Bull, $86,018 covering net profit of the Puerto Rico terminal companies, and $68,187 covering top wharfage collected in Philadelphia. Public Counsel and the interveners contend that the revenues should be further adjusted so as to include $38,335 of the net profits of Caribbean Dispatch, Inc., earned in carrying bagged raw sugar under contract terms which would normally have been transported by Bull at tariff rates, and $60,069 of profits earned by Bull in conducting independent stevedoring operations at Puerto Rico for other carriers during the strike period. The interest revenue from the Brooklyn terminal is no more a part of the earnings derived from the Puerto Rican service than the revenue from any other unrelated investment. The terminal is not a part of Bull's rate base. The elimination of the strike expense for 1957 requires also that the bagged raw sugar and stevedoring profits should be excluded from the assigned revenues.

Bull shows total allocated operating expenses of $22,644,027. Adjustments upward include $95,872 covering costs incurred as a result of actions brought in Puerto Rican courts for overtime wages by stevedore foremen, and $69,273 covering the excess of actual Puerto Rican overhead expenses over budget provisions therefor. Adjustments downward include a credit of $145,299 for stevedore overhead charged into the stevedoring account; $3,813 to cover a correction in the allocation of 1957 strike expenses;

and a stipulated correction of $35,232 in management and operating commissions. The Manufacturers Association of Puerto Rico contends that the adjustment of expenses to cover the foremen's overtime suits is improper on the ground that the expense is attributable to a violation of law by Bull. The suits arose from a difference of opinion as to Bull's liability for overtime payments, and the costs incurred by Bull are operating costs properly includable.

The Manufacturers Association of Puerto Rico also contends that Bull's 1957 expenses should be adjusted downward by $6,398 to reflect an allocation of inactive vessel expense and depreciation of other equipment to the Dominican traffic not made by the respondents, and this adjustment is considered proper. Bull's operating expenses should also be reduced by $139,404 to cover the excess of commissions paid to A. H. Bull & Co. over and above the costs of the latter as allocated on a revenue prorate.

Alcoa shows gross operating revenues in 1957 of $9,175,949. Operating expenses after allocation were $10,615,037.

Lykes shows gross operating revenues in 1957 of $3,774,843. Operating expenses after allocation were $4,540,813.

Waterman shows gross operating revenues in 1957 of $9,416,267, covering both its Gulf and North Atlantic operations. Expenses were $8,771,685. Interveners contend that the expenses should be adjusted to eliminate charter hire of $32,400 on a vessel included in the rate base, and to eliminate $13,770 interest on a vessel mortgage. Since the vessel is not included in the rate base the charter hire paid is a proper expense. Interest payments are not operating expenses as such, but are rather costs of capital employed which should be borne out of profits earned, and an adjustment is proper. It is also contended that Waterman's revenues and expenses for 1957 should be restated so as to eliminate the results of its North Atlantic service, which was conducted in that year at a loss, for the reason that such service was only temporarily operated. As stated above, operating results for 1957 do not enter into projections for the future, and the service was instituted by Waterman with the full intention of making it permanent. To eliminate the results of this service would distort the actual revenue position of Waterman, contrary to the facts of record.

Giving effect to the findings above, including elimination of strike expenses and adjustments relating thereto, and the adjustment in Bull's revenues as found above, and the inclusion of

rental expenses and deletion of owners' expenses for non-owned property disallowed in the rate base, Table VII below shows the operating results of the respondents in 1957, as adjusted:

TABLE VII

1957 OPERATING RESULTS

	Revenues	Expenses	Net Profit or (Loss)
Bull	$21,800,588	$21,303,362	$ 497,226
Alcoa	9,175,949	10,615,037	(1,439,088)
Lykes	3,774,843	4,540,813	(765,970)
Waterman	9,416,267	8,757,915	658,352
Totals	$44,167,647	$45,217,127	($1,049,480)

1958 revenues and expenses. As stated in paragraph 16 above, the revenue projections of the respondents, where given, were based on an extension of their most recent experience, that for the first half of 1958, subjected to adjustments for known or contracted cost increases. Revenues for 1958 were calculated as twice those for the first six months, adjusted to give effect for the full year to the 12 percent increase which became effective January 15. Expenses for the first six months were adjusted upward by about 1 percent. Waterman did not submit future projections, basing its position on the fact that it ceased operations in the trade and its successor in the operation is not a respondent herein. Waterman contends, therefore, that no consideration may be given to the future operations of Waterman P. R. in the trade in determining the lawfulness of the rates here under investigation. Waterman P. R. is, however, an existing operator in the Gulf/Puerto Rico trade, its rates are identical with those under investigation, and it has agreed to be bound by the findings herein. Accordingly, for the purposes of this report, projected 1958 results for the combined Waterman and Waterman P. R. operation from the Gulf ports to Puerto Rico are calculated below on the same basis as used by the other respondents. Revenues for the first six months are doubled, and adjusted upward by $54,000 as suggested by Public Counsel to reflect a full year's operation under the 12 percent increase. Expenses for the first six months, as adjusted, are doubled and adjusted upward by 1 percent to reflect the cost increases expected by the other respondents. This will fail to give effect to the cost increases shown by Waterman individually as stated in paragraph 22 above, but it is expected that similar cost increases will also affect the other

respondents, and they are disregarded here in order to treat all the carriers similarly.

In computing operating expenses for the first six months of 1958, Bull included vessel repair expenses on a reserve basis in its voyage accounts. For the period these reserves totaled $197,428. Actual repair expenses during the period were $57,951 less than this amount, and it is contended that the excess should be credited to Bull's expenses and only actual repair costs allowed. Bull's actual repair expenses were $413,311 in 1957, and $562,795 in 1956, and it does not appear that the reserves are excessive. For the purpose of projecting expenses over the full year 1958, the reserves for repair expenses will be allowed.

The combined Waterman and Waterman P. R. expenses reported for the first six months of 1958 in their Gulf/Puerto Rico service include costs of $8,617 attributable to transfer of the *Bienville* cargo at New Orleans into a vessel regularly providing breakbulk service to Puerto Rico. Waterman contends that this amount should not be disallowed. It is a cost of a non-recurring nature and for the purpose of projecting future operating results it will be disallowed.

Giving effect to the findings relating to 1957 revenues and expenses, and those made specifically with regard to 1958, Table VIII shows the revenues and expenses of the respondents for the first six months of 1958, and the projected operating results for the full year 1958.

TABLE VIII
1958 OPERATING RESULTS

	First half 1958		1958 Projected		
	Revenues	Expenses	Revenues	Expenses	Net Profit or (Loss)
Bull	$11,706,918	$11,214,148	$23,650,643	$22,730,182	$ 920,461
Alcoa	4,215,049	4,990,803	8,484,000	10,027,000	(1,543,000)
Lykes	1,940,279	2,150,083	3,919,737	4,318,234	(398,497)
Waterman and Waterman P.R.	4,121,323	3,417,080	8,296,646	6,902,501	1,394,145
Totals	$21,983,569	$21,772,114	$44,351,026	$43,977,917	$ 373,109

The parties agree that income tax liabilities may be considered as an operating expense before calculation of rates of return earned or expected. However, it is contended that income tax liability should be computed on the basis of "actual liability", and from computed operating results there should be deducted interest which Bull may claim on its tax returns. They argue that

Bull has no tax liability for its earnings in the Puerto Rican trade so long as such earnings are within the zone of reasonableness, because its fixed annual interest payments would exceed such earnings.

The Commonwealth contends that the rate of return allowable on the capital invested in the trade should not exceed 5 percent, because 5 percent represents the actual needs and costs. They point out that Bull's $22 million capital structure is all debt except $100,000, consisting of some $16 million of bank loans with annual interest at 4¼ to 5 percent, or about $720,000 per annum, and roughly $5 million from stockholders of ACS, with annual interest at 5 percent or $250,000 per annum.

Apparently, the position of the Commonwealth is that the owners of Bull are entitled to no return on borrowed capital, although a part of it came from the stockholders of ACS and ACS guaranteed the bank loans. This would be a sure way to inhibit investment.

The investors or the carriers are entitled to enough revenue not only for operating expenses but also for capital costs, including service on the debt and dividends. The equity owner's return should be sufficient to ensure confidence in the financial integrity of the Company, so as to maintain its credit and attract capital.

We need not in this proceeding determine what the maximum rate of return allowable is in this trade, since, as shown above, the carriers suffered a composite loss in 1957 of over $1 million, and in 1958 earned before income taxes only $373,109, or less than 3 percent. In those circumstances, no further consideration need be given the question of the amount of income taxes allowable.

We find and conclude that the 15 percent and 12 percent increases here under investigation are just and reasonable.

An order discontinuing this proceeding will be entered.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at its office in Washington, D. C., on the 1st day of February 1962.

No. 807

ATLANTIC & GULF-PUERTO RICO GENERAL INCREASE IN RATES AND CHARGES

Full investigation of the matters and things involved in this proceeding having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rates and charges herein under investigation are just and reasonable:

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

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 951

INVESTIGATION OF CERTAIN RATE PRACTICES OF THREE CONFERENCES FOR TRAFFIC FROM GREAT LAKES TO EUROPE

Decided February 5, 1962

Rates from Erie, Buffalo, Rochester, Oswego and Ogdensburg which are the same as rates from Cleveland, and higher than rates from Toronto and Hamilton, found not shown to operate to the detriment of commerce of the United States or to be otherwise unlawful.

Thomas Roche and *Edward L. Johnson* for respondents.

Paul J. Williams for Williams Marine Agency, *Edwin Avery* for Toledo Lucas County Port Authority, *Joseph M. Arnold* for Chicago Regional Port District, and *Robert Jorgensen* for Board of Harbor Commissioners, City of Milwaukee.

Donald J. Brunner and *Robert J. Blackwell* as Public Counsel.

INITIAL DECISION BY WILLIAM J. SWEENEY, EXAMINER[1]

This investigation was initiated by the Federal Maritime Board in an order dated July 6, 1961. The Federal Maritime Commission, successor to the Board, has continued the investigation in order to determine whether rates established and maintained by respondents[2] for application on commodities shipped from Erie, Buffalo, Rochester, Oswego or Ogdensburg to foreign destinations, are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or are unjustly discrimina-

[1] This decision became the decision of the Commission on February 5, 1962. (Rules 13(d) and 13(h) Rules of Practice and Procedure, 46 CFR Sec. 201.224, 201.228).

[2] United States Great Lakes, Scandinavian and Baltic Eastbound Conference, and its members (Agreement No. 8180); United States Great Lakes-Bordeaux/Hamburg Eastbound Conference, and its members (Agreement No. 7820); and Great Lakes-United Kingdom Conference, and its members (Agreement No. 8130).

tory, prejudicial or unfair to exporters of the United States as compared with their foreign competitors, or make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, or operate to the detriment of commerce of the United States.

One of the respondents, the Great Lakes-United Kingdom Eastbound Conference, has a tariff on file with the Commission in which rates are published from both United States and Canadian ports on the Great Lakes. The other respondent conferences do not publish rates from Canadian ports, although their member lines do participate in rates from such ports as parties to Canadian conferences.

There are two specific rate situations named in the order of investigation as being possible sources of unlawfulness. One of these is the question of whether rates from the Canadian ports of Toronto or Hamilton are lower than those applicable on the same commodities from Erie, Buffalo, Rochester, Oswego or Ogdensburg, and if so, whether such differences in rates are unlawful. The applicable commodity tariff[3] publishes rates from Toronto and Hamilton which, depending on the commodity, are higher, lower, or the same as rates on the same commodity from Erie, Buffalo, Rochester, Oswego and Ogdensburg. The following examples illustrate these various rate relations: (1) rates applicable on aluminum ingots, in bundles, up to 6,720 pounds, are $23 per long ton from Erie, Buffalo, Rochester and Oswego, $19 per long ton from Ogdensburg, and $3 per 100 pounds or $67.20 per long ton from Toronto and Hamilton; (2) rates applicable on canned goods are $1.45 per 100 pounds from United States ports and $1.20 per 100 pounds from Toronto and Hamilton; and (3) the rate applicable on small arms ammunition is the same from United States and Canadian ports.

There is nothing inherently unlawful in the fact that some rates from Toronto and Hamilton are lower than those on similar commodities from United States ports, and the same is true of the fact that rates from the latter ports are lower on some commodities than rates from Toronto and Hamilton.

[3] Great Lakes-United Kingdom Eastbound Conference Freight Tariff No. 14, effective April 15, 1961.

An intervener, Williams Marine Agency, contends that rates from United States ports located east of the Welland Canal are unlawful to the extent they exceed rates from Toronto and Hamilton. Nothing is said concerning rates from such United States ports which are lower than those from Toronto and Hamilton. Evidence submitted by this intervener as proof of the alleged unlawfulness is shown in the following table which lists the tons of imports and exports through specified ports, and the number of vessel movements at such ports, in the navigation season of 1960.

Port	Import/Export Tons	Number of Sailings
Toronto	762,282	852
Hamilton	570,659	519
Buffalo	102,809	104
Rochester	7,800	79
Oswego	9,600	19
Ogdensburg	10,400	16

The foregoing statistics afford no foundation for any direct or inferential conclusion concerning the rates under consideration. Since the tonnage figures cover both import and export traffic, it is not even known how many export tons or outbound sailings are included in the totals shown. There is neither a description of the cargoes, nor a listing of destinations. Consequently, there is no showing as to the amount, if any, of freight which moved under rates in issue herein, and no probative evidence of unlawful rate discrimination by respondents.

In contrast, testimony on behalf of respondent Great Lakes-United Kingdom Eastbound Conference shows that rates from Toronto and Hamilton are not made in consideration of, or in relation to rates from United States ports. The competition which that respondent must meet at Toronto and Hamilton is from a Canadian conference composed of, and limited to, British and Canadian flag operators. The latter conference publishes dual rates from Canadian ports and respondent must establish rates in relation thereto in order to be competitive in any degree.

Additionally, official representatives of the ports of Milwaukee, Chicago, Toledo, Oswego and Ogdensburg testified that such ports are not in competition with, and had lost no traffic to Toronto or Hamilton. It was indicated that the cost of transportation from an origin in the United States to Toronto or Hamilton exceeds the difference between rates applicable from the latter ports and United States ports, thus making transportation via Toronto or

Hamilton uneconomical for goods produced in the United States. An official representing the Port Authority at Oswego stated that the latter port is basically in competition with the port of New York for goods manufactured in the area tributary to Oswego and New York. It was explained that for Oswego to be competitive, the rates applicable from it must be related to the prevailing rates from New York. Thus, it would not be realistic to establish rates from Oswego on a level with, or in relation to rates from Toronto or Hamilton because rates from such Canadian ports need not be competitive with rates from New York.

The other tariff situation under investigation concerns rates from Erie, Buffalo, Rochester, Oswego and Ogdensburg which by applicable rule in respondents' tariffs are the same as the rates from Cleveland. For the sake of convenience such rule, reproduced below, will be called the Cleveland Rate Rule.

RATES FROM ERIE, BUFFALO, ROCHESTER, OSWEGO and OGDENSBURG, N. Y. Whenever rates from Erie, Pa., Buffalo, Rochester, Oswego or Ogdensburg, N. Y., are NOT shown in this tariff, the rates as published from Cleveland shall be applied. However, application of Cleveland rates to Erie, Pa., Buffalo, Rochester, Oswego or Ogdensburg, N. Y., shipments are to be only when vessel makes direct call at such port or ports.

The rates under investigation are published in commodity tariffs which are established with the intention of specifically naming each commodity which is moving, or can reasonably be expected to move, through ports on the Great Lakes or St. Lawrence River. Each tariff also contains a commodity rate which applies on cargo not named specifically in the tariff. The purpose of the latter publication is to accord a rate which can be quoted and applied by respondents on any new movement, pending establishment of a specific commodity description and lower rate if the movement proves to be steady and in sufficient volume. The respondents are receptive to requests by shippers or port officials for the establishment of rates lower than the general cargo rate in advance of a prospective movement of a commodity not specifically described. The same is true as to requests for rates from Erie, Buffalo, Rochester, Oswego, or Ogdensburg lower than those applicable under the Cleveland Rate Rule. The record contains no evidence that such requests have been denied but on the contrary it is shown that the tariffs published by respondents contain 25 commodity rates from United States ports east of Cleveland which are lower than rates from Cleveland on the same commodities.

It is a common and reasonable practice for water carriers to publish a general cargo rate in their commodity tariffs, pending the development of some traffic movement. The establishment of the Cleveland Rate Rule by respondents is simply a refinement of such practical method of establishing rates.

A factor favoring rates from Erie, Buffalo, Rochester, Oswego and Ogdensburg on a lower basis than rates from Cleveland, is that such ports are closer than Cleveland to foreign destinations. However, distance is but one of several important considerations in formulating a rate which is reasonable for a shipper and yet profitable to a carrier. Some of the other factors which must be considered in rating a commodity are its value, density, fragility, stowage characteristics, similarity to other commodities, volume of movement, and possible problems in connection with stevedoring. Additionally, the location of a port in relation to a competitive port and the point of production of a commodity is a very important consideration. Thus, only if other factors are relatively equal does distance become of controlling importance in establishing rates lower than those applicable under the Cleveland Rate Rule. See *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936), *Eastbound Intercoastal Lumber,* 1 U.S.M.C. 608, 622 (1936), and *Increased Rates—Alaska Steamship Company,* 3 F.M.B. 632, 637 (1951).

The foregoing indications that the Cleveland Rate Rule is not unlawful, particularly in the light of respondents' willingness to establish departures from it upon reasonable request, is supported by answers to an interrogatory sent by Public Counsel to the Foreign Trade Club of Syracuse, New York. The membership of such club is composed of shippers in the Syracuse area who are interested in foreign trade. Syracuse is the nearest center of manufacturing which is naturally tributary to the port of Oswego. It was resolved at a meeting of the club that the prime elements considered by an exporter in selecting a port of export are: (1) regular scheduled sailings; (2) forwarding agents facilities; (3) prompt customs clearance; (4) international banking facilities; (5) marine insurance facilities; and (6) foreign consular offices to expedite document clearance. Regularly scheduled sailings, accompanied by the foregoing services, are regarded as more important than lower freight rates from Lake Ontario ports. It was specifically stated that a reduction of $2 per ton from Lake Ontario ports would not induce the movement of any additional traffic from the Syracuse area through such ports.

There is no evidence of record indicating any dissatisfaction by a shipper, exporter, importer or port authority with the Cleveland Rate Rule, or that Erie, Buffalo, Rochester, Oswego or Ogdensburg are in competition for traffic with the port of Cleveland.

CONCLUSIONS

It is hereby concluded that:

1. The rules established by respondents which make rates from Cleveland applicable on cargo shipped from Erie, Buffalo, Rochester, Oswego, or Ogdensburg are not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and do not operate to the detriment of the commerce of the United States.

2. The charging by respondents of higher rates on cargo shipped from Erie, Buffalo, Rochester, Oswego or Ogdensburg than is charged by respondents on cargo shipped from Toronto or Hamilton is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and does not operate to the detriment of commerce of the United States.

3. The practices specified above are not unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors, and such practices do not make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, nor do they subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

An order will be entered discontinuing this investigation proceeding.

775-794 O-65-10

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D. C., on the 5th day of February, A.D. 1962

No. 951

INVESTIGATION OF CERTAIN RATE PRACTICES OF THREE CONFERENCES FOR TRAFFIC FROM GREAT LAKES TO EUROPE

The initial decision of the examiner herein having become the decision of the Commission on February 5, 1962, which decision is hereby referred to and made a part hereof;

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

By the Commission.

(SEAL) (Signed) THOMAS LISI,
Secretary.

No. 951

INVESTIGATION OF CERTAIN RATE PRACTICES OF THREE CONFERENCES FOR TRAFFIC FROM GREAT LAKES TO EUROPE

NOTICE OF EFFECTIVE DATE OF DECISION

No exceptions having been filed to the initial decision of the examiner herein, and the Commission having determined not to review such decision, notice is hereby given, in accordance with section 13(d) of the Commission's Rules of Practice and Procedure (46 CFR 201.224), that the initial decision of the examiner became the decision of the Commission on February 5, 1962.

By order of the Federal Maritime Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 931

AGREEMENT NO. 8555
BETWEEN ISBRANDTSEN STEAMSHIP COMPANY, INC.,
ISBRANDTSEN COMPANY, INC., AND AMERICAN EXPORT LINES, INC.

Decided February 5, 1962

F.M.B. Agreement No. 8555 found properly filed pursuant to Section 15 of the Shipping Act, 1916. Said agreement further found not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Further found that said agreement is not in violation of the Shipping Act, 1916, will not operate to the detriment of the commerce of the United States, and is not contrary to the public interest.

F.M.B. Agreement No. 8555 approved, pursuant to Section 15 of the Shipping Act, 1916.

Francis T. Greene, Whitman Knapp, David Simon, and *Robert Arum* for Prudential Steamship Corporation.

Richard W. Kurrus, John W. Castles, III, and *Leonard S. Leaman* for Isbrandtsen Company, Inc., and Isbrandtsen Steamship Company, Inc.

Ralph D. Ray, Frank B. Stone, Alan S. Kuller, and *Eugene R. Anderson* for American Export Lines, Inc.

Robert B. Hood and *Donald V. Brunner* as Public Counsel.

REPORT OF THE COMMISSION[1]

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner.*

[1] The evidentiary hearing was held before an Examiner. Thereafter opportunity was afforded all parties to file proposed findings, conclusions, and supporting briefs. After such documents were filed, the Commission required the entire record to be certified to it for an initial decision, which was based on our consideration of the entire record including proposed findings and conclusions, and supporting briefs.

BY THE COMMISSION:

This case presents two questions (a) is the Commission authorized and required to act with respect to certain agreements which have been filed with it, and (b) if so, what should the Commission's action be? The controlling statute, section 15 of the Shipping Act, 1916 (39 Stat. 733, 46 U.S.C. 814) hereinafter "the Act" reads in directly pertinent part, as follows: ". . . every common carrier by water . . . shall file . . . with the Commission a true copy . . . of every agreement with another such carrier . . . controlling, regulating, preventing, or destroying competition . . . .

"The Commission shall by order, after notice and hearing, disapprove, cancel, or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements . . . ."[2]

We hereby find the following facts:

(1) Isbrandtsen Company, Inc., and American Export Lines, Inc., both common carriers by water, and New York corporations, have filed with this Commission, and ask this Commission to approve under section 15 of the Act, an agreement between them dated November 25, 1960, an important part of which (Exhibit "A") is an agreement between Isbrandtsen Company, Inc., and its wholly-owned subsidiary, Isbrandtsen Steamship Company, Inc. (also a New York corporation) dated November 23, 1960.[3]

(2) Isbrandtsen and Export are both primary United States-flag liner operators on Essential United States Foreign Trade Route No. 10[4] which runs between United States

[2] This quotation is from the Act as amended by Public Law 87-346, 87th Cong., 1st Sess., effective Oct. 3, 1961 (75 Stat. 763). The characterization of this quotation as section 15 "in directly pertinent part" is not intended to indicate that the balance of the statute is not considered in deciding this case. As later indicated we have carefully considered the entire section and all arguments based on any provision in it. The quotation however, highlights (a) the character of agreements covered by the section, and (b) the statutory rule of decision with respect to them.

[3] Hereinafter "Isbrandtsen" means Isbrandtsen Company, Inc., "Export" means American Export Lines, Inc.

[4] "Essential United States Foreign Trade Route" as used herein, means a route which has been determined pursuant to section 211 of the Merchant Marine Act, 1936 (49 Stat. 1989, 46 U.S.C., 1121), to be an ocean route from ports in the United States to foreign markets essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States.

North Atlantic ports (Maine-Virginia, inclusive) and ports in the Mediterranean Sea and Black Sea, Portugal, Spain, South of Portugal and Morocco (Tangier to southern border of Morocco).

(3) The percentages of total commercial cargo moving on Trade Route 10 in 1957, 1958, and 1959 carried by Isbrandtsen and Export were approximately as follows:

Outbound	*Export*	*Isbrandtsen*
1957	29.8	4.0
1958	24.9	2.4
1959	20.6	2.4
Inbound		
1957	35.4	—
1958	29.2	—
1959	27.6	—

(4) Isbrandtsen and Export are both primary United States-flag liner operators on Essential United States Foreign Trade Route No. 18, which runs between United States Atlantic and Gulf ports (Maine-Texas, inclusive) and ports in southwest Asia from Suez to Burma, inclusive, and in Africa on the Red Sea and Gulf of Aden.

(5) The percentages of total commercial cargo moving on Trade Route 18 in 1957, 1958, and 1959 carried by Isbrandtsen and Export were approximately as follows:

Outbound	*Export*	*Isbrandtsen*
1957	11.0	6.7
1958	7.6	5.6
1959	6.9	4.0
Inbound		
1957	11.7	.4
1958	12.4	.2
1959	9.5	.0

(6) The overall effect of the Isbrandtsen-Export arrangement before us (which has been designated F.M.B. Agreement No. 8555 and is hereinafter called "No. 8555") will be for Isbrandtsen, which recently acquired 26.37% of the outstanding Export common stock, to transfer its liner fleet of 14 ships, and its entire business (including good will) as a common carrier by water in the foreign commerce of the United States to Export, agreeing as a part of the transaction not to compete in the services transferred without Export's consent.

> The foregoing findings require us to conclude, as we do, that F.M.B. Agreement No. 8555 in its entirety constitutes an agreement and arrangement between Isbrandtsen and Export, common carriers by water, and citizens of the United States, controlling, regulating, preventing, and destroying competition.

The clear, unqualified language of section 15 of the Shipping Act, 1916 therefore requires us to approve, disapprove, cancel, or modify No. 8555.[5]

The first question is therefore answered in the affirmative: we are required to act with respect to No. 8555. We now turn to the remaining question which is *what* should our action be, and with respect thereto, we hereby find the following additional facts: [6]

(7) In this case there is neither claim nor evidence that No. 8555 is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or as between exporters from the United States and their foreign competitors, or is in violation of the Act.[7]

(8) Prudential Steamship Corporation (hereinafter "Prudential") does not operate on Trade Route 18, but is a primary United States-flag liner operator (subsidized) on Trade Route 10.

(9) Prudential has successfully operated on Trade Route 10 for more than ten years, most of that time unsubsidized, and has steadily increased its outbound carryings of commercial

[5] We hold that Congress means what it says. Congress (by Section 15 of the Act) authorizes and requires us to approve, disapprove, cancel, or modify "*every* agreement . . . controlling, regulating, preventing, or destroying competition." To read this language as authorizing and requiring us to approve, disapprove, cancel, or modify every agreement . . . controlling, regulating, preventing, or destroying competition *except agreements of the nature of the agreement here under scrutiny*, would constitute statutory *amendment* masquerading as statutory *construction*. We are not authorized anywise, wih respect to particular types of agreements (or anything else), to emasculate the Act to the detriment of the public interest, and this (although it might make our task substantially easier) we will not do.

[6] If we found that No. 8555 is unjustly discriminatory or unfair as between (1) carriers (2) shippers (3) exporters (4) importers (5) ports, or (6) exporters from the United States and their foreign competitors, it would necessarily be disapproved, cancelled, or modified as provided by section 15 of the Act, as would also be required if we found that it would operate to the detriment of the commerce of the United States, be contrary to the public interest, or be in violation of the Act. Otherwise, according to the legislative mandate, it must be approved. This test presents questions for highly specialized judgment in the maritime transportation field, for what is "unjustly discriminatory" or "unfair," will "operate to the detriment of the commerce of the United States" or "be contrary to the public interest" in that area, depends in large measure upon considerations not elsewhere applicable.

[7] This leaves for consideration whether No. 8555 is unjustly discriminatory or unfair as between carriers i.e., as between Export and Prudential, will operate to the detriment of the commerce of the United States, or be contrary to the public interest.

cargo from 1957 to 1959 inclusive from 3.8% to 5.5% while Isbrandtsen's fell from 4% to 2.4% and Export's fell from 29.8% to 20.6%. Inbound, Prudential's percentage-carriage rose from 7.7% in 1957 to 10.4% in 1959, while Export's fell from 35.4% to 27.6%. Isbrandtsen's operating pattern does not permit it to carry substantial inbound cargo on this trade route.

(10) Export, Isbrandtsen, and Prudential, as United States-flag liner operators on Trade Route 10, face strong, increasingly effective competition from more than 30 foreign-flag lines. To prosper, even to survive, United States-flag operation must achieve maximum operating efficiency, and the public interest demands its achievement by all lawful means.

(11) Outbound sailings on Trade Route 10 by United States-flag lines and foreign-flag lines, 1957-1960, were approximately as follows:

	1957	*1958*	*1959*	*1960*
U.S. Flag	210	271	268	246
Foreign Flag	346	426	415	463

For the four year period, foreign-flag sailings outnumbered United States-flag sailings by an average of more than 160 sailings per year. In 1960 foreign flags outnumbered United States flags by 217 sailings, and made 65.3% of that year's sailings on the route.

(12) Although from 1957 to 1959 the volume of liner-cargo moving outbound on Trade Route 10 has held steady, and the inbound cargo movement substantially increased, the proportion of cargo carried by United States flag ships both outbound and inbound has steadily and substantially declined. Cargo-carryings under foreign flag have increased proportionately to United States flag losses.

(13) No. 8555 should result in substantial economies and improved operating results in the combined Export-Isbrandtsen operation, and increase the efficiency of performance.[8]

[8] Aside from alleged fear of wholly hypothetical injury at some necessarily unspecified future date, this appears to be the primary (if not the only) basis of Prudential's protest against our approval of F.M.B. Agreement No. 8555. Not only is it unsubstantial; to adopt it would in our opinion, be contrary to the dominant public interest, which is the basis of our decision on the merits and on the jurisdictional point as well. Prudential may have an interest in preventing its United States flag competitors from increasing the economy and efficiency of their operations. If so, the private interest must yield to the public interest, which demands that United States flag steamship lines in foreign trade (especially subsidized operations) operate as economically and efficiently as possible.

(14) No. 8555 will result in the performance of Isbrandtsen's service competitive with Prudential being performed by a subsidized operator or a subsidized operator's wholly-owned subsidiary.

(15) The operations of subsidized operators and their subsidiaries, competitive with other United States flag lines as distinguished from Isbrandtsen's present, unsubsidized competition with Prudential, are particularly restricted by law, and subject to constant policing by the Maritime Administration.[9]

(16) There is no reasonable probability that No. 8555 will result in any substantial loss of revenue by Prudential, or that Prudential will as a result of No. 8555 be hampered anywise in maintaining and improving its service, or be otherwise injured.[10]

Based upon the findings we have made, and the whole record in this case, we find, determine and conclude that No. 8555 is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; that it will not operate to the detriment but will operate to the advancement of the commerce of the United States; that it is not in violation of the Shipping Act, 1916; and that it is not contrary but beneficial to the public interest. It follows that we should approve F.M.B. Agreement No. 8555, and we do approve it.[11]

We must now consider exceptions on file with respect to the foregoing.

These exceptions argue that agreements such as those before

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[9] e.g., Section 804 of the Merchant Marine Act, 1936, provides *inter alia*, that it shall be unlawful without permission for a subsidized operator or its subsidiary to operate foreign flag vessels in competition with United States flag operators (such as Prudential) on essential United States foreign trade routes. And see certain standard provisions in all operating-differential subsidy contracts.

[10] While each and every result of maritime operating pattern changes cannot, of course, be predicted with certainty, it is significant that no evidence in this record would, in our opinion, support a finding that, as a result of this agreement, Prudential will lose a ton of cargo in the foreseeable future.

[11] Except to the considerable extent that the proposed findings and conclusions are substantially embodied herein, they are denied as unsupported by substantial evidence, contrary to the weight of the evidence, or irrelevant to decision under Section 15 of the Shipping Act, 1916.

us are not subject to the provisions of section 15 of the Shipping Act, 1916. The argument appeared in a brief filed by exceptors, which asserts that F.M.B. Agreement No. 8555 offends neither the standards of the Shipping Act nor those of the antitrust laws, and should be approved by the Commission, if within the Commission's jurisdiction. The hamstringing argument that we lack jurisdiction, now embodied in exceptions, was considered in connection with our initial decision.

The exceptions argue that steamship lines are not required to file such agreements with the Commission, thus being left free to keep this regulatory agency in the dark about such situations, even if they are wholly repugnant to the Shipping Act and the public interest. We hold, to the contrary, that such agreements must be filed with the Commission, and the Commission fully informed.

The exceptions argue that such unfiled, unapproved agreements may be carried out by the parties without violating section 15 of the 1916 Act.

We hold, to the contrary, that carrying out such agreements (unfiled or unapproved) violates section 15, and subjects the parties to penalties of as much as $1,000 for each day the agreements are effective.

The exceptions argue that the Commission lacks power to approve such agreements (under any conditions whatsoever), even those which are consistent with maritime and antitrust standards and may be expected to have beneficial results.

We hold, to the contrary, that we have, as the public interest requires us to have, power to approve such agreements, modifying them with safeguards in appropriate cases.

The exceptions argue that we have no power to disapprove and thereby prevent such agreements, even if they will operate to the detriment of the commerce of the United States, and are contrary to the public interest.

We cannot agree. The exceptions are overruled. An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

No. 931

IN THE MATTER OF AGREEMENT NO. 8555 BETWEEN ISBRANDTSEN COMPANY, INC., ISBRANDTSEN STEAMSHIP COMPANY, INC., AND AMERICAN EXPORT LINES, INC.

ORDER

Whereas the Commission on the 5th day of February 1962, issued its report herein, which is made a part of this order,

Now therefore, for the reasons stated in said report, *it is ordered* that said agreement be, and it hereby is approved, and this proceeding discontinued.

BY THE COMMISSION:

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 972

ORDER THAT A. H. BULL STEAMSHIP CO. SHOW CAUSE

Decided February 28, 1962

Respondents found not to have complied with the requirements of section 2 of the Intercoastal Shipping Act, 1933, in its attempt to impose an embargo on the carriage of sugar from ports in Puerto Rico to the United States North Atlantic Ports of Baltimore, Philadelphia, and New York; and on the carriage of all freight destined for Ponce and Mayaguez, Puerto Rico from the ports of Baltimore, Philadelphia and New York.

Mark P. Schlefer, John Cunningham, T. S. L. Perlman for A. H. Bull Steamship Co.

John Mason, Gerald A. Malia for Sugar Producers of Puerto Rico, Puerto Rico American Refinery, Inc., Western Sugar Refining Company, Central Roig Refining Company and Olavarria & Co. Inc.

Donald J. Brunner and *Robert J. Blackwell* Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner.*

BY THE COMMISSION:

This proceeding arises out of the Commission's order to show cause of February 9, 1962, as amended by order of February 19, 1962. The order to show cause was issued as a result of the circumstances and conditions set forth below.

By an "Embargo Notice" dated February 1, 1962, the A. H. Bull Steamship Co., a common carrier by water engaged in the transportation of property between ports in Puerto Rico and ports in the United States, advised all shippers that effective March 3, 1962 it would be necessary for Bull to place an "embargo" on the carriage of sugar refined and turbinated, in bags, from ports in Puerto Rico to the ports of Baltimore, Philadelphia, and New York. By a second "Embargo Notice" dated February 5, 1962, Bull advised shippers that, due to a realignment of schedules and a curtailment of service, effective February 10, 1962, freight destined for Ponce and Mayaguez, Puerto Rico would not be accepted at the ports of New York, Baltimore and Philadelphia.

The Commission's order of February 9, 1962, directed Bull to show cause why it should not be ordered to withdraw its so-called embargoes substituting therefor new schedules filed in accordance with section 2 of the Intercoastal Shipping Act, 1933, and which would cancel the schedules then in force for the commodity and service which Bull proposed to discontinue. Oral argument was scheduled for February 20, 1962, but was postponed by our order of February 19, 1962 until February 27, 1962.

Bull is a respondent in *Investigation of Increased Rates on Sugar, Refined or Turbinated, in Bags, in the Atlantic/Gulf Puerto Rico Trade,* F.M.C. Docket 954 (Sub 2) instituted by the Commission on December 7, 1961. The proceeding involves a proposed rate increase by Bull on sugar, the commodity which Bull sought to "embargo" by its notice of February 1, 1962. When Bull's proposed increase was filed, we ordered the effective date of the increase suspended pending final determination by the Commission as to the reasonableness of the proposed new rate. On January 17, 1962 Bull filed a "Petition to Omit Initial Decision and For Immediate Final Decision". The petition was grounded on Bull's contention:

> . . . that respondent (Bull), contending that the present rate is so low as to be confiscatory and that the order of suspension in this case is an unconstitutional confiscation of its property, will embargo all refined sugar traffic upon 30 days' notice to be published on February 1, 1962, unless the proposed rate under investigation is permitted to go into effect on or before that date; and that such an embargo may leave the Puerto Rican shippers without common carrier steamship service to the mainland; in these circumstances an immediate decision may prevent termination of respondent's service and vast disruption of the Puerto Rican sugar refining business.

On February 12, 1962, Bull filed a motion in the instant proceeding "For Clarification, Particulars, Additional Hearing, Vaca-

tion of Suspension, Consolidation, and Other Relief." In its motion Bull sought, among other things, vacation of the order of suspension in Docket 954 (Sub 2) *supra*, consolidation of this proceeding with that docket, and reiterated the contentions made in its motion to Omit Initial Decision. We denied Bull's motion on February 16, 1962. Memoranda of law were filed and oral argument was had on February 27, 1962.

The sole issue in this proceeding as manifested by the order to show cause is whether Bull has properly complied with section 2 of the Intercoastal Act, 1933, and section 18 of the Shipping Act, 1916, in that its tariff presently on file with the Commission accurately reflects the common carrier service of Bull.

Section 2 of the Intercoastal Act, 1933, requires carriers in the off-shore domestic trades to file and post schedules showing all their rates and charges for or in connection with transportation. The section further provides that no change in rates filed and published shall be made except by the publication, filing, and posting of new schedules which shall not become effective earlier than 30 days after the date of posting and filing, and that no carrier shall engage in service as a common carrier by water unless and until it has complied with the requirements of the section.

The right of a common carrier to impose an embargo under certain emergency operating conditions has been recognized. In *Boston Wool Trade Asso.* v. *Merchants and Miners Trans. Co.*, 1 U.S.S.B. 32 (1921), it was held that:

> The right of a common carrier to declare an embargo when the circumstances warrant such action is established, as is also the fact that the necessity for placing embargoes is a matter to be determined in the first instance by the carrier. On the other hand an embargo is an emergency measure to be resorted to only where there is congestion of traffic, or when it is impossible to transport the freight offered because of physical limitations of the carrier. During the existence of the embargo, the common carrier obligations of the transportation company are suspended insofar as the embargo has application, and the reality of a situation sufficient to justify this suspension of obligations is requisite if the embargo is to be justified. *Id* at 33.

Of immediate concern here is whether the actions of Bull under the notices of February 1, and 5, 1962 constitute true embargoes, thus relieving Bull of the necessity of complying with the requirements of section 2 of the Intercoastal Act.

As pointed out in the *Boston Wool Trade* case, *supra*, an embargo "is an emergency measure to be resorted to only where there is a congestion of traffic, or when it is impossible to trans-

port the freight offered because of physical limitations of the carrier." (1 U.S.S.B. at page 33.) See also, *New York Central Railroad Company* v. *United States*, 201 F. Supp. 958 (USDC, S.D.N.Y., 1962) and cases cited therein. There is no evidence in the record that Bull is unable to perform the carriage in question because of physical limitations. The only reason proffered by Bull for its cessation of service is that of financial loss. Generally speaking financial loss is not justification for the imposition of an embargo. *New Orleans Traffic & Transp. Bureau* v. *Mississippi Valley Barge Line Co.* 280 I.C.C. 105 (1951); *New York Central R.R. Co.* v. *U.S., supra.*

Bull's attempts at embargo present essentially the same factual pattern as that presented to our predecessor in *Embargo on Cargo, North Atlantic and Gulf Ports,* 2 U.S.M.C. 464. In that case the respondent sought by means of an embargo to completely abandon its intercoastal service to and from the Gulf. After a discussion of section 2 of the Intercoastal Act, the Commission held at page 465:

> While the foregoing provisions do not specifically require that such schedules shall be cancelled upon withdrawal of service or before withdrawal of service, they clearly contemplate that such schedules shall serve as notice to the Commission and the public of the services maintained and the charges therefor. It follows that the maintenance by common carriers of schedules of rates for services they do not perform cannot be justified. *Intercoastal Investigation, 1935,* 1 U.S.S.B. 400, 449. *Id* at 465

In view of the above, we find that the actions of Bull taken pursuant to its notices of February 1 and 5, 1962 do not constitute true embargoes. We are not here dealing with the right of Bull to discontinue any part or all of its common carrier service. Our decision is restricted to the issue of whether in its attempts at discontinuance Bull has complied with the requirements of section 2 of the Intercoastal Act, and on the basis of the record before us we find that it has not. Compliance with that section requires that Bull withdraw and cancel the "embargoes" imposed by its notices of February 1 and 5, 1962 in the same manner in which they were imposed, and substitute therefor new schedules, filed pursuant to the provisions of section 2 of the Intercoastal Act, 1933. An appropriate order will be issued.

FEDERAL MARITIME COMMISSION

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its Office in Washington, D. C. on the 28th day of February, 1962.

ORDER THAT A. H. BULL STEAMSHIP CO. SHOW CAUSE

This proceeding having been initiated by an Order to Show Cause, issued by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That respondent A. H. Bull Steamship Co. withdraw and cancel the "embargoes" imposed by the "Embargo Notices" of February 1, 1962 and February 5, 1962, in the same manner in which the embargoes were instituted.

BY THE COMMISSION.

(Sgd.) THOMAS LISI,
Secretary.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its Office in Washington, D. C. on the 9th of February 1962.

No. 972

ORDER THAT THE A. H. BULL STEAMSHIP CO. SHOW CAUSE

It appearing, That on or about February 1, 1962, the A. H. Bull Steamship Co., a common carrier by water engaged in the carriage of goods between ports in Puerto Rico and United States North Atlantic ports, issued a notice to all shippers, entitled "Embargo Notice" wherein said carrier advised shippers that effective March 3, 1962, it is necessary for said carrier to place an "embargo" on the carriage of sugar, refined and turbinated, in bags, from ports in Puerto Rico to United States North Atlantic ports of Baltimore, Philadelphia, and New York; and

It further appearing, That on or about February 5, 1962, said A. H. Bull Steamship Co. also issued an "Embargo Notice" wherein said carrier stated that effective February 10, 1962, due to a realignment of schedules and a curtailment of service, freight for Ponce and Mayaguez, Puerto Rico, will no longer be accepted; this notice to apply to service from the United States North Atlantic ports of New York, Baltimore, and Philadelphia; and

It further appearing, That there is no evidence of any emergency condition or physical limitations of said carrier necessitating the imposition of embargoes; and

It further appearing, That said carrier has on file with this Commission a schedule of freight rates which includes a rate for the carriage of sugar, refined and turbinated, in bags, from Puerto Rican ports to the United States North Atlantic ports of Baltimore, Philadelphia, and New York; neither a supplemental schedule nor a new schedule has been filed with the Commission by said carrier cancelling the aforementioned schedule of rates; and

It further appearing, That said carrier also has on file with this Commission a schedule of freight rates for the carriage of commodities from the United States North Atlantic ports of Baltimore, Philadelphia and New York to Puerto Rican ports including

Ponce and Mayaguez; said carrier has not filed a new or supplemental schedule with this Commission cancelling this aforementioned schedule; and

It further appearing, That section 2 of the Intercoastal Shipping Act, 1933, and this Commission's Freight and Passenger Tariff Regulations require a carrier to file with this Commission a new schedule or schedules to become effective not earlier than thirty days after date of filing, before any change shall be made in the rates, fares, charges, classifications, rules or regulations that have previously been filed with the Commission; and

It further appearing, That the imposition of said embargoes may constitute unjust and unreasonable practices in violation of section 18(a) of the Shipping Act, 1916:

Now, therefore, It is ordered, Pursuant to section 2 of the Intercoastal Shipping Act, 1933, and sections 18 and 22 of the Shipping Act, 1916, That the A. H. Bull Steamship Co. show cause on or before February 20, 1962 why it should not be ordered to withdraw the aforementioned embargoes and to file and post new schedules cancelling the schedules now in force for the commodity and service which it proposes to discontinue; and

It is further ordered, That this order be published in the Federal Register and served on the A. H. Bull Steamship Co. who is named as respondent in this proceeding. Oral argument in this proceeding will be heard by the Commission on February 20, 1962, in Room 4519, 441 G Street, N. W., Washington, D. C. at 9:00 a.m. EST. Notwithstanding the rules as to time and service of documents of this Commission's Rules of Practice and Procedure, the parties to this proceeding shall adhere to the following schedule: Affidavits of fact and memoranda of law may be submitted to the Commission on or before the close of business on February 16, 1962 and replies thereto on or before the close of business on February 19, 1962. All persons having an interest in this proceeding, desiring to intervene therein, should notify the Secretary of the Commission promptly and may file petitions for leave to intervene up to the time of oral argument before the Commission; replies to petitions for leave to intervene shall be filed on or before the close of business on February 23, 1962. Parties seeking leave to intervene may file affidavits of fact and memoranda of law and replies in accordance with the schedule previously set forth. All documents or pleadings filed in this proceeding including petitions to intervene and replies thereto must be

served by the person filing same upon all parties of record. The parties to this proceeding are directed to file their requests for time allotment for oral argument with the Secretary of the Commission on or before February 19, 1962.

BY THE COMMISSION.

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 954

INVESTIGATION OF RATES AND PRACTICES IN THE ATLANTIC-GULF/PUERTO RICO TRADE

Decided March 5, 1962

Motion for order invalidating reduced rates for the carriage of zinc from the continental United States to Puerto Rico denied.

Matter remanded to Examiner for further hearing and initial decision.

George F. Galland and *Robert N. Kharasch* for respondent, American Union Transport.

Mark P. Schlefer for respondents, A. H. Bull Steamship Company and Lykes Brothers Steamship Company.

Sterling Stoudenmire for respondent, Waterman Steamship Company.

Warren Price, Jr. and *Carl H. Wheeler* for respondent, Sea-Land Service, Inc.

Edward T. Cornell for respondent, TMT Trailer Ferry, Inc.

William L. Hamm for respondent, Alcoa Steamship Company, Inc.

John T. Rigby and *William D. Rogers* for intervener, Commonwealth of Puerto Rico.

Donald J. Brunner and *Robert J. Blackwell* Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner*

BY THE COMMISSION:

This particular segment of this case is concerned with a just

and reasonable charge for the carriage by water of zinc from the continental United States to Puerto Rico.[1]

We have before us a motion by Sea-Land Service, Inc., Puerto Rican Division, (hereinafter "Sea-Land") which is supported by Hearing Counsel, and which urges us to hold that a suspended but presently-effective rate of $1.03 per 100 pounds for the carriage of zinc from the continental United States to Puerto Rico is unjust and unreasonable in violation of the Intercoastal Shipping Act, 1933, and the Shipping Act, 1916.[2] We refuse so to hold, because we are wholly dissatisfied with the state of the record.

Treating the motion as seeking an order compelling the cancellation of the rate,[3] we refuse to issue such an order because as heretofore stated, we are dissatisfied with the state of the record (a situation which must and will be corrected), and because to enter such an order at the present time would be detrimental to the public interest, and contravene sound regulatory principles of general application.

For some years practically all zinc has moved from the continental United States to Puerto Rico out of the North Atlantic at a rate of $1.25 per 100 pounds. A. H. Bull Steamship Company (hereinafter "Bull") and Sea-Land have carried almost all of it; Waterman Steamship Corporation (hereinafter "Waterman") carried 10 tons in 1960, none in the first half of 1961. Lykes Bros. Steamship Company (hereinafter "Lykes") apparently has carried none. During the summer of 1961 conditions in the United States-Puerto Rican trade, which had for some time been unstable, became almost chaotic. Confronted with what may well have been the early stages of a full-scale rate war, our predecessor, the Federal Maritime Board, gave particular attention to rate changes in the trade, especially reductions which might well be in the nature of noncompensatory "fighting rates". In July 1961, the Board instituted this proceeding as an investigation of revision (both rate increases and decreases) of tariffs by various operators in the Puerto Rican trade. Among such operators were Sea-Land, Lykes, Waterman, and Bull. From time to time thereafter the scope of the proceeding was expanded

[1] The procedural details out of which this opinion grows are stated in the appendix.

[2] The argument on which the rate of $1.03 was suspended was that this rate is unjust and unreasonable because it is *too low*. The suspension period expired by operation of law on January 14, 1962, and the rate (proposed by the United States Atlantic and Gulf-Puerto Rico Conference) thereupon went into effect.

[3] e.g. *Commodity Rates Between Atlantic Ports and Gulf Ports*, 1 USMC 642, 645 (1937). *Pacific Coastwise Carrier Investigation*, 2 USMC 191, 196, 197 (1939).

to include investigation of other rates in the trade. The rate of $1.03 per 100 pounds on zinc, which we are here urged to strike down as unjust and unreasonable because it is alleged (not proved) to be too low, was published by the United States Atlantic and Gulf/Puerto Rico Conference (hereinafter "the Conference" with Lykes and Waterman, its carrier members) as a decrease from a rate of $1.25 per 100 pounds, to become effective September 15, 1961. (Conference Freight Tariff No. 1, FMB-F No. 1, first revised page No. 98.)

On August 25, 1961, Sea-Land, which then had and now has in effect a zinc rate of $1.25 per 100 pounds, protested the $1.03 rate as too low, and petitioned for its suspension. On September 7, 1961, the Acting Members of the Commission (which had by that date succeeded the Board) by the fourth supplemental order in this proceeding, served September 14, 1961, suspended the $1.03 zinc rate for the full 4-month statutory period, which expired January 14, 1962. By the same order the Acting Members of the Commission "with a view to making such findings and orders in the premises as the facts and circumstances shall warrant" expanded the scope of the proceeding to include, *inter alia*, not only the $1.03 zinc rate but the then (and now) effective zinc rates of Sea-Land, $1.25 per 100 pounds (Sea-Land Service, Puerto Rican Division Outward Freight Tariff No. 2, FMB-F No. 3, first revised page No. 118), of Bull, $1.25 per 100 pounds (Bull Outward Freight Tariff No. 1, FMB-F No.1, second revised page No. 84), Alcoa Steamship Company, Inc. (hereinafter "Alcoa"), $1.25 per 100 pounds (Alcoa Outward Freight Tariff No. 2, FMB-F No. 2, original page No. 91), American Union Transport, Inc. (hereinafter "AUT"), $1.07 per 100 pounds (AUT Outward and Inward Freight Tariff No. 6, first revised page No. 46), and TMT Trailer Ferry, Inc. (hereinafter "TMT") of $1.19 per 100 pounds trailer load, and $1.24 per 100 pounds less than trailer load (TMT Freight Tariff No. 3, FMB-F No. 3, second revised page No. 142).

The $1.03 zinc rate having been suspended, the burden of proving it fair and reasonable is placed upon its proponent carriers, Lykes and Waterman by section 3 of the 1933 Act (46 U.S.C. 844), which provides in pertinent part that:

> At any hearing [on a suspended rate] the burden of proof to show that the [suspected] rate . . . is just and reasonable shall be upon the carrier or carriers.

Normally, the failure to sustain the burden results in cancellation of the suspended rate (see cases cited in footnote 3), but this is not a normal situation. Neither Lykes nor Waterman could complain of a cancellation order, for, as stated by Sea-Land in its motion here under consideration (pp. 2-3), "Neither Waterman, Lykes nor the Conference have sustained their burden of proof in showing the justness and reasonableness of the proposed reduced rate applicable to the carriage of zinc".

As Sea-Land also points out in the instant motion, Lykes' counsel expressed for Lykes a position which we cannot condone, namely, that "Lykes is unconcerned with the rates, if it doesn't sustain its burden of proof, it is unconcerned about whatever the consequences may be " (Tr. 388). We hope that one of the consequences of this opinion will be a more seemly attitude by carriers and their counsel with respect to rates filed by them in the future. A changed attitude in this regard may well be the only alternative to more drastic measures. Certainly this Commission is *very much concerned* about these rates, all of them.

The Acting Members of the Commission by the fourth supplemental order in this proceeding placed under investigation the zinc rates of the Conference (Lykes, Waterman), Sea-Land, Bull, Alcoa, AUT and TMT. Hearing counsel describes the record as one wherein "all the rates under investigation . . . *save the 'zinc'* rate were the subject of extensive examination and various exhibits were introduced relating to the cost of transporting these commodities" (other than zinc).[4] Such a record in a proceeding investigating zinc rates will not serve. We will not issue an order striking down the decreased $1.03 zinc rate on such a record, notwithstanding the procedural grounds presented by Sea-Land and Hearing Counsel. We are primarily interested in the merits of the matter, not with procedural technicalities. We agree with the unavoidable inference from statements in Sea-Land's motion and Hearing Counsel's reply, that the record in this proceeding is deficient.

Exhibit 10 was offered by Bull for identification (Tr. 11), and is the subject of examination and cross-examination, which has not been struck. As to zinc, Exhibit 10 shows without explanation the highest costs of any of the selected 21 commodities. Although on cross-examination, Bull's witness explained that loading costs on chemicals were so much larger than for most other cargo be-

[4] (Emphasis added).

cause chemicals are hazardous cargo, requiring special precautions, no explanation was solicited or volunteered as to why costs for zinc are even higher. Notwithstanding these highest of costs, and the fact that in computing measurement ton revenue Bull used a stowage factor of 25, the exhibit showed (at a rate of $1.25 per 100 pounds) the highest gross and net revenue return of any of the 21 selected commodities. (The proper stowage factor, which is the number of cubic feet required to stow a ton weight of a specific commodity is all-important in comparing costs with revenue. A measurement ton is 40 cubic feet. No explanation, other than the generalization that all stowage factors used are based on experience and measurement, is offered for the use of zinc stowage factors of 25 and 38. "Modern Ship Stowage" indicates stowage factors for zinc from 8 to 12. There may *be* justification for utilizing in this trade stowage factors several times as large, but it is not in this record.) The gross revenue shown against measurement tons costs of $34.45 was $44.80. Had Bull used the same stowage factor (10) used by Lykes, which is supported by the standard reference work "Modern Ship Stowage" issued by the Department of Commerce in 1942, the revenue figure would be $112.00. Although offered for identification Exhibit 10 was, with no very informative explanation, in effect withdrawn thereafter when Bull's counsel said he "was not offering" it, and the Examiner said that it "will stand on the record as rejected". Exhibit 57 purports to cover the same ground. Costs are stated under five methods. Under the first, costs are stated as $22.64 plus 38c additional for vessel depreciation. Under the second, costs are stated as $13.26 plus 38c for vessel depreciation. Under the third, costs are stated as $13.66 plus 38c for vessel depreciation. Under the fourth, total "stevedore and terminal cost" is stated as $14.38. Under the fifth, costs are shown as $19.48.

With respect to the $1.03 zinc rate, Lykes included in Exhibit 71 cost data aggregating $45.28 per measurement ton and revenue of $92.28 per measurement ton. Lykes had no witness to support the exhibit. On November 22, 1961, this matter was brought up by Lykes' counsel who said that he did not propose to put the Lykes exhibits in evidence "unless somebody is particularly interested in them". When the Examiner asked if Lykes' counsel would have a witness at the next hearing, counsel replied:

> I wasn't planning to, and I talked to public counsel about this. He is not concerned about it. We furnished the information because you ordered us to, and nobody indicated any—so far as I know—any particular interest in our

bringing a witness up from New Orleans on this subject. Lykes is unconcerned about whatever the consequences may be. (Tr. 387-388).

The matter was held open, and later, on December 8, 1961, came up again. At this time Hearing Counsel and counsel for Waterman evinced proper concern for the introduction of Lykes' Exhibit 71, Waterman counsel pointing out that Lykes and Waterman were the members of the respondent conference which filed the $1.03 zinc rate. Sea-Land counsel stated a general objection to Lykes' cost-calculations, but said his objections were primarily aimed at the zinc data. He was supported by Counsel for TMT. Sea-Land counsel then said that if "they" (Lykes) would eliminate the line containing the zinc data "and concurrently cancel their suspended matter from the tariff we would have no objections" (Tr. 909-914). Again the matter was delayed. Lykes' counsel later offered Exhibit 71 for identification, stating that "the line for zinc should be striken from the document as identified". There was no objection, and Exhibit 71 was received in evidence "upon stipulation" (Tr. 985-988). As received, there is a light line drawn through the zinc figures, which are legible however, and show the figures for cost and revenue heretofore stated.[5]

AUT reported no data on zinc, stating that it carried none. TMT, for the same reason, reported no zinc data. Waterman merely reported that it carried no zinc.

Sea-Land's data on zinc is particularly interesting (Ex. 32—No. III, Part 1—p. 2 of 3). It shows that Sea-Land carried only 186 long tons of zinc in 1960 but carried 252 long tons in the first half of 1961. (The stowage factor reported is 38). In Exhibit 32, No. IV, p. 2 of—, Sea-Land reports zinc costs (terminal expense, stevedoring expense, vessel expense, and overhead, including administrative and general expenses plus amortization and depreciation) of $14.24 per long ton. This exhibit does not show revenue, but Sea-Land's rate of $1.25 per 100 pounds would result in a revenue figure of $28.00 per long ton. Exhibit 32, No. V., p. 3 of 3, purports to show that Sea-Land has been increasing its zinc carrying at the rate of 27 tons per month, which together with the fact that, according to its Exhibit No. IV, the revenue on zinc approximately *doubles* the zinc transportation costs, may explain Sea-Land's interest in the commodity.

[5] This exhibit (as to zinc), and exhibit 10 are not probative of costs or revenue in this proceeding, but do illustrate the deficiency of the record.

In a later exhibit (No. 63), Sea-Land shows measurement ton costs of $15.40 (Method A) and $15.666 (Method B) against a revenue of $30.00 which would reflect a stowage factor of 37⅓. The nearest approach to a questioning of any cost data on zinc is found in Exhibit 78, admitted in evidence over objection by Sea-Land's counsel. It was prepared by a partner in the Price Waterhouse accounting firm after a study of some of Sea-Land's records, and was described by Lykes-Bull counsel as "exactly similar to a parallel Sea-Land exhibit", obviously Exhibit 63. In this exhibit zinc costs stated in Exhibit 63 under "Method A" (which in the Price Waterhouse partner's opinion "is the preferable one"), at $15.400 were decreased to $13.662; the zinc costs in Exhibit 63 under "Method B" at $15.666, were increased to $16.284. There is no particular significance as to zinc in the Price Waterhouse testimony, and it is stated here only to round out the picture.

Viewing this record in detail, we are compelled to conclude that it must be amplified with respect to zinc, in spite of the small quantity of the commodity moving in the trade. We have here a distinctly unusual situation—one where even pennies may be important to both cargo and carrier interests, and even more important to the people of the Commonwealth of Puerto Rico, who are struggling to better their economic condition. Considering the special dependence of the Commonwealth, and the States of Alaska and Hawaii on ocean shipping, coupled with the continuing regulatory responsibility placed upon the Federal Maritime Commission by the Congress; it is basic that just and reasonable rates and practices by the steamship lines serving their ports be assured to the full extent legally possible.

We know it is particularly important to the shippers and consignees of zinc that the cost of moving cargo to Puerto Rico shall not be excessive, and if zinc is used in Puerto Rican manufacturing, as seems probable, the Commonwealth may well have special interest in this commodity.

We know it is particularly important to carriers in this troubled trade where they are having some difficulties, that the rate on all cargo shall be sufficient to yield a fair return on invested capital.

To the end, therefore, that the zinc rate shall be just and reasonable, which is to say, neither too high nor too low, we shall make provision for a limited reopening of the record. We regret even the small amount of lost time this may involve. It is a well-

established principle that all the speed compatible with sound decision is an essential element of effective regulation. Adherence to that principle caused us to require the record to be certified to us for decision at this time, and only because we are convinced that the present state of the record is incompatible with sound decision now, causes us to remand the matter to the Examiner. We note especially three things. First, we know that we are giving Lykes and Waterman a second chance to meet their burden of proof. They show no sign of wanting a second chance, and we do not intend in any way to favor them. The rationale of this decision is that the public interest is paramount, and while we realize that a remand will afford the proponents of a suspended rate a second opportunity to meet their burden of proof, in a proceeding of this nature the Commission is charged with special responsibility, and since we feel that a more complete record is essential for us to decide the matter on the merits, the case will be remanded.

Second, we are fully conscious of the importance of holding proponents of suspended rates strictly accountable for their burden of proof, because such suspended rates go into effect in no more than four months. But, as previously pointed out, this is an unusual case, and it involves a decreased rate to which the public is entitled if it is just and reasonable.

Third, this proceeding contemplated that it might involve the fixing of just and reasonable maximum-minimum rates on certain commodities, either or both. The parties and the Examiner were conscious of this fact from the beginning. As to zinc, the record is wholly insufficient for a determination if such rates should be prescribed, and if so, at what level.

Premises considered, we decline to order the Conference zinc rate of $1.03 now in effect cancelled, and we remand the record to the Examiner for further hearing and an initial decision.[6]

The carriers will be expected to present at least the following:

(1) Total amount of zinc carried in 1961, and how it was shipped, i.e. in what form, in containers or packages, loose, and the nature and dimensions of containers, crates, etc.

(2) Point of zinc's origin, port of loading, and port of discharge.

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[6] In so doing, we stress the fact, that this action is essential, regardless of the ultimate decision on the zinc rate. The conference rate of $1.03 per hundred pounds may be too low or too high as also the Sea-Land rate of $1.25 per hundred pounds. We are uninformed by this record about the rate, and it is our duty to be so informed.

(3) Cost per measurement ton (40 cu. ft.) to the ship of carrying zinc from port of loading to port of discharge, stating cost factors separately, and showing if they are known or allocated (and if allocated), the basis or method of allocation.

(4) Gross revenue per measurement ton on the basis of the carriers' tariff rates, including (separately) suspended rates.

(5) Stowage factor used in converting zinc to a measurement ton, and full explanation of the basis and authority for this stowage factor.

APPENDIX

After the hearing closed, and on January 8, 1962, Sea-Land Service, Inc. filed a motion for an immediate finding by the Commission that a proposed rate of $1.03 per 100 pounds for the carriage of zinc from the continental United States to the Commonwealth of Puerto Rico is unjust and unreasonable. The motion is unopposed, and our Hearing Counsel supports it.

On January 22, 1962, we made the requisite statutory findings, and required the record to be certified to the Commission for decision of the issue tendered by the motion.

On January 24, 1962, the record was certified to the Commission by the Examiner.

Meanwhile, on January 15, 1962, the rate which had been suspended, became effective by operation of law, the maximum suspension period expiring January 14, 1962.

FEDERAL MARITIME COMMISSION

No. 926

INVESTIGATION OF INCREASED INTER-ISLAND CLASS AND COMMODITY RATES BETWEEN PORTS OF CALL WITHIN THE STATE OF HAWAII

Decided April 5, 1962

Increased class and commodity rates between ports in the State of Hawaii found just and reasonable.

George F. Galland, Robert N. Kharasch and *Amy Scupi* for Respondent.

Shiro Kashiwa, Arthur S. K. Fong, William D. Rogers and *Richard S. Sasaki* for State of Hawaii.

Robert J. Blackwell as Public Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT and JOHN S. PATTERSON, *Commissioners*

BY THE COMMISSION:

This is an investigation under the Intercoastal Shipping Act, 1933 (Act) to determine whether increased class and commodity rates filed by Young Brothers, Ltd. are just and reasonable. The Federal Maritime Board (Board) suspended the increased rates for the four months statutory period from December 4, 1961 to April 4, 1962, when they became effective. After hearings the examiner issued an initial decision in which he found:

"I. Fair value for ratemaking purposes of property owned and used by respondent determined to be $3,650,000 which will probably yield a return of 5.62%.

"II. The rates in the new tariff are just and reasonable, except the rates on fruits and vegetables from Kailua and Kawaihae to Honolulu are unreasonable to the extent they were increased by more tnan 9%."

Respondent excepted to the initial decision and oral argument was held.

1. Young Brothers, has operated, since 1947, a common carrier service by towed barges among the islands of the State of Hawaii (State). In 1951 respondent merged with, and became a wholly owned division of Oahu Railway and Land Company (O.R. & L.). On October 31, 1960, with approval of the Hawaiian Public Utilities Commission, respondent was established as a separate corporation (still owned by O.R. & L.) so that its costs and accounting for the common carrier operation could be more closely supervised. All of the barges and certain other common carrier equipment was transferred to respondent. O. R. & L., which maintains a fleet of oceangoing tugs for contract towing, continues to supply respondent with general overhead service, at no profit, and towing service at a fixed amount per trip based on a rate of $60 for each hour the tugs are in use. This rental arrangement saves respondent the expense of maintaining separate offices and accounting and supervisory personnel, and avoids a heavy investment in tugs. Respondent's officers are also officers of O.R. & L., and each company pays a portion of salaries, respondents' portion being approximately 1% of projected revenues for 1961. Overhead allocated to respondent approximates 8% of projected revenue.

2. Respondent has expanded its services in the face of competition from three successive carriers, which in turn failed. It provides 11 sailings a week between Honolulu (Oahu) and the other four major outer islands—Hawaii, Maui, Molokai and Kauai. Its present competition is from inter-island airlines, carrying perishables, furniture and appliances, and direct water services from the United States mainland coasts to the outer islands. The State is studying whether to subsidize inter-island sea or air ferries, which might provide additional competition.

3. The inter-island trade is: (1) seasonal and imbalanced, almost 70% of revenue coming from outbound cargoes, consisting of consumer goods, feed, fertilizer, cement and automobiles, which substantially fill outbound barges at the peak of the shipping season; and 30% from inbound traffic consisting of agricultural products which cargo is insufficient to fill the inbound barges; (2) difficult, involving short hauls over rough water; and (3) comparatively small, with revenue of less than $3,000,000 annually. Respondent claims that the trade is fairly static. The facts are that while Oahu has been growing, the outer islands

have been losing population since 1930. Revenues have increased by 44% over the last three years (including estimated revenue for 1961) which respondent attributes to the increased demand on Oahu for fruits and vegetables from the outer islands and the establishment on Oahu of manufacturing plants and bulk storage facilities which permit the shipment from Oahu to the outer islands of products formerly shipped direct from the mainland. These factors resulted in a 7 percent growth in cargo in late 1960. Respondent predicted that this trend would not obtain beyond the first half of 1961, and that the total increase for 1961 over 1960 would be somewhat less than 3%.

4. Respondent owns and operates barges, one of which is self-propelled—the Hualalai. Five are double-deck barges, purchased new in 1958 at a cost of some quarter-million dollars each. They have ramps from upper deck to hold which permits rapid loading of cargo on pallets by lift truck from pier to hold or open-deck. Containers are used for asphalt, feed and other bulk commodities, and reefer boxes and vans, recently purchased, are used for refrigerated cargo. This method of handling cargo eliminated shipper's packing costs, minimizes cargo damage, and enables respondent to provide an efficient and low cost express service among the islands. The Haulalai, although especially designed as the most efficient barge to carry the fairly small traffic to and from Kailua and Kawaihae (Hawaii), has operated at a heavy loss and respondent expects to incur some losses under the new rates.

5. Respondent provides class rates, based generally upon distance, for general cargo. Lower special commodity rates are published on (a) economically important commodities such as those related to agriculture, and on automobiles, (b) containerized cargo, and (c) commodities coming into competition with shipments to the outer islands direct from the mainland. The class rates were increased 13% generally, or only 7% if shippers obtain the allowance of 50 cents a ton by delivering cargo loaded on their own pallets. Many commodity rates were increased less than 13%, as for instance 6% on containerized propane, 8% on feed, 4% on lime, and no increase on fertilizer, for competitive reasons. According to respondent the new rates would have increased revenue during all of 1961 by $240,000 or 9%. However, their suspension during the first three months of 1961 reduces the anticipated revenue by one-fourth or $60,000, leaving $180,000 which is only 6½% additional.

6. The only challenge to any specific rates comes from spokesmen for fruit and vegetable growers and produce dealers in Honolulu. They oppose the increases on empty crates; and on fruits and vegetables—which amount to 26% from Kailua and Kawaihae and 9% from the other ports. The gist of their testimony pertinent here is: that the farmers are caught in a "cost-price" squeeze; that the proposed rate increases will increase retail prices of fresh fruits and vegetables, forcing (a) increased consumption of canned or frozen items, and (b) the importation of fresh fruits and vegetables from the mainland; that instead of increasing rates which will discourage further expansion in production on the outer islands, respondent should seek additional revenue from the increasing volume of perishables shipped from the outer islands; that the 26% rate increase from Kailua and Kawaihae, served by the Hualalai, will force some farmers out of business; that the poor service on empty crates does not justify an increase thereon; and that refrigeration capacity and service are inadequate.

7. The facts cited by respondent in support of the increases are that the new rates on fruits and vegetables: (a) are half or less than half of the regular class rates, at which most of the other traffic moves; (b) are being increased a lesser percentage than most other rates (e.g. 5% on cabbage from Maui); (c) are actually lower than those in effect in 1947; and (d) have been increased insignificantly when compared with Matson's rates on competing items from the mainland; and (e) are less, from ports served by the Hualalai, than one-half of the rates of the predecessor carrier which went broke serving these ports. The rates on empty crates were supposedly applicable only to *returned* crates which had moved full to Honolulu via respondent's line. However, the testimony is that some growers were actually shipping full crates to Honolulu by air and returning their empties via respondent's line. Respondent, in order to prevent the wholly uneconomic carriage of empty boxes for the convenience of the airlines, increased the rates per ton from the equivalent of $1.00 (on deck) and $1.60 (under deck) to $1.80 and $2.40 a ton respectively. The latter are a third or a fourth of class rates.

8. Gross revenue and expenses estimated by respondent for 1961 are $3,118,969 and $3,004,209 respectively, leaving net earnings of $114,760. This is based on application of the old rates for three months and the new rates for nine months. Public Counsel and the State take issue with this method, contending that the new

rates should be applied for the full "test year", 1961. On this basis the figures should be $3,179,649 revenue, $2,974,378 expenses, and $205,271 net earnings. Pro forma calculations by respondent show a loss of $62,000 for 1958 and $94,000 for 1959, and a profit of $31,000 in 1960.

9. The property used by respondent in its common carrier service is listed in Column A of the table below. As indicated, the allocated tug property is owned by O.R. & L. The book values, less depreciation, (bv) and fair market values (fm), used in the succeeding columns to arrive at the various rate bases, were assigned by respondent and they are unchallenged.

COMPARISON OF RATE BASES PROPOSED BY PARTIES

	Respondent	Public Counsel	State
(a)	(b)	(c)	(d)
FLOATING EQUIPMENT			
Barges	$1,535,362 bv	$1,535,362	$1,535,362
Tugs (O.R. & L.)	1,701,975 fm	1,172,532 bv	1,069,940
SHORE FACILITIES			
Equipment	334,912 bv	334,912	334,912
Equipment (fully depreciated)	56,818 fm	-0-	-0-
Tugs parts (O.R. & L.)	161,189 bv	161,189	omitted
LAND & IMPROVEMENTS	419,922 fm	109,872 bv	109,872
Tug shop (O.R. & L.)	205,410 fm	30,292 bv	omitted
	$4,415,588	$3,344,159	$3,050,086
WORKING CAPITAL	361,604	314,113	343,493
TOTALS	$4,777,192	$3,658,272	$3,393,579
RATES OF RETURN	4.29%	5.61%	6.04%
Net Earnings	$205,271		

It will be noted that the rate bases proposed by Public Counsel and the State are based entirely on book value less depreciation. (Col. c & d). However, the State omitted certain items of tug property apparently through inadvertence (Col. d). Respondent's rate base, including allocated tug property, which it contends should be eliminated, is composed of both book values and fair market values. (Col. b).

10. Respondent, who extends one month's credit to shippers in order to speed up the loading and handling of cargo, arrives at its figure of $361,604 for working capital in 1961 on basis of the peak amount receivable from shippers during 1960, which was

$362,241 in August, 1960, and on the theory that revenues for 1961 should be projected on the application of the old rates for the first three months and the new rates for the last nine months.

11. A Honolulu investment banker testified that based on the premise that the business is small and static and has been unprofitable, an investor would require a 7½ to 8% dividend return plus earnings coverage of the dividend of at least double percent—that is, a return on capital of 15 or 16%.

The respondents contend that the examiner was wrong in including an allocated portion of the value of the tugs owned by its affiliate O.R. & L. in the rate base and excluding the $60 per hour rental paid to O.R. & L. by Young Bros. We agree with the examiner. There is nothing in the record to show whether the rental is reasonable. It is experimental in nature and will be adjusted as the companies gain experience and knowledge regarding the cost of operation. It is admitted that O.R. & L. hope to make a reasonable profit on the tug service it supplies to its affiliate, Young Bros. Only the cost of service rendered by an affiliate of a regulated carrier should be allowed as operating expense, and the affiliate's profits should be excluded from the revenues and expenses of the carrier in rate determinations. *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236 (1936). On this record it is impossible to determine either the reasonableness of the rental charged Young Bros. or the profit realized by O. R. & L. In view of the uncertainties and the admission that a reasonable profit is contemplated, we will treat the respondent as a division of O.R. & L. and include an allocated portion of the capital investment in the tugs in the respondent's rate base.

While the rental charge for the tugs in the rate base will be disallowed as an expense, an allocable portion of the wages and other operating expenses will be included.

On the basis of the foregoing and adjusting respondents revenues and expenses for 1961 so as to reflect 12 months operations under the new rates we find that Young Bros. would realize earnings after taxes of $205,271.

While agreeing that the barges and certain property devoted to the trade should be valued under the prudent investment standard, the respondents contend that the tugs and certain land should be valued on a basis of fair market value. They argue that where values under the prudent investment theory are totally unrealistic, market value should be employed.

Young Bros. is entitled to a fair return of its property being used in the service of the public.

We recently held that in the domestic offshore trade the prudent investment standard would be used to determine the fair value of property. *Atlantic & Gulf/Puerto Rico General Increases in Rates and Charges,* 7 F.M.C. 87 (1962)

We find nothing in this record that warrants our departing from the prudent investment standard.

Working capital required to pay operating expenses prior to time revenues are received for the services rendered was found by the examiner to amount to $304,366. We agree.

We find the fair value of the property being devoted to the public by respondent to be $3,648,495 including working capital of $304,166.

With earnings after taxes of $205,271 respondent's rate of return would be 5.63 percent.

While the respondent presented testimony that a return of capital of 15 or 16 percent was reasonable the record in this case is totally inadequate for us to determine the maximum reasonable rate level. A 5.63 percent return on property valued on the basis of the prudent investment standard is not unreasonable.

Respondent excepts to the examiner's finding that the proposed rates on fruits and vegetables from Kailua and Kawaihae to Honolulu are unjust and unreasonable to the extent they were increased by more than 9%. The record shows losses during 1960 for Young Bros.' service to Kailua of $63,000 and for service to Kawaihae of $61,000 during the same year. Even at the new rates, it is doubtful that the service will be profitable. Rates after the increases, which amount to less than a tenth of a cent a pound, will be less than the rates in effect in 1947. The rates on fruits and vegetables are half or less than half of the regular class rates at which most other traffic moves; thus, leaving the shippers of the former commodities in a preferred position. Young Bros.' rate of return on all of its operations, even under the increased tariffs, will remain low, and this service will in all probability operate at a loss. On this record we are unable to find the proposed 26% increase on fruit and vegetables from Kailua and Kawaihae to Honolulu to be unjust and unreasonable.

We find and conclude that the rates under investigation are just and reasonable.

An Order discontinuing this proceeding will be entered.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at its office in Washington, D. C., on the 5th day of April, 1962.

No. 926

INVESTIGATION OF INCREASED INTER-ISLAND CLASS AND COMMODITY RATES BETWEEN PORTS OF CALL WITHIN THE STATE OF HAWAII

Full investigation of the matters and things involved in this proceeding having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to an made a part hereof, and having found that the proposed rates and charges herein under investigation are just and reasonable:

It is ordered, That this proceeding is hereby discontinued.

BY THE COMMISSION.

(Signed) THOMAS LISI
Secretary