FEDERAL MARITIME COMMISSION

No. 1099

GENERAL INVESTIGATION OF WEIGHING PRACTICES IN RE GREEN HIDE SHIPMENTS

Decided January 17, 1964

A rule is necessary requiring carriers of green hides in the foreign commerce of the United States to file with the Commission within 30 days tariff amendments setting forth certain provisions relating to computation of weight of such hides and furnishing of weighing certificates or dock receipts by shippers. Proposed rule for this purpose adopted and published.

Richard S. Harsh and *Robert J. Blackwell*, Hearing Counsel.

Boris H. Lakusta and *E. Myron Bull, Jr.*, for Marubeni-Iida (America) Inc., and James Loudon and Sons, Intervenors.

Benjamin A. Theeman, Hearing Examiner.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*; Thos. E. Stakem, *Vice Chairman*; Ashton C. Barrett, James V. Day, John S. Patterson, *Commissioners*)

As a result of information indicating that weights of green salted hides exported from the United States are misstated on the ocean bills of lading and determined in a nonuniform manner by shippers, we ordered a general investigation to examine the weighing practices in green hide shipments and whether we should "promulgate appropriate rules, regulations or orders governing the practices to be employed in the weighing and certification of weights and the billed weights of green hides exported in the foreign commerce of the United States."

Pursuant to the above order, hearings were held in San Francisco from April 30–May 2, 1963, and in New York City from June 10–14, 1963. At these hearings testimony was received from several shippers and hide exporters, as well as certain carriers, conferences and freight forwarders. No respondents were named in the order of investigation.

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Each of the above witnesses appeared under subpoena. The only parties formally intervening in the proceeding were Marubeni-Iida (America), Inc. and James Loudon & Sons, a shipper-exporter and a freight-forwarder, respectively. Representatives of these intervenors testified as Hearing Counsel's witnesses under subpoena. Intervenors presented no witnesses of their own but cross-examined certain of Hearing Counsel's witnesses.

The record in the proceeding was certified by the Examiner to the Commission for decision.

FACTS

Hides, after being removed from the animal, are cured in order to preserve then from deterioration due principally to bacteria and moisture. In the curing process much but not all of the blood and moisture content in the hides is removed. In almost all cases hides are cured at slaughter houses.

The two principal methods of curing hides are the old and prevalent wet salt method, in which salt is added to hides stocked in cellars, and the newer brine method, in which hides are immersed in vats of brine and then drained. After curing some hides are "fleshed" (i.e., stripped of flesh and fat). Fleshing is not widely done on exported hides.

Hides which have been cured, but not "tanned," are called green hides. Hides destined for export are protected by adding a layer of safety salt to each hide at the place of purchase, usually the packing house. Thus cured hides which are exported are known as "green salted hides."

Most of the hides are exported by shippers who act as "brokers" and purchase lots of hides at packing houses from collectors of hides or from other brokers (hereafter, the supplier). A lot is purchased only after an order is received or a contract is made with the foreign buyer. Normally, these brokers do not physically handle the hides or even have facilities for their receipt or storage.

There are currently on file with the Commission 242 outbound tariffs containing commodity rates on green salted hides. Of this number 167 are silent as to what weight is to be employed in the assessment of ocean freight charges, but in practice are interpreted to mean that the shipping weight is considered as the gross weight of the shipment at the time the shipment is delivered to the water carrier. Sixty-four other tariffs contain a general rule adopting this method of determining the shipping weight. The remaining 11 tariffs require the weights to be those reflected on the dock receipts of the connecting rail or motor carriers, some giving the shipper the option of reweighing the goods before shipment and attaching a certified weight certificate to the bills

of lading. It is significant that in practice the rail or truck delivery weights are based upon either the packing house scale weight or upon a reweighing of the shipments by the connecting carrier.

Overland tariffs do not contain provisions stating explicitly what weight is to be shown as the ocean shipping weight. They do, however, contain a provision that an inland bill of lading must be furnished to the water carrier. This latter provision has been interpreted by shippers and possibly some carriers as requiring the shipping weight to coincide with that shown on the inland bill of lading.

With the exception of the 11 tariffs containing special weight rules, and possibly the overland tariffs, all tariffs provide or are popularly interpreted as providing that the shipping weight shall be the gross weight at the time the hides are delivered to the water carrier. Ascertaining the gross weight of hides at the particular time of delivery to the water carrier constitutes the critical problem in this proceeding.

The difficulty of determining the gross weight of hides at the time of delivery to the water carrier is due principally to two factors: (1) The tendency of green hides to lose weight continuously from the time of curing at the packing house to the time of tanning and (2) the absence of reliable evidence as to the amount of weight loss from the time of curing to the time of delivery to the water carrier.

Weight loss characteristics of hides

Hides lose weight because of many varied factors—time, type of cure, presence or absence of "fleshing", temperature, amount of handling. In general it appears that hides which are fleshed, brine cured in winter, shipped quickly, and handled little, lose least weight. However, there was no evidence presented at the hearings which would in any way indicate the amount of weight loss which could be attributed to each or any one of the above-mentioned factors.

Present practices in weighing hides

Hides are weighed first at the packing house, usually by employees of the house. The weights are normally not "certified", i.e., made by a weighmaster licensed by the State who pays an annual fee for his certificate. Hides are reweighed by inland carriers to insure that the declared shipper weights are accurate. These weights are not certified. Rail cars and trucks are weighed loaded, and hide weights are determined by subtracting the weight of an empty rail car or truck from the resultant. Estimations of weight of empty inland transportation vehicles is somewhat arbitrary, allowances not being made for loss of weight due to wear or increase due to collection of waste materials. Usually land carriers employ (absent a sizable discrepancy between the two weight measurements) the scale weights

taken at the packing house as supplied by the shipper. Hides are often reweighed at oversea port of discharge.

The only positive way of determining the gross weight of hides when they are tendered to the water carrier is to weigh them at that time. Hides are not weighed at the U.S. ports of loading. There are two possible methods of determining weight of hides at the time of delivery to the water carrier, neither of which is used, and each of which has disadvantages making it impracticable to use. The first alternative, that of weighing hides on individual pallets, is almost prohibitive in cost, while the second method, that of weighing the hides while loaded on the delivering truck or rail car, although less costly, has the disadvantage of inaccuracy in weight due to the need to subtract the weight of the vehicle, noted above in reference to weighing by the inland carrier upon receipt of the hides. There is the further disadvantage of an inaccuracy caused by the additional loss in weight during the time of transfer from inland carrier to water carrier, which may be considerable as the nearest truck scale is often miles across the city from the loading pier. With the exception of a few spot checks made by Bissinger, a shipper who testified at the hearing, all witnesses testified that they never had occasion to weigh hides at the ports. It must be concluded that there is no reliable and probative evidence concerning the amount of weight lost by green salted hides from the time that they are weighed at the packing house until the time when they are tendered to the ocean carrier.

Present methods of declaring shipping weight and their disadvantages

Several methods have been evolved by the shippers and carriers for declaring shipping weights:

1. *Gross weight (scale weight rule)*

This is the scale weight at the time of weighing at the packing house or receipt by inland carrier. (As noted above, the packing house weight is usually adopted by the inland carrier.) Shippers unanimously object to such a procedure as in practice, due to the weight loss characteristics of green hides, it requires them to pay shipping charges for weight which they do not ship.

2. *Scale-deduction procedure*

Perhaps because of the inequity to the shipper of forcing him to adopt a scale weight rule, many carriers have acquiesced in other methods by which weights may be declared to make some allowance for weight loss in transit from packing house to dockside.

(a) *Net weight*—One shipper on the West Coast, Marubeni-Iida (America) Inc., intervenor in this proceeding, employs the net weight shown on its suppliers' invoices as the

declared shipping weight. The supplier net weight is the gross scale weight taken at the packing house from which allowances for tare and salt have been deducted. These allowances on the West Coast are normally two pounds for tare and 1½–2 pounds for salt per hide for salt cured hides and 1 pound for tare and 1 pound for salt per hide for brine cured hides.

(b) *Gross weight minus standard deduction*—The other West Coast shipper who testified in this proceeding, Bissinger & Co., utilizes the gross scale weight after curing, minus a standard deduction of 2 pounds for salt cured hides and 1 pound for brine cured hides made at dockside at the time of loading on the water carrier. Bissinger's deduction from scale weight is one-half that taken by its competitor, Marubeni. Bissinger not only exports hides but also is a major curer of hides, and at times acts as a supplier to Marubeni.

(c) *Sales contract weight*—Several of the major exporters on the Atlantic Coast utilize a method of declaring shipping weights which is based upon commercial considerations. A "commercial tolerance" of approximately 5% is allowed between the net weight shipped and the net weight received. Any greater discrepancy between these weights results in monetary adjustments between shippers and buyers. Thus weights are stated so as not to exceed the commercial tolerance. The stated weights bear no fixed relationship to scale weights or to the weights of the hides at the time they are tendered to the ocean carriers.

CONCLUSIONS

Our investigation shows that the present method of declaring shipping weights for export purposes on green salted hides is not sufficiently set forth in carrier tariffs nor uniformly applied as is necessary to comply with the Shipping Act, 1916:

(a) Only a minimal number of the tariffs contain rules or regulations sufficiently explicit as to the manner of declaring shipping weights on green salted hides. The need for correcting and clarifying this situation is obvious. As a minimum, all carriers should clearly and fully state in their tariffs the manner in which they require shipping weights to be declared.

(b) The present methods of stating weights vary from shipper to shipper. Clearly, all carriers should be required to treat equally all their shippers similarly situated by insuring a uniform method of declaring shipping weights. Fair and nondiscrimina-

tory treatment is fundamental to common carriage and is required by the Shipping Act, 1916.

Proposed rule

It would, of course, be desirable for us to promulgate a shipping weight rule containing a formula for weight determination which would accurately reflect the "weight shipped," i.e., the weight of the hides at the time they are delivered to the ocean carrier. Each of the methods presently used to state shipping weights has its faults. The use of the scale weight rule results in the overstatement of weight and forces the shipper to pay for weight not shipped. Because we lack information as to the amount of weight loss between the time of weighing at the packing house and time of delivery to the water carrier, we are unable to adopt any of the scale deduction procedures used by the carriers. There is insufficient evidence in the record to permit an order in this respect.

Therefore, we propose the following rule, allowing carriers to adopt, as long as uniformly applied to all similarly situated shippers and clearly stated in their tariffs, at their election, a scale or a scale-deduction rule:

> In order to insure a uniform method of declaring shipping weights on greeen salted hides for export in the foreign commerce of the United States, all water carriers having commodity rates on green salted hides shall file with the Federal Maritime Commission within 30 days amendments to their tariffs setting forth tariff rules which require that the shipping weight for purposes of assessing transportation charges shall be either a scale weight or a scale weight minus a deduction whose amount and method of computation are specified in said tariff rule.

We do not mean to imply that shippers and carriers should forego attempts to discover the most accurate possible method of stating shipping weights. Weight rules may be revised at any time more clearly to reflect actual weights shipped and will, of course, be acceptable to us if they are uniformly applied to all shippers. The present situation in the green hides trade, however, requires that, in fairness to carriers and shippers alike, means be found clearly to set forth weight rules in a nondiscriminatory fashion.

Additional features of the proposed rule

Each of the alternative proposals discussed above depends upon the use of a weight shown on the scaling certificate or dock receipt in the determination of the shipping weight. The furnishing of a scaling certificate or dock receipt appears to be a logical, simple way for the carrier to verify that the proper weight is being used. Additionally,

if the scaling certificate or dock receipt is attached to the bill of lading and remains in the carriers' files for a reasonable period of time, it would permit us to verify that uniformly determined and otherwise lawful weights are being employed as shipping weights.

An exception to a rule requiring that each shipment be backed by a scaling certificate or dock receipt showing the weight of such shipment, should be made in the case of purchase lots split by the shipper-exporter for separate shipment. In such case it appears reasonable to permit the furnishing of a scaling certificate showing the total weight of the lot purchased; the shipping weight would then be computed based on the average weight per hide of the total lot. (If the purchase lot is split by the supplier or at the supplier's plant on the order of the shipper-exporter, the split lot exception would not apply, and a separate weighing certificate would be required for each shipment.) The split lot exception is justified because it frees the shipper from the uneconomical cost of individual reweighing which would otherwise exist.

The principal problem with respect to furnishing a scaling certificate is whether it must be certified. Our proposed rule allows shippers to furnish either a certified or an uncertified scaling certificate, provided that the latter is attested to by the shippers' supplier.

The practical effect of this rule is to permit the use of the scaling certificate produced at the packing house, which, as noted above, is not usually certified. The cost of providing a certified weighmaster at the packing house is prohibited for either the packing house or the buyer-exporter. If a certification requirement were adopted which rendered the packing house weighing certificate unacceptable, the shipper-exporter would be charged the cost of having his shipment reweighed by a "certified weighmaster." The reliability of uncertified weight certificates is supported by the fact that they normally are prepared by a party not privy to the transportation of the hides (i.e., an employee of the packing house), and further they are normally accepted by rail and motor carriers as the basis for the assessment of transportation charges and the preparation of dock receipts. In addition, a refusal of the part of the carrier to accept uncertified certificates may possibly involve unjust discrimination. Those shipments which move via commercial carrier, except where the minimum carload or truckload rate precludes the use of actual shipping weights, would have a usable dock receipt. Shipments which are transported by private means would be placed at a disadvantage by the nonrecognition of noncertified packing scale weights. Privately conveyed shipments would be impressed with the expense of securing a certified weighing certificate which shipments conveyed by public carriers could avoid.

The following proposed rule will be published in the Federal Register, allowing all interested persons an opportunity to make comments thereon:

In order to insure a uniform method of declaring shipping weights on green salted hides for export in the foreign commerce of the United States, all water carriers having commodity rates on green salted hides shall file with the Federal Maritime Commission within 30 days amendments to their tariffs setting forth tariff rules which require that the shipping weight for purposes of assessing transportation charges shall be either a scale weight or a scale weight minus a deduction whose amount and method of computation are specified in said tariff rule.

The tariff rules shall further require that the shippers furnish to the carrier a weighing certificate or dock receipt from an inland carrier for each shipment of green salted hides at or before the time the shipment is tendered to the ocean carrier. The weighing certificate, if furnished, shall either be certified or attested by the signature of the shipper's supplier of the hides. For purchase lots which are split by the shipper after purchase into two or more shipments, a weighing certificate covering the entire purchase lot may be provided, and the shipping weight shall be determined from a computation of the average weight of the hides in said purchase lot.

FEDERAL MARITIME COMMISSION

No. 1090

GENERAL INVESTIGATION INTO COMMON CARRIER FREIGHT RATES AND PRACTICES IN THE FLORIDA/PUERTO RICO TRADE

ORDER

These proceedings having been instituted by the Commission upon its own motion, and the Commission having completed its investigation of the matters involved insofar as possible on the present record, and having this date made and entered a Report stating its findings and conclusions, which report is made a part hereof by reference:

It is ordered: That this proceeding be and it is hereby discontinued as to respondents Motorships of Puerto Rico, Inc., Sea-Land Service, Inc., Puerto Rican Division (without effect upon the investigation of Sea-Land's rates and practices in Docket 1143), and TMT Trailer Ferry, Inc., C. Gordon Anderson, Trustee;

It is further ordered, That respondent South Atlantic & Caribbean Line, Inc., shall amend promptly its tariff to clarify the rates and charges on the movement of personal effects in automobiles and on the movement of trailers when respondent utilizes the inside cargo space, that respondent conform its conduct to the tariff as so modified by assessing and collecting the tariff rates and charges;

It is further ordered, That respondent South Atlantic & Caribbean Line, Inc., shall file with the Commission for the 12-month period beginning with the month of January 1964, monthly financial reports reflecting the results of operations during each month, that such reports shall contain a detailed statement of operating revenues and other income items, operating expenses (including a reasonable allocation of overhead of the related China Foundation Companies to respondent), with balance transferred to profit and loss, and a detailed statement of revenues and expenses of individual voyages included in the accounts for the month, including data showing the number of tons of cargo carried and the number of voyage days, that the books of entry upon which the financial reports are based shall be made available to the Commission's staff for the purpose of auditing said monthly reports, and that said respondent shall furnish such additional information as the staff or the Commission deems necessary for a proper evaluation of the reports.

By the Commission, January 21, 1964.

(Signed) THOMAS LISI,

FEDERAL MARITIME COMMISSION

No. 1105

AGREEMENT 7700–6—PERSIAN GULF OUTWARD FREIGHT CONFERENCE

No. 1105 (SUB. 1)

AGREEMENT NO. 8900—RATE AGREEMENT

UNITED STATES/PERSIAN GULF TRADE

Proposed modifications to conference agreement approved under section 15, Shipping Act, 1916. Modifications include establishment of $2,500 fee for admission payable by new members; amendments to clause covering damages for breach; increase of security deposit from $15,000 to $25,000; and requirements for reporting violations.

Elmer C. Maddy and *Paul F. McGuire* for respondents in Docket 1105, interveners in Docket 1105 (Sub. 1).

Stanley O. Sher for Hellenic Lines, Nedlloyd Line, Hansa Line, and Crescent Line, respondents in Docket 1105 (Sub. 1).

Thomas K. Roche and *Sanford C. Miller* for Concordia Line, respondent in Docket 1105 (Sub. 1).

J. Scot Provan and *Robert J. Blackwell*, Hearing Counsel.

INITIAL DECISION OF E. ROBERT SEAVER, PRESIDING EXAMINER,[1] ON THE ISSUES IN DOCKET NO. 1105

The Persian Gulf Outward Freight Conference, consisting of Central Gulf Lines, Isthmian Lines, and Stevenson Lines, seeks approval of modifications to its basic conference agreement (Federal Maritime Commission Agreement No. 7700) pursuant to section 15 of the Shipping Act, 1916 (hereinafter called the Act). The proposed modifications, including certain changes made by the conference to the proposed modifications in the course of the hearing, are attached to this decision. Portions sought to be deleted from the existing Agreement 7700 are enclosed in brackets and the new portions are underscored. The proposed modifications have been assigned Federal Maritime Commission Agreement Number 7700–6.

[1] This decision became the decision of the Commission on February 11, 1964, and an order was entered on that date approving Modification 6 to Agreement 7700.

Docket No. 1105 was instituted by the Commission pursuant to sections 15 and 22 of the Act to determine whether the proposed modifications should be approved, disapproved, or modified.[2] Under the terms of section 15, the Commission shall disapprove, cancel or modify any agreement or modification thereof (such as those involved here) if it finds that they will be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States, or to be contrary to the public interest or in violation of the Act. The statute requires the Commission to approve all other agreements of this nature. The agreement under consideration is between common carriers by water, as defined by section 1 of the Act. Its purpose is to fix and regulate transportation rates and control or regulate competition in the outbound trade from United States Atlantic and Gulf ports to ports in the Persian Gulf. It is a typical conference agreement and is subject to section 15 and the jurisdiction of the Commission.

In the course of the hearing, respondents amended their proposals in two respects and thereby eliminated rather strenuous objections raised by Hearing Counsel and others. These will be mentioned briefly at the end of this report just to round out the picture. As matters now stand, there is no objection to the approval of the proposed modifications. Hearing Counsel advised the Examiner, after the hearing, that they recommend approval of the modifications. This absence of dispute does not eliminate the need for discussion and findings under section 15, of course, but these need not be extensive, in these circumstances.

Taking up the proposed modifications in the order in which they appear in the Agreement, the first would add a sentence at the end of Article 10(b) of the Agreement which requires the Secretary of the conferences to report to the conference the findings of any investigation of members conducted under the provisions of that Article. This amendment is intended to strengthen the self-policing system of the conference. It will undoubtedly assist in the accomplishment of this end. It is apparent that the conference should be furnished such reports.

The next amendment is that in Article 10(c), described on page 7, which makes the assessment of damages for breach mandatory rather

[2] On June 4, 1963, the Commission, in initiating Docket No. 1105 (Sub. 1), ordered that that Docket and Docket No. 1105 be consolidated for hearing and decision. The two Dockets were heard together. There being no controversy in Docket No. 1105, no briefs were filed. Briefs will not be filed in 1105 (Sub. 1) until the end of January. That case presents issues of much greater complexity. There is no need to hold up the decision in 1105 until 1105 (Sub. 1) is decided. The evidence revealed that the decisions in each Docket can be made independently of the other. The initial decision in Docket 1105 (Sub. 1) will be issued as a supplement to this decision.

than permissive. Article 10(c) is also amended to change the measure and the amount of damages recoverable in the event of breach by a member. At present the Article merely provides for "a penalty of not more than $15,000 for each violation". The amendment will create a sliding scale of liquidated damages which increases for repeated violations; i.e., not more than: $5,000 for the first offense; $10,000 for the second; $15,000 for the third. This scale applies to breaches not involving a non-observance of the conference tariff. For such rate violations, the new provision provides for liquidated damages in a sum equal to four times the freight that the offending member would have earned had the proper conference rate been charged.

The General Secretary of the conference testified that these amendments to the damages clauses are intended "to augment and clarify and put on a proper and reasonable basis the self-policing by the conference of its members", and that the sliding scale will provide a more reasonable standard since the repeated offender should be subject to a greater assessment than the first offender. The graduated scale should be a deterrent to repeated violations. This conference has never assessed damages against a member. Reports or rumors of violations have been received by the conference but they were not substantiated. The conference Secretary, and apparently the members, feel that the indications that violations have occurred in the past are sufficiently strong to justify the strengthening of the sanctions. He felt that, "Where there is smoke there is fire." The conference hopes by these amendments, and by increased surveillance, to discourage violations and strengthen the self-policing system. Another persuasive reason given for the amendment to base the amount of damages for rate cutting on the amount of the freight is the fact that the damage to the conference varies proprotionately with the amount of the freight chargeable under the conference tariff. The revised provisions on the amount of and the measure of damages are not out of line with those employed by other conferences, as shown on an exhibit provided by Hearing Counsel.

Article 10(c) is further modified by the Conference to:

1. Increase the security deposit to guarantee the faithful performance of obligations under the agreement from $15,000 to $25,000.

2. Make this deposit available to the conference for payment of the member's share of the conference expenses for the current year if he resigns from the conference.

3. Require the Secretary to submit to the Federal Maritime Commission full and complete reports concerning "all complaints, disputes, and matters presented to, and all actions taken by, the Conference Secretary, the Member Lines and/or the Arbitrators."

The last reference has to do with the arbitration clause which is contained in Agreement 7700.

4. Provide that the records of the Conference, the Secretary, and Arbitrators appointed under the terms of the Agreement shall be available for inspection by the Commission.

5. Provide that "Nothing contained in the Agreement shall interfere with the rights of a Member Line under the provisions of the Shipping Act, 1916, as amended, nor the jurisdiction of the Federal Maritime Commission * * *."

The last of the modifications (Article 14(a)) provides for an initiation or admission fee of $2,500 to be paid by new members, who "shall share in the expense of maintaining the conference as may be agreed." Agreement No. 7700 does not presently provide for payment of an initiation fee. This last amendment requires special comment because, at first blush, it might be considered to be at odds with the decision of the United States Maritime Commission in *Pacific Coast European Conference Agreement*, 3 U.S.M.C. 11 (1948), where the Commission disapproved a proposed increase in the admission fee from $250 to $5,000. The decision seems to be based in part on a conclusion that it would be unjustly discriminatory to charge new members a $5,000 admission fee where the old members paid only $250. In addition, the Commission found that the fee might be a deterrent to a small carrier "entering the trade" and would therefore be a detriment to the commerce of the United States. The deterrent factor was based on "official cognizance", the Commission said. Apparently the record contained no evidence on this point.

The testimony in the case at hand establishes that the $2,500 admission fee would not deter carriers from joining the conference. Considering the change in the value of the dollar since 1948, the fee is appreciably less than that disapproved by the U.S.M.C. The amendment cannot be found to be a detriment to commerce on this score. This case is also distinguishable on another ground. Public Law 87–346 amended section 15 in 1961 by adding a provision that no agreement shall be approved "which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership * * *." Thus we now have a new, or additional, statutory test directed specifically to this matter of admission to membership. The *Pacific Coast European Conference* decision was based on the general tests of unjust discrimination and detriment to commerce. What does the new test mean when it requires that new members be admitted on reasonable and equal terms and conditions?

The Committee on Merchant Marine and Fisheries of the House of Representatives attached to its report on the Bill that became Public Law 87–346 a letter from the Secretary of Commerce which states

(Report No. 498, 87th Congress, 1st Session, page 19; Page 130 of Index of Legislative History of the Steamship Conference/Dual Rate Law, Document No. 100, 87th Congress, 2nd Session):

> At page 5, line 2, we recommend that the phrase following the numeral 5 be stricken, and the following language substituted therefor: "fails to provide reasonable terms and conditions for the admission of all other qualified carriers in the trade." We are fully in accord with the intent of this provision that all conferences be open to all carriers; however, we believe that once a conference is established, the members should be permitted to impose some reasonable terms for the admission of *other* carriers, including, for example, the payment of a reasonable membership fee to help defray the costs of the conference.[3] (Italic added.)

The marked-up Bill attached to the Committee Report includes the language proposed by the Secretary of Commerce, with slight change.[4] It must be concluded that the Committee and Congress accepted this recommendation and that Congress therefore did not intend to prohibit the establishment of a reasonable membership fee to be paid by new members but not by existing members. The purpose of the conference in this case is precisely that cited by the Secretary of Commerce. The conference Secretary testified that a new member gets the pro rata benefit and ownership of an asset belonging to the conference which consists of the going concern value or "equity" that has been built up over the years by the conference members who paid their shares of the expenses of the organization. The amount here cannot be found to be unreasonable in all the circumstances. In 1962 alone, when there were only two members, the administrative costs were $20,398.04. A compilation submitted by Hearing Counsel at the Examiner's request shows that eleven other conferences charge admission fees in this same amount. None have higher admission fees; fifty-eight do not charge an admission fee; the remaining thirty-two have admission fees ranging from $100 to $1,250.

The same compilation also lends support to the proposed increase in the amount of the security deposit from $15,000 to $25,000. Five conferences require a deposit of $50,000 and six others provide for a $25,000 deposit. As in the case of the admission fee, the testimony established that the requirement of a $25,000 deposit (which can be made in currency, U.S. bonds, surety bond, or letter of credit) would not deter an ocean carrier from joining the conference. There was no evidence to the contrary. The testimony of the officials of the member lines makes it very clear that they do not wish to exclude from the conference the five independent carriers that operate in this trade

[3] The phrase following numeral 5 on page 5, line 2, of H.R. 4299, referred to by the Secretary, would have required the admission of "every qualified carrier in the trade * * * on application." See p. 61 of Index to Legislative History.

[4] Apparently no significance should be attached to the Committee's addition of the word "equal" after "reasonable", in this context, because Agreement 7700-6 provides for equal treatment of all new members. See p. 151 of Index.

and who are seeking approval of a separate rate making agreement in Docket No. 1105 (Sub. 1). It appears that such an increase would do little more than keep pace with the decrease in the buying power of the dollar since 1945, when the Agreement was originally adopted. This provision, which is intended to strengthen the self-policing program of the conference, is quite in keeping with the Congressional policy expressed in the 1961 amendment to section 15 (P.L. 87–346), which requires that the Commission shall disapprove an agreement upon a finding of inadequate policing of the obligations under it. This same consideration lends support to most of the other proposed modifications, for they too are aimed at self-policing. The other modifications do not require special discussion as they are self-explanatory. There is nothing that suggests that any of them would violate the provisions of the Act.

As originally submitted, the proposed modifications would have included an amendment to the voting procedure of the conference whereby decisions of the conference would require unanimous agreement, rather than the vote of a majority of the members. This proposal was withdrawn by the conference prior to the hearing and, with this change, the only objection to the modifications voiced by shippers was eliminated. The non-conference carriers in this trade have also objected to the unanimous voting rule. With the withdrawal of the proposed rule, their objection to the proposed modifications has been satisfied.

Hearing Counsel questioned the legality of Article 10(c), as it was sought to be amended, insofar as it would leave to the discretion of the conference the assessment of damages if one of the members breached the agreement. The Article would have provided, "The Conference may assess against any party to this Agreement which it regards to have violated this Agreement damages as hereinafter provided for each violation of this Agreement by such party." The conference eliminated this problem by changing the word "may" to "shall", during the course of the hearing. This change makes the assessment of damages mandatory. It strengthens the self-policing element of the contract and diminishes the chance of discriminatory treatment of members. With this change, Hearing Counsel are satisfied with all the proposed modifications.

It is concluded that the proposed modifications will not violate any of the provisions of section 15 of the Shipping Act, 1916 and they are therefore approved in accordance with that section. An appropriate order will be entered.

(Signed) E. ROBERT SEAVER,
Presiding Examiner.

January 13, 1964.

APPENDIX

F.M.C. Agreement No. 7700–6

The undersigned parties to Agreement No. 7700, as amended, hereby agree that said Agreement shall be modified to read as follows:

1. Article 10(b) is amended to read:

The Secretary shall have access to such records in the offices and on the piers of the parties hereto, the inspection of which by him shall be reasonably necessary to enable him to determine that the members of the Conference are respectively abiding by the terms and provisions of this Agreement, and the right to make such copies of, and extracts and transcripts from, such records as he may determine advisable, and each of the parties hereto agrees to furnish to the Secretary, or to such persons as he may designate for said purpose, such access and such right; any information so acquired shall not be used in violation of Section 20 of the Shipping Act, 1916, as amended. *The Secretary shall report the finding of any investigation under this Article to the Conference.*

2. Article 10(c) is amended to read:

The Conference [may] *shall* assess against any party to this Agreement which it regards to have violated this Agreement [a penalty of not more than $15,000 for each violation of this Agreement by such party.] *damages as hereinafter provided for each violation of this Agreeemnt by such party.* Such assessment shall be by unanimous vote of Member Lines entitled to vote, except that the party charged with any violation shall not be entitled to vote thereon. The amounts assessed and collected hereunder shall be placed in the Conference treasury.

In view of the difficulty or impossibility of determining the damages, which may result from breach or violation of this Agreement, or any of the Rules, Regulations or Tariffs of the Conference, by any one of the members hereof, it is hereby agreed as follows:

Where the breach or violation is a non-observance of the tariffs of the Conference, or any of the Rates or Charges therein contained, such damage for such breach shall be and hereby is liquidated in a sum equal to four times the freight and other monies which the offending party shall or would have received had the applicable Tariff Rates for transportation of the cargo involved been applied; and

Where the breach or violation is a non-observance of this Agreement (including Rules and Regulations), such damage shall be the sum of not more than $5,000 for the first offense; $10,000 for the second offense; and $15,000 for the third or subsequent offense.

If any party against whom any such [*penalty had*] *damages have* been assessed is dissatisfied with the assessment of such [penalty] *damages*, it may refer the question of breach of this Agreement or the amount of [penalty] *damages* assessed to three arbitrators to be nominated within 30 days from the day on which the party charged gives written notice of its desire for arbitration but it shall have the burden of proof of its position. One arbitrator shall be

nominated by a majority of the parties hereto (except the party or parties charged with the violation), one by the party charged, and the third to be appointed in agreement with the arbitrators so nominated and failing agreement by the American Arbitration Association. The arbitrators so chosen shall, after hearing both parties, make their award in writing and the decision of the arbitrators or any two of them shall be final and binding without right of appeal by either party.

As a guarantee of faithful performance of obligation under this Agreement and or prompt payment of any [penalties] *damages* against it hereunder or any judgment written against them hereunder, each of the parties hereto agrees to deposit with the Conference security in the sum of [Fifteen thousand dollars ($15,000)] *Twenty-five thousand dollars ($25,000)* in United States currency or in United States Government bonds or irrevocable Letter of Credit or a Surety Bond of like amount satisfactory to the Conference. Any interest accruing on funds or bonds deposited shall be for the account of the party making such deposit and shall be remitted promptly to such party when received by the Conference. Each of the parties further agrees to deposit additional cash or security as required so as to constantly maintain the deposit at the amount herein above specified. Such deposit or the proceeds thereof may be applied to the payment of any damages imposed under this Article 10 unless otherwise fully paid or previously satisfied. In the event of the termination of this Agreement or the termination of membership or withdrawal of any of the parties hereto, the deposit made by the parties concerned shall be returned to them together with any accrued interest in the possession of the Conference, but only after any indebtedness to the Conference has been fully satisfied, *including paying their share of Conference expenses for the current calendar year in which the resignation takes place.*

The Conference Secretary shall submit promptly to the Federal Maritime Commission full and complete reports, including all material facts relating thereto, of all complaints, disputes and matters presented to, and all actions taken by, the Conference Secretary, the Member Lines and/or the Arbitrators

All records of the Conference Secretary, the Conference, and Arbitrators with respect to the provisions of the above requirements, shall be available for inspection by the Commission or its representatives.

Nothing contained in the Agreement shall interfere with the rights of a Member Line under the provisions of the Shipping Act, 1916, as amended, nor the jurisdiction of the Federal Maritime Commission under said Act, or any other appropriate Federal Laws.

3. Article 14(a) is amended by adding the following sentence at the end thereof:

All new Members shall contribute to the general fund of the Conference office the sum of Two thousand five hundred dollars ($2,500) and shall share in the expense of maintaining the Conference as may be agreed.

This Agreement is subject to the approval of the Federal Maritime Commission in accordance with the provisions of the Shipping Act

1916, as amended, and shall not be carried out in whole or in part prior to such approval.

Dated at New York, New York, November 7, 1963.

CENTRAL GULF LINES, (As one member or party only.)
Central Gulf Steamship Corporation,
General Shipping & Trading Corporation,
Compania Maritima Unidas, S.A.

By /s/ N. W. JOHNSEN, *Vice President.*

ISTHMIAN LINES, INC.

By /s/ A. E. KING.

STEVENSON LINES, T. J. STEVENSON & CO., INC.

By /s/ MANUEL DIAZ, *Vice President.*

775-794 O-65-47

FEDERAL MARITIME COMMISSION

No. 1130

MARTIN BIRNBACH

v.

LA FLOR DE MAYO EXPRESS COMPANY

Respondent freight forwarder not shown to have violated section 17 or 18 of the Shipping Act, 1916, in connection with a shipment from Puerto Rico to Lincoln, Nebr.

Martin Birnbach for complainant.
Frank Hernandez for respondent.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER [1]

Complainant Martin Birnbach seeks to recover reparation from respondent La Flor de Mayo Express Co., for alleged violations of sections 17 and 18 of the Shipping Act, 1916 (the Act) in connection with a shipment of household goods from Puerto Rico to New York and thence to Lincoln, Nebr. Complainant further seeks the issuance of an order requiring respondent to cease and desist from violating said sections of the Act.

Complainant failed to appear at the Commission's Hearing Room in Washington, D.C. on November 19, 1963, the time and place set for the hearing, although due notice had been issued on October 28, 1963 and duly served on him. The parties are not represented by counsel and the pleadings are less than artful. To afford both parties full opportunity to present their case, and other good cause appearing, a ruling was served on both parties on December 18, 1963, which permitted either party to request further hearing, present written statements in lieu of oral testimony, or to file such additional pleadings as they might deem necessary or appropriate; that in the absence of further action by either party on or before January 6, 1963, the recitals of the complaint and answer not denied by the adverse party

[1] This decision became the decision of the Commission on February 13, 1964, and an order was entered dismissing the complaint.

would be considered as evidence.[2] Further action was not taken by either party and they have therefore acquiesced to the submission of the issues on the factual basis stated in the ruling.

The complaint and answer, together with the documents submitted by the parties as a part thereof, disclose the following facts:

1. Complainant is an individual, now residing at 996 Franquette Avenue, San Jose, Calif.

2. Respondent carries on the business of forwarding in connection with a common carrier by water and has offices at 1679 Calle Nueva, Santurce, Puerto Rico, and 571 Jackson Avenue, Bronx 55, N.Y.

3. Complainant engaged respondent to handle a shipment of household goods from Rio Pedras, Puerto Rico to New York and thence to Lincoln, Nebr.

4. On or about September 13, 1961, respondent went to complainant's home in Rio Piedras and in cartons furnished by it, packed the household goods which it delivered to the pier at San Jose, Puerto Rico. At San Jose, the shipment was consolidated in a steel van with other shipments being handled by respondent for carriage to New York via Bull Steamship Co. vessel. When the goods arrived in New York, respondent delivered complainant's household goods to Joy Van and Storage Co. (land carrier) for carriage to Lincoln, Nebraska.

5. In connection with its services, respondent billed complainant as follows:

Ocean freight, 80 cu. ft. at 0.66 per cu. ft	$52.80
Landing charges	5.00
Pick up in Puerto Rico	24.00
Delivery to pier	10.00
Handling paper work in connection with shipment	3.20
Pier pick up in New York	20.00
Labor and handling shipment to express line	10.00
Insurance	20.00
	145.00

On September 29, 1961, complainant wrote respondent and enclosed a check for $75 with the advice that the balance "which is to be paid to you or to another company you name" would be paid upon receipt of the goods. Complainant further requested notification of the name of the "shipper who is to receive our goods in Lincoln"

[2] Rule 1(l) of the Commission's Rules of Practice and Procedure (46 CFR 502.9) provides: "Also, any rule may be waived by the Board or the presiding officer to prevent undue hardship in any particular case." The ruling, in affording complainant an opportunity to reply to the answer, was a waiver of Rule 5(f) (46 CFR 502.66) which provides that replies will not be permitted, and a further waiver of that portion of the rule which states that new matter in the answer will be deemed to be controverted.

and that the bills of lading and other documents needed to claim the goods be forwarded.

7. On October 20, 1961, complainant dispatched a telegram to respondent's Puerto Rican address stating: "Need baggage badly. Where is it."

8. On October 25, 1961, the shipment arrived at Lincoln, Nebr. and Joy Van and Storage Company notified complainant that the goods were available upon payment of charges. Complainant, although he had advised respondent of the need for prompt delivery, was unable to accept the goods as the charges turned out to be substantially greater than estimated by respondent.

9. Total charges for the shipment amounted to $338. In addition thereto, the land carrier assessed $65.88 in connection with the holding the goods pending complainant's ability to accept it.

10. Complainant consulted the Lincoln office of the Interstate Commerce Commission and was advised that such agency could take no action beyond requesting the land carrier to hold the money paid to it by complainant pending action by some other agency.

11. Respondent did not furnish complainant with an ocean freight bill or bill of lading.

In support of his claim for reparation in the amount of $129.13, complainant contends that the charge of $65.88 assessed by the land carrier in connection with the delay pending complainant's ability to receive the shipment, was unjust and unreasonable and the result of failure of respondent or the land carrier to give proper notice of arrival of the shipment; that the ocean freight charge of $52.80 was based on a measurement of 80 cubic feet although the shipment actually measured only 65 cubic feet; that the charges for landing fees, pick-up and delivery were not only unjust and unreasonable but duplicated each other. Respondent, in its answer, denies these allegations and further denies responsibility for charges in connection with the land shipment. Respondent's statement in its answer that its charges were "extremely reasonable in view of the services performed," is considered in the nature of a denial of complainant's allegations rather than presentation of new matter. Consideration of any portion of respondent's answer which may be deemed "new matter" is not essential to this decision.

Complainant has failed to present evidence to overcome respondent's denial of responsibility for charges in connection with the land shipments which charges, in the absence of proof to the contrary, are deemed to be the sole responsibility of the land carrier, a person not a party to this proceeding nor subject to the jurisdiction of the Federal Maritime Commission. The charges assessed by respondent in connection with the shipment from packing to delivery to the land

carrier in New York, are not per se unjust or unreasonable or in violation of section 17 or 18 of the Act and complainant has failed to prove, although in view of the denial the burden is on him to do so, that such charges were unjust, unreasonable or duplicative. There is no evidence upon which to base a finding that complainant is entitled to reparation.

Complainant further alleges that respondent has not filed a tariff or schedule of rates approved by the Federal Maritime Commission "or any other agency." The Commission is asked to issue an order requiring respondent to cease and desist unlawful practices and "to put in force and apply in the future such other rates and charges as the Commission may determine to be lawful." Section 18 of the Act requires a common carrier by water to file its rates and charges in connection with transportation by water. Complainant does not allege that respondent is a common carrier by water, only that respondent is a forwarder in connection with a common carrier by water. To determine in this proceeding whether or not respondent is a common carrier by water subject to section 18 would be to extend this proceeding beyond the scope of complainant's allegations. Even assuming that respondent, at the time of complainant's shipment, had been required, but failed, to file a tariff as a common carrier by water, complainant has failed to prove he was damaged thereby or entitled to reparation. Moreover, evidence has not been produced in this proceeding to support the issuance of a cease and desist order. This report will serve to put the Commission on notice of the allegations relating to respondent's violations of the Act and it is presumed the Commission will make such investigation as may be considered necessary.

An order dismissing the complaint will be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

JANUARY 16, 1964.

FEDERAL MARITIME COMMISSION

No. 805

PARSONS & WHITTEMORE, INC.

v.

REDERIAKTIEBOLAGET NORDSTJERNAN (JOHNSON LINE)

No. 809

PARSONS & WHITTEMORE, INC.

v.

COMPAGNIE GENERALE TRANSATLANTIQUE (FRENCH LINE)

No. 810

PARSONS & WHITTEMORE, INC.

v.

THE BLUE STAR LINE LTD. (BLUE STAR LINE)

No. 811

PARSONS & WHITTEMORE, INC.

v.

FURNESS WITHY & CO. LTD. (FURNESS LINE)

No. 812

PARSONS & WHITTEMORE, INC.

v.

WESTFAL-LARSEN & CO. A/S (INTEROCEAN LINE)

No. 813

PARSONS & WHITTEMORE, INC.

v.

FRED OLSEN & CO. (FRED OLSEN LINE)

Decided February 4, 1964

The Shippers' Rate Agreement of the Pacific Coast European Conference was never approved under section 15, Shipping Act, 1916, and therefore was unlawful at the time of the shipments involved here.

Complainant found to have evaded its obligations under the Shippers' Rate Agreement by using a subsidiary to ship cargo on nonconference vessels.

The authority to award reparations under section 22 of the Act is discretionary. Here the record shows that it would be inequitable under all the circumstances to grant reparations, and reparations are accordingly denied.

Francis T. Greene for complainant.
Leondard G. James and *Robert L. Harmon* for respondents.
E. Robert Seaver, Hearing Examiner.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Thos. E. Stakem, *Vice Chairman;* Ashton C. Barrett, James V. Day, *Commissioners*):

These consolidated proceedings arise out of complaints filed by Parsons & Whittemore, Inc. (P & W) on December 14, 1956 and January 28, 1957,[1] seeking reparation for alleged violations of sections 14, 16, and 17 of the Shipping Act, 1916 (the Act) by respondents, all of whom are members of the Pacific Coast European Conference (the Conference). Respondents are alleged to have made unlawful overcharges with respect to certain lumber shipments of P & W.

FACTS

The basic factual situation out of which these proceedings arose was found to be substantially as follows by the Examiner.

P & W was signatory to the Conference's Shippers' Rate Agreement. Lyddon and Co. (America) Inc. (Lyddon), a wholly owned subsidiary

[1] Because these proceedings involved rights and obligations under a dual rate contract our predecessor, the Federal Maritime Board, on February 11, 1957, issued an order staying the proceedings pending decision of the United States Supreme Court in *Isbrandtsen Co., Inc.* v. *U.S.*, 239 F. 2d 933 (D. C. Cir 1956), aff'd. 356 U.S. 481 (1958).

of P & W, was not a signatory to a Shippers' Rate Agreement, and the agreement between P & W and the Conference did not cover any P & W subsidiaries. It did, however, provide that:

> In agreeing to so confine the carriage of its (their) shipments to the vessels of the Carriers the Shipper hereby promises and declares it is the intent and purpose to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or subsidiaries.

On September 3, 1954, 3300 short tons of woodpulp were shipped from Everett, Washington, to Glasgow, Scotland, on the *M.S. Ferm* of Paul Wilson Company, Bergen, Norway, a nonconference carrier. The bill of lading for the shipment shows the shipper as Lyddon. The export declaration and the cargo insurance policy also show Lyddon as shipper. On July 11, 1954, 962 short tons of woodpulp were shipped from Tacoma to London on the *Asakasan Maru* of the Mitsui Steamship Company, a carrier which at that time was not a member of the Conference. The bill of lading and export declaration show Massachusetts Trading Corporation as the shipper. The cargo insurance policy, however, showed Lyddon as the beneficiary. Massachusetts Trading Corporation was an inactive corporation all of whose shares were owned by the ex-wife of one Karl F. Landegger, President of both P & W and Lyddon. On August 17, 1954, 450 tons of woodpulp were shipped on the Mitsui vessel *Awobasan Maru* from Tacoma to Rotterdam. The shipping documents on this shipment were also in the name of Massachusetts Trading Corporation as shipper. The cargo insurance policy, however, showed Lyddon as the beneficiary. The woodpulp shipped on the nonconference vessels, as described above, was purchased in the name of Lyddon. Lyddon was named as the beneficiary of the bank letter-of-credit issued for the purchase price of the woodpulp. Collection from the consignees of the woodpulp was made through banking channels, in the name of Lyddon.

On August 10, 1954, the chairman of the Conference wrote P & W inquiring as to whether they had shipped woodpulp on nonconference vessels during July and August. P & W replied by telegram the following day stating, "Shipping arrangements were made outside our control." On August 16, 1954, the Conference chairman, pursuant to article 2 of the Shippers' Rate Agreement, requested that P & W furnish complete information in regard to the shipments carried aboard the *M.S. Ferm* and the *Asakasan Maru*. Again on September 3, the chairman advised Mr. Landegger that the Conference had received information regarding the third shipment of woodpulp on a nonconference vessel (the *Awobasan Maru*) and requested that P & W

supply, with their reply to the previous conference letter, the shipping documents covering all three shipments. On September 8, 1954, Mr. Landegger wrote a letter of reply to the Conference inquiries stating that the business in question was transacted by Lyddon in conjunction with Massachusetts Trading Corporation. The Conference then made a demand for liquidated damages on September 25, 1955, which P & W did not pay. On October 26, 1954, the Conference wired P & W stating "Your right to conference's contract rates under your Shippers' Rate Agreement dated March 5, 1951 terminated effective today October 26, 1954 pursuant articles 1 and 2 of said agreement and all members notified accordingly." Thereafter, P & W made nine shipments from December 18, 1954, to July 31, 1955, at the higher noncontract rates which were paid by P & W under protest. The contract rates charged at that time to other shippers who were allegedly competitors of complainant in the trade for substantially similar transportation services were approximately $3.35 per ton less than the noncontract rates charged complainant. The record does not establish that the difference in the freight rate resulted in the loss of sales by complainant or other economic damage, other than the alleged overpayment of freight.

The Examiner in addition to the above found that the record clearly established the following: [2]

(1) The bales of woodpulp shipped on the nonconference vessels were all marked "P & W", with a stencil, which is the shipping mark of Parsons & Whittemore.

(2) Lyddon had an address which was the same as that of P & W, in Manhattan.

(3) Lyddon did not have its own staff, but its functions were carried out by employees of P & W.

(4) Mr. Karl Landegger was the sole stockholder of P & W, and P & W was the sole stockholder of Lyddon.

(5) Massachusetts Trading Corporation was admittedly used as a "dummy" in two of the transactions here in issue.

(6) Lyddon has not shipped woodpulp in this trade since 1955.

(7) Half of the six customers for woodpulp served by Lyddon in 1954 and 1955 were also customers of P & W during the same period. It therefore appears that they would be willing to accept delivery in the name of either corporation.

(8) The officials of P & W were not only in a position to transact this business and ship the cargo under the name of either corporation,

[2] The numerical categorization of these "findings of fact" does not appear in the Initial Decision. It is used herein for the purpose of highlighting the contentions of the parties on exceptions.

complainant admitted that they elected to use Lyddon or Massachusetts Trading Corporation to obtain the lower freight rates on nonconference carriers "because the woodpulp prices then prevailing in the United States west coast and in the European market as of July, August and September were such that Parsons & Whittemore could not have done the business except at an out-of-pocket loss."

(9) Other than the advantage of lower rates, there were no circumstances connected exclusively with the interest of Lyddon that motivated the use of its name.

(10) P & W had complete control over the shipments, and it follows from the above admission that P & W would have shipped in its own name if the Conference's rate on woodpulp had been lower than that obtainable from any nonconference carriers.

Based on the above findings the Examiner concluded that complainant had violated its Shippers' Rate Agreement by using a subsidiary to evade its contract obligations. He rejected as not persuasive as to the identity of the true shipper, certain evidence which complainant offered in an attempt to show that Lyddon had a separate corporate existence and identity and the shipments in question were in fact Lyddon's shipments.

Having concluded that the shipments were P & W shipments made through Lyddon and Massachusetts Trading Corporation as an "evasion" or "subterfuge" for the purpose of avoiding P & W's obligation under the Shippers' Rate Agreement, the Examiner found that P & W's right to contract rates was properly terminated by respondents and that, contrary to complainant's contention, respondents' requirement that P & W pay the higher noncontract rate was neither retaliation by a discriminatory or unfair means within the meaning of section 14, Third of the Act, nor undue and unreasonable prejudice or disadvantage in violation of section 16, First, nor unjust discrimination under section 17. The Examiner further concluded that neither the clause in the Shippers' Rate Agreement requiring arbitration of disputes between the parties, nor certain suits previously brought by P & W against one of the respondents, served to deprive the Commission of its jurisdiction in these proceedings.

Although there is no substantial dispute over the facts, complainant took exception to the conclusions drawn by the Examiner. Respondents did not file exceptions as such, but in their reply to complainant's exceptions they disagreed with the Examiner's conclusion regarding the effect of the arbitration clause in the Shippers' Rate Agreement. Complainant's exceptions can be placed in two categories. It says the Examiner erred in finding that P & W breached the Shippers' Rate

Agreement by evasion or subterfuge. In addition, it raises for the first time the question of the validity under section 15 of the Act of the Shippers' Rate Agreement. In urging consideration by the Commission of this latter question, P & W relies upon what it contends is a change in the applicable law which took place subsequent to filing of briefs to the Examiner but prior to the filing of exceptions to the Initial Decision. This change in the applicable law was, according to P & W, brought about by the decision of the United States Court of Appeals for the District of Columbia Circuit in *Kempner, et al.* v. *F.M.C.*, 313 F. 2d 586 (1963), which reversed the decision of Federal Maritime Board in Dockets 732–735. In Dockets 732–735, the Board had held that where a dual rate system was in use by a conference and the conference had "filed transcripts of extracts from minutes of its meetings showing adoption of the practice of offering dual rates" and had "filed tariffs showing dual rates," approval of the system and the contract "has been tacit where no action was taken and no order was issued." Moreover, the Board took the position that any infirmities in existing dual rate systems had been cured by the so-called "Moratorium Legislation." [3] P & W contends that it relied upon the Board's decision in Dockets 732–735 in failing to challenge the validity of the Shippers' Rate Agreement in its complaint or before the Examiner.

In overruling the Board, the Court of Appeals in *Kempner*, *supra*, had the following to say in a per curiam opinion:

> The discriminatory rates here involved were not approved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal. We think too, that the Moratorium Act is prospective only and so does not relieve an offender from liability for reparations arising from a violation which occurred prior to its enactment.

The Examiner took cognizance of this development in his Initial Decision and dealt with it as follows:

> The Examiner is not unmindful of the Court of Appeals decision in [*Kempner*], which was decided January 10, 1963, after briefs were submitted in this proceeding. The Court held that the so-called Moratorium Act, Public Law 85–626, 72 Stat. 574 did not protect carriers from liability arising out of actions under unlawful dual rate systems which accrued before the passage of that Act. It is unnecessary to consider this question in this proceeding because the complaint does not question the legality of the particular dual rate system involved here.

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[3] 72 Stat. 574. This statute amended section 14 of the Shipping Act, 1916, by stating that "* * * nothing in this section or elsewhere in this act, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regulatory body administering this Act, unless and until such regulatory body disapproves, cancels or modifies such arrangement in accordance with the standards set forth in section 15 of this Act."

DISCUSSION AND CONCLUSIONS

Respondents argue that consideration of the validity of the Shippers' Rate Agreement is time-barred under section 22 of the Act. That section provides for the filing of a complaint alleging any violation of the Act and states that we may award reparations for the violation "if the complaint is filed within two years after the cause of action accrued." Respondents cite no authority for their position. However, it is beyond dispute that the complaints in these proceedings were filed within the statutory period. Moreover, under the circumstances of this case, we do not think complainant should be foreclosed from urging an additional ground in support of its complaint. It should not be penalized for having relied upon the then applicable precedents of the very agency with which its complaint was filed.

As here presented, the issue over the validity of the Shippers' Rate Agreement resolves itself into the question whether the agreement has ever received the required approval under section 15. When the question was first raised by complainant the Commission requested memoranda from the parties on the following:

1. Prior to the enactment of Public Law 87-346 and for the purpose of the approval required under section 15, was there any valid distinction between approval of a *dual rate system* and approval of a *dual rate contract?*

2. Was the *dual rate system* of the Pacific Coast European Conference ever approved under section 15 by any agency charged with the administration of the Shipping Act, 1916? If so, when and under what circumstances?

3. Was the Shippers' Rate Agreement of the Pacific Coast European Conference ever approved under section 15 by any agency charged with the administration of the Shipping Act, 1916? If so, when and under what circumstances?

The respondents take the position that there is a distinction between a "dual rate system" and a "dual rate contract." They further maintain that although the dual rate system has always required approval by the Commission it was not until 1959 that there was any requirement that the dual rate contract be approved under section 15. It is respondents' position that although the specific contract (Shippers' Rate Agreement) here in question was never approved, approval was given to the system in Docket 648, *Pacific Coast European Conference*, 3 U.S.M.C. 11 (1948). Thus, if respondents' view that only the "system" need be approved under section 15 is correct, the Shippers' Rate Agreement itself would have been lawful for the period here in issue.

Complainant on the other hand contends that respondents are drawing a distinction without a difference, and that whatever the respondents wish to call it, the means by which they charged the allegedly

discriminatory dual rates in question has never been approved under section 15.

Litigation involving the lawfulness of so-called dual rates can be traced back many years, but it was not until 1954 and the decision of the United States Court of Appeals for the District of Columbia Circuit in *Isbrandtsen Co., Inc.* v. *United States*, 211 F. 2d 51 (1954), *cert. den.* 347 U.S. 990 (1954) that the question was resolved as to what section 15 requires by way of approval before a system of dual rates may be instituted. In that case Isbrandtsen brought suit to set aside an order of the Board allowing the Japan-Atlantic & Gulf Conference to initiate a system of contract-noncontract rates within 48 hours of the issuance of the order. Although the basic agreement under which the conference operated, approved several years earlier, provided for the future establishment of a dual rate system, no system of dual rates had been approved, and no hearing had been held prior to the issuance of the Board's order. The Conference merely filed a statement of intention to institute such a system showing the reasons for its use and the amount of spread between contract and noncontract rates.[4] Isbrandtsen and the Attorney General petitioned the Board for an immediate hearing pending institution of the system. The Board, however, issued an order allowing the Conference to institute the system, and granted hearing at a date subsequent to the effectuation of the system. The Court of Appeals set aside the Board's order, holding that "dual rate system agreements" must be approved under section 15 before they become operative.

A careful reading of its opinion can leave no doubt that the Court in referring to the "dual rate system agreement" was speaking of the actual system and the contract between the Conference and the shipper.

Respondents' contention that approval of their Shippers' Rate Agreement was not required until 1959 is primarily grounded on the decision of the United States Court of Appeals for the Ninth Circuit in *Anglo-Canadian Shipping Co., Ltd.* v. *U.S. & F.M.B.*, 264 F. 2d 405 (1959) and an incorrect interpretation of that decision in the Recommended Decision of the Examiner in Commission Docket No. 870, *In the Matter of Pacific Coast European Conference—Exclusive Patronage Contract.* Respondents cite with approval the following statement appearing at page 24 of that Recommended Decision:

> Approval of respondents' Section 15 rate agreements was not a matter before the Commission in 1948. It was not until the Ninth Circuit Court of Appeals decision in the Anglo-Canadian case that rate agreements or any modifications thereof required Section 15 approval, because at that time and until the decision in the Anglo-Canadian case in 1959, the interpretation placed upon Section 15 by the Commission was that rate agreements including modifications of rate

agreements did not require Section 15 approval in addition to approval of the basic conference agreement.

There is a further extensive quote by respondents from pages 24–26 of the Recommended Decision wherein the Examiner reasons that a contract rate system must necessarily be preceded by (1) the establishment of a conference; (2) an agreement between the members to institute a contract rate system; and (3) relying on the 1954 *Isbrandtsen* decision, *supra*, that only the agreement between the carriers to institute the system needed approval prior to 1959. There are fatal flaws in these arguments.

First, the very proposition for which respondents contend the 1954 *Isbrandtsen* case stands was in fact argued to the Court. As the Court said:

> The Board's position here is that it may allow the agreement to go into effect in advance of formal approval because *the basic conference agreement* authorizes dual rate system agreements. It maintains that the basic conference agreement carries with it the "cover of authority" for subsequent changes of rates since the language of the basic agreement is as broad as that of the statute itself. *If this is so, no additional approval would be necessary to allow the dual rate system to go into effect.* (211 F. 2d, at 55.) (Emphasis supplied.)

Two things are beyond dispute from the statement of the Court. On the one hand it demonstrates that the position respondents are here contending for was considered by the Court and on the other that when the Court spoke of "dual rate system agreements" it meant something other than the basic conference agreement or any provision therein authorizing the future establishment of a contract rate system. In rejecting the "cover of authority" argument the Court said, at page 56:

> "Agreements" referred to in the Shipping Act are defined to include "understandings, conferences, and other arrangements." Clearly, a scheme of dual rates like that involved here is an "agreement" in this sense. It can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement. But even if it were not a new agreement, it would certainly be classed as a "modification" of the existing basic agreement. In either case, § 15 requires that such agreements or modification "shall be lawful only when and as long as approved" by the Board. Until such approval is obtained, the Shipping Act makes it illegal to institute the dual rate system. And this

[4] This procedure was required under the Board's General Order 76 (46 CFR 236). General Order 76 was a direct outgrowth of the decision in *Isbrandtsen Co., Inc.* v. *U.S.*, 96 F. Supp. 883 (1951), *aff'd.* 342 U.S. 950 (1952), wherein the Court restricted its decision to a finding that the differential or spread between the contract and noncontract rates had admittedly been arbitrarily fixed and thus was unlawfully discriminatory. General Order 76, among other things, required conferences to file copies of their dual rate contracts, a statement of the reasons for the institution of the use of contract and noncontract rates in the particular trade and the basis for the spread or differential between such rates.

illegality cannot be spirited away by action which the Board labels "interlocutory * * * of a discretionary nature." (Footnotes omitted.)

Thus, it is patently clear that the *Isbrandtsen* decision does not stand for the proposition relied upon by respondents, for the Court expressly rejected the argument that approval of the agreement between the carriers (the basic conference agreement) to institute a "system" of dual rates was sufficient to allow the actual imposition of contract-noncontract rates. The Court in fact required approval of the actual dual rate scheme, of which the contract is an integral part.

Perhaps more serious than the misconstruction of the 1954 *Isbrandtsen* decision is the treatment accorded the *Anglo-Canadian* decision *supra*. At page 24 of the Recommended Decision in Docket 870, upon which respondents rely, the Examiner had the following to say concerning *Anglo-Canadian:*

It was not until the Ninth Circuit Court of Appeals decision in the Anglo-Canadian case in 1959[13] that rate agreements or any modification thereof required Section 15 approval * * *

* * * * * * *

Immediately preceding the statement of the Court quoted by the Examiner in his footnote 13 there appears, on the same page as the quoted statement, the following:

We understand *Isbrandtsen Co.* v. *United States* (D.C. Cir.) 211 F. 2d 51, to hold that proposals for agreements between shippers and conference lines must be approved by the Board under § 15 * * * before a dual rate system may be initiated. *River Plate & Brazil Conf.* v. *Pressed Steel Car Co.*, (2nd Cir.) 227 F. 2d 60, dealt with an attempted action by a common carrier steamship conference upon an alleged contract or agreement between a shipper and the conference for damages sought because of a claimed breach of the contract by the shipper. The action was held unenforceable because the agreement had not been approved by the Board as required by § 15 of the Shipping Code.

Thus, when not taken out of context the Court's holding in *Anglo-Canadian* was merely a restatement of the law as interpreted first in the 1954 *Isbrandtsen* decision and again in 1955 in the *River Plate & Brazil Conference* decision.

Manifestly, respondents' position that approval of the Shippers' Rate Agreement was not required until 1959 is not well taken.

Respondents themselves state that their Shippers' Rate Agreement has never been approved under section 15. That is correct, as is the Recommended Decision in Docket 870 insofar as it stated, at page 24, that approval of respondents' rate agreement was not a matter before the Commission in Docket 648. Such approval was not an issue in

[13] Reported at 264 Fed. 2d at page 411 where the Court said "we hold therefore that the shippers rate agreement here involved is one subject to the provisions of section 15."

that case, and as we have seen the approval there given was not enough under section 15 to validate the institution of an actual dual rate scheme, nor the shippers' contract adopted as part thereof.

The Examiner properly rejected respondents' contention that this matter should first have been submitted to arbitration under paragraph 11 of the Shippers' Rate Agreement. Without considering what obligation P & W would have under a valid contract to submit the dispute to arbitration before seeking other relief, the arbitration clause could not oust the Commission of jurisdiction and the Examiner was correct in relying in this respect upon *Swift and Co.* v. *F.M.C.* 306 F. 2d 277 (D.C. Cir. 1962).

The complainant's remaining exceptions to the Examiner's decision are largely addressed to the argument that the shipments which led to the termination of its contract rates were in fact "bona fide" shipments of Lyddon, and hence were not covered by the rate agreement. Certain of complainant's contentions are either of doubtful materiality to the resolution of the issue or are subject to dual inferences. For example, the existence of Lyddon as a separate corporation prior to P & W's purchase of its stock in 1947 does nothing to negate the Examiner's finding that Lyddon was thereafter completely controlled by P & W. The claim that P & W derived no monies from Lyddon except dividends when declared, and reimbursement for out-of-pocket costs and salaries of P & W employees when working for Lyddon, means little. In the final analysis all monies went to President Landegger as sole owner of all the stock of both corporations.

Nor are we impressed by complainant's contention that Lyddon had separate bookkeeping accounts and records and a separate bank account out of which payment was made for the nonconference shipments, and further that the shipping documents and letter of credit were in Lyddon's name or that of its nominee, Massachusetts Trading Corporation. We agree with the Examiner that these contentions are not convincing in the light of the additional evidence of record. Complainant had the opportunity and machinery for making nonconference shipments in order to reduce freight costs. It admits it used Lyddon and Massachusetts Trading for this purpose. Once the decision was made to ship in this manner, the shipping papers would naturally be made out in the name of Lyddon or Massachusetts Trading. It is significant, moreover, that the woodpulp bales in question were all marked with complainant's "P & W" stencil. There were no reasons connected exclusively with Lyddon's interests for shipping them in Lyddon's name. But if not so shipped, complainant would have suffered an out-of-pocket loss. On the other hand, the record

makes clear that complainant would have used its own name had the conference rates been lower.

We cannot give credence to the alleged separation of corporate entities in such circumstances. The sole and effective control of both corporations was vested in one of them and the alleged separation, at least so far as these shipments were concerned, appears to have been no more than a "paper" undertaking for the purpose of evading complainant's obligation under its Shippers' Rate Agreement with respondents.

Section 22 of the Shipping Act provides in relevant part:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, * * * and asking reparation for the injury, if any, caused thereby. * * * If the complaint is not satisfied the board shall, * * * investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, * * * of full reparation to the complainant for the injury caused by such violation.

The power thus vested in us is that we "may" award reparation for injury caused by violation of the Act. It is permissive and discretionary, and the mere fact that a violation has been found "does not in itself compel a grant of reparations." *Consolo* v. *Flota Mercante Grancolombiana*, Dkt. 827 (Sub. 1), Report served September 18, 1963. A similar construction was placed upon section 22 by the Court of Appeals for the District of Columbia Circuit in the same case. *Flota Mercante Grancolombiana* v. *F.M.C.*, 302 F. 2d 887 (1962). In *Flota* our predecessor, the Federal Maritime Board, had awarded reparations for violations of the Act. On judicial review Flota advanced numerous arguments as to why it was "inequitable" to require it to pay reparations. The Court, while agreeing with the Board's finding of violations, remanded the case to this Commission to consider "whether under all the circumstances, it is inequitable to force Flota to pay reparations." The Court explained it was taking this action because, *inter alia*, "The Board may have erroneously believed (1) that it was required to grant reparations once it found a violation of the Act."

Under the circumstances of this case, we are of the opinion that it would be inequitable to require the payment of reparations. While the court precedents leave us no choice but to hold that the Shippers' Rate Agreement was invalid for lack of section 15 approval, we are here concerned with equitable considerations and the fact is that complainant thought the agreement was valid at the time it attempted to evade its obligations thereunder by shipping in the name of a subsidiary.

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No question as to the lawfulness of the agreement was raised in this case until February 12, 1963, when complainant filed its exceptions to the Examiner's Initial Decision. Complainant therein stated, by way of explanation for belatedly raising the issue: "Prior to the Court's decision in the Kempner case [*Kempner, et al.* v. *F.M.C.*, *supra*, decided January 10, 1963] it had been the law established by the former Board, * * * that any infirmity which may have existed in a pre-existing dual rate contract arrangement was cured by the Moratorium Act, and that 'tacit' approval of a dual rate system was adequate to make it lawful under Section 15." Of course, respondents considered that the Shippers' Rate Agreement was valid and the case, as the Examiner said, was tried before him with the parties in accord:

> * * * that the basic question in this proceeding is whether Parsons & Whittemore, in connection with the shipments on the nonconference vessels, violated its promise to confine the carriage of its shipments to the vessels of the conference lines and to do so "without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or subsidiaries."

It is a fact that the agency charged with the administration of the Shipping Act, the Federal Maritime Board, viewed as lawful not only respondents' Shippers' Rate Agreement but those of some 60-odd other conferences utilizing the contract-noncontract rate system, although no specific approval of the agreements had been given under section 15 of the Act. This was on the theory that approval of the basic conference agreement authorizing the future establishment of a dual rate system was all that was required. The Board imposed no requirement by order or otherwise after the 1954 *Isbrandtsen* decision, *supra*, that existing dual rate agreements be approved before continuing to apply them and the agreements remained in widespread use throughout the steamship industry.

Thus, it seems to us respondents were acting in good faith in enforcing the provisions of the Shippers' Rate Agreement whereas the complainant, from the record before us, was not acting in good faith but consciously sought to avoid its contractual obligations by shipping in the name of a subsidiary. Certainly, equity does not dictate that complainant be rewarded for this endeavor. In view thereof and after consideration of the alternatives open to us under the law, we choose to leave the parties as we found them. Complainant's claim for reparations in the form of alleged overcharges, *i.e.*, the difference between the contract and noncontract rates on some nine shipments made on respondents' vessels during the period from December, 1954, to July, 1955, will be denied. An appropriate order is attached.

Commissioner John S. Patterson, *Concurring:*

Based on the record before me in these proceedings, I deem it appropriate, based on the following reasons, to concur separately in the results reached in the preceding report.

The six proceedings covered by the preceding report involve substantially identical complaints that six common carriers by water in foreign commerce overcharged Parsons & Whittemore, Inc. (P & W) on several shipments of wood pulp. P & W claims a refund by way of a reparation action under section 22 of the Shipping Act, 1916 (Act), equal to the difference between the discount rate charged to shippers pursuant to an exclusive patronage contract called the Shippers' Rate Agreement (Agreement) with the Pacific Coast European Conference (Conference) and the higher rate shown in the tariffs as applicable to shippers who do not sign a Shippers' Rate Agreement.

The facts show that P & W as of the fifth day of March 1951, made an Agreement with the Conference and the several steamship lines named therein "to offer or cause to be offered for transportation on vessels of the Carriers from Pacific Coast ports of the United States and Canada to ports of call in Great Britain, Northern Ireland, Eire (Irish Free State), Continental Europe, Scandinavia, and French Morocco and on the Mediterranean Sea * * * all of its shipments by water on which said contract rates are applicable." The contract rates are those shown in the applicable tariffs. P & W's Agreement also provides: "In agreeing to so confine the carriage of its (their) shipments to the vessels of the Carriers the Shipper hereby promises and declares it is the intent and purpose to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or subsidiaries." (Exhibit C–1–e.)

As a part of my finding as to the facts, I am also satisfied that the corporate relationships between P & W and Lyddon and Massachusetts Trading Corporation, whose names are shown in the bills of lading covering the shipments on lines not parties to the Agreement, are such that they are all the same as P & W and all of them were really the same shippers.

The facts as stated above establish to my satisfaction that when P & W made shipments of wood pulp on Paul Wilson Company and Mitsui Line ships, which are not named in the Agreement, and during a period when the Agreement was still in effect, P & W failed to perform its agreement properly. The Conference was justified in terminating this Agreement under the provisions which gave the Conference the right to do so on "Failure of the Shipper to pay liquidated dam-

ages" for shipments in violation of the Agreement "within thirty days after the receipt of notice" (second paragraph). Thereafter the Conference was justified in charging the complainant P & W a higher or non-contract rate, and complainant is not entitled to reparation, because there were no overcharges as claimed. In the absence of any wrongful charges, there were no violations of the Act either.

The preceding report contains a decision "to leave the parties as we found them" even though the Agreement is thought to be invalid as a result of developments in the law since 1954 and 1955 when the Agreement and the acts that are the subject of these proceedings occurred.

The developments in the law that are thought to control the decision all involved questions about the approvability under Sections 14 and 15 of the Act of dual rate arrangements, exclusive patronage trade practices, and conference agreements putting them into effect. None of the cases discussed involved comparable issues or facts as we have here, but involved inter-carrier competitive disputes about certain trade practices and the approvability of agreements under Section 15. Violation of Section 15 was not charged in the complaint herein.

We are concerned here solely with the 1951 Agreement between the complainant shipper and the respondent carrier and the performance thereof. Specific agreements with shippers such as this one were not subject to approval under Section 15, and permission to use them was not required by statute until Section 14b was added to the Act in 1961, about six years after the actions herein occurred. The arguments that the 1951 Agreement required approval under Section 15 and did not get such approval are not pertinent to my decision.

The preceding report contains no decision as to the violations of Section 14, Third, Section 16, First, or Section 17 charged in the complaints. I believe this was correct on the facts, because there was no violation of these sections.

FEDERAL MARITIME COMMISSION

No. 805

PARSONS & WHITTEMORE, INC.

v.

REDERIAKTIEBOLAGET NORDSTJERNAN (JOHNSON LINE)

No. 809

PARSONS & WHITTEMORE, INC.

v.

COMPAGNIE GENERALE TRANSATLANTIQUE (FRENCH LINE)

No. 810

PARSONS & WHITTEMORE, INC.

v.

THE BLUE STAR LINE LTD. (BLUE STAR LINE)

No. 811

PARSONS & WHITTEMORE, INC.

v.

FURNESS WITHY & CO. LTD. (FURNESS LINE)

No. 812

PARSONS & WHITTEMORE, INC.

v.

WESTFAL-LARSEN & CO. A/S (INTEROCEAN LINE)

No. 813

PARSONS & WHITTEMORE, INC.

v.

FRED OLSEN & CO. (FRED OLSEN LINE)

ORDER OF DISMISSAL

These proceedings having been instituted upon complaints filed under section 22 of the Shipping Act, 1916, and the Commission having this date made and entered its Report containing its findings and conclusions thereon, which Report is made a part hereof by reference:

It is ordered, That the complaints be, and they are hereby, dismissed.

By the Commission, February 4, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 873

INVESTIGATION OF PASSENGER STEAMSHIP CONFERENCES REGARDING TRAVEL AGENTS

Decided January 30, 1964

1. Agreements No. 7840 and No. 120 of Atlantic Passenger Steamship Conference and Trans-Atlantic Passenger Steamship Conference, respectively, and the rules adopted thereunder, as they relate to travel agents, found to violate section 15 of the Shipping Act, 1916, in certain respects and ordered modified in accordance with this decision which requires that the conferences:
   a. Establish, publish, and apply definite, objective standards for screening of applicants who apply for placement on the conference list of travel agents eligible for appointment by member lines, for the approval or disapproval of change of officers or sales or transfers of agencies, for cancellations of agencies from the list of eligibles, and for the imposition of penalties for violation of the conference rules.
   b. Provide notice of conference rules and practices to agents and prospective agents, and complete reasons for conference action in excluding applicants from the eligible list, refusing to approve a change of officers or the sale or transfer of the agency, cancellation of eligibility, and the imposition of fines and penalties against agencies.
   c. Afford a reasonable opportunity for hearing to agents before taking action to disapprove a change of officers or the sale or transfer of an agency, to cancel the eligibility of an agency, or to assess a fine or penalty against an agency.
   d. Discontinue the practice of (1) establishing quotas for the maximum number of agents that will be placed on the eligible lists, (2) requiring that an applicant be sponsored by a member line, (3) denying eligibility to applicants whose offices are south of Fulton Street in Manhattan or those who are in department stores or automobile clubs.
   e. Submit for Commission review the conference rule prohibiting the appointment of foreign freight forwarders as travel agents.
   f. Discontinue the prohibition against the sale by agents of transportation on nonconference lines.
   g. Discontinue the unanimity rule in voting on applicants for the eligible lists, change of officers or sales or transfer of agencies, and level of agents' commissions.

h. Discontinue certain practices of secrecy surrounding conference rules and activities regarding travel agents, and provide the Commission with detailed minutes of all matters coming before their meetings, which include the votes of the members on these matters.

2. The Commission has jurisdiction over the levels of commissions paid to travel agents. However, the record in this proceeding does not contain a sufficient showing that the present level is so low as to be detrimental to the commerce of the United States or otherwise unlawful under section 15 of the Act.

Edward R. Neaher, *Joseph Mayper*, and *Carl S. Rowe* for Trans-Atlantic Passenger Steamship Conference and Atlantic Passenger Steamship Conference, respondents.

Robert J. Sisk, *Richard A. Givens*, and *Rocco C. Siciliano* for American Society of Travel Agents, and *James F. McManus pro se* and for Mary R. McManus, doing business as Levittown Travel Center, interveners.

Wm. Jarrell Smith, Jr., and *Robert J. Blackwell*, Hearing Counsel.

E. Robert Seaver, Hearing Examiner.

REPORT

BY THE COMMISSION (JOHN HARLLEE, *Chairman;* THOS. E. STAKEM, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner*):

This proceeding is a general investigation of the agreements and practices of two interrelated passenger steamship conferences as those practices relate to travel agents. It is the first general investigation to be held by the Commission or its predecessors in this area, and all of the passenger lines engaged in the transatlantic trade and their travel agents are directly involved.

This proceeding was instituted as a result of a petition filed by the American Society of Travel Agents (ASTA). The purpose of the investigation is to determine whether Agreement 120, the organic agreement of the Trans-Atlantic Passenger Steamship Conference (TAPC), and Agreement 7840, the organic agreement of the Atlantic Passenger Steamship Conference (APC), should be disapproved, canceled, or modified, insofar as they relate to travel agents, in accordance with section 15 of the Shipping Act, 1916 (46 U.S.C. 814).

Extensive hearings were held in New York. The parties represented at the hearings included: The 2 conferences and their member lines, 3 of which are American flag and 23 foreign flag, as respondents; ASTA and certain individual travel agencies as interveners; and hearing counsel. ASTA, Hearing Counsel, and respondents filed

briefs. The examiner issued an initial decision based upon the evidence adduced at the hearings. Hearing Counsel, ASTA, and respondents filed exceptions thereto and we heard oral argument.

FACTS

A. The Conferences

The two conferences whose activities are the subject of this investigation are the Trans-Atlantic Passenger Steamship Conference (TAPC) operating pursuant to Agreement No. 120 and the Atlantic Passenger Steamship Conference (APC) operating pursuant to Agreement No. 7840.

The TAPC and its predecessors have been in existence for at least 80 years. The TAPC consists of two American-flag carriers, American Export Lines and United States Lines, and 23 foreign-flag carriers. Agreement No. 120 was first approved February 12, 1929. It contains comprehensive provisions relating to the selection and control of travel agents, and requires that all conference action be unanimous (Unanimity Rule). It provides for a permanent conference committee known as the Committee on Control of Sub-Agencies [1] (Control Committee), which is vested with broad powers relating to agents in so-called "Metropolitan List Territories." The Control Committee decides which applicants will be placed upon the lists of "eligible" agents in the specified metropolitan areas; decides which agents holding appointment in those areas should be retained or canceled; and obtains from the lines or agents such information as the committee requires to carry out its functions. Agreement No. 120 governs all of the issues raised by the parties in this proceeding except the level of commissions.

The APC and its predecessors have been in operation for about the same length of time as the TAPC. The APC presently operates pursuant to Agreement No. 7840, approved by the Commission on August 29, 1946. The voting membership of the APC is the same as the TAPC, except that it includes one additional American-flag line, American President Lines, and does not include Spanish Line. APC is domiciled in Folkstone, England, and holds its meetings in Britain or on the Continent. Its records are located in Folkstone. APC establishes uniform fares and the maximum levels of commission payable to agents by the member lines. Like TAPC, APC operates pursuant to a unanimity rule. It has no function with respect to the

[1] Travel agents are referred to in both conference agreements as subagents. They will be referred to hereinafter as travel agents or agents.

appointment, dismissal, or control of the agents in the United States, these matters being within the jurisdiction of the TAPC. TAPC has no jurisdiction over the level of commissions to be paid agents, but its views are sometimes requested by APC and sometimes treated as confidential. TAPC may be thought of as the agency-regulating arm of APC. APC does not take or record votes, and only a bobtailed report of final action taken is filed with the Commission. Neither the agenda of the meeting, a report of the discussion of the members, nor any reference to proposals discussed but not adopted is filed with the Commission. In general there appears to be a deliberate conference policy to avoid government review of conference action. One of the lines referred in its correspondence to the conference to "an understanding not to have too much official correspondence," and several references are made in the transcript of hearings to the statements by leading representatives of conference carriers that no minutes could be taken or published because of the existence of the U.S. antitrust laws.

B. The Travel Agents

There are about 4,000 travel agents in the United States who represent the carriers of the two conferences. Approximately one-third of these are members of ASTA. There are some 575 agencies in New York alone. In 1960, the 4,000-or-so travel agents were responsible for 80 percent of all trans-atlantic steamship passenger bookings made in the United States, exclusive of tours. The conferences and their member lines acknowledge that the travel agents constitute their principal sales force.

The conference action relative to the appointment and control of travel agents is confined, with the exception of agencies located in department stores and automobiles clubs, which require conference approval for appointment, to six so-called "Metropolitan Eligible List Territories." The Metropolitan List Territories are those including and immediately surrounding New York, Boston, Philadelphia, Chicago, Los Angeles, and San Francisco.

The agencies located in these Metropolitan List Territories are generally small in size, about 70 percent having five or fewer employees and half having yearly net earnings under $5,000. There are basically two types of agents—"wholesale" agents, who arrange, sponsor, and conduct package tours, and "retail" agents, who sell the packaged product. In addition to the 7-percent commission the retail agent receives from the TAPC, for the ocean passage, he is paid an additional 3-percent commission by the wholesaler on those items in the package

other than steamship fare. Under a somewhat similar arrangement of the International Air Transportation Association, an association of airlines in foreign commerce, the airlines pay a 10-percent commission on the air transport segment of tours. The wholesaler does not receive any net remuneration from the shipline or airline in these circumstances. His revenue comes from commissions on the hotel and insurance facets of the tours. A large majority of agents in Metropolitan List Territories handle retail business exclusively. The agents who act as "wholesalers" may also act as "retailers." The great majority engage exclusively in the travel business and practically all agents represent airlines as well as steamship lines.

C. Specific Practices of TAPC Affecting Travel Agents

1. Appointment

Under the TAPC agreement the Control Committee is responsible for the screening of agents in the Metropolitan List Territories, and exercises final authority over all matters relating to the screening of agents including determination as to the placement of an applicant on the "Eligible List." Under the terms of the conference agreement, the member lines may appoint agents only from those appearing on the Eligible List for the particular metropolitan territory. The Control Committee has eight members who each serve for a term of 2 years. Two members are chosen to represent the lines whose vessels are registered in countries in each of the following areas:

The North Atlantic Group which includes Great Britain, the Scandinavian countries, and Canada;

The Mediterranean Group which includes countries bordering on the Mediterranean, Adriatic, and Black Seas (including Mediterranean France);

The U.S. Group which includes only the United States;

The Continental Group which includes any country on the Continent of Europe not classified above.

The members in each group are selected by the unanimous vote of the lines within the group. The committee meets informally about every 6 weeks. Votes are not ordinarily taken, and if a vote is taken it is not recorded. No minutes of meetings are kept. All actions of the committee must have the unanimous approval of the members.

In the Metropolitan List Territories other than New York, local subcommittees of the Control Committee preliminarily determine the qualifications of applicants and forward their recommendations for agency appointments to the Control Committee. Normally the Control Committee accepts these recommendations. The procedures of the several local committees are not uniform, even as to the Unanimity Rule, which under the conference rules they are all supposed to follow.

However, votes are taken and these are forwarded to the Control Committee. If a local committee refuses to recommend an applicant, the application itself is not forwarded to the Control Committee. Thus, in practical effect each local subcommittee exercises considerable power over an applicant in the Metropolitan List Territory under its jurisdiction.

a. The Sponsorship Rule

An applicant for appointment as a travel agent usually communicates with the secretary of the conference, who, in turn, sends the information relative to the applicant to all the member lines. The secretary places the name of the applicant on the agenda of the Control Committee only if one or more of the member lines show an interest in the particular applicant. If no member line shows any interest in the applicant, action on his application is "deferred," and the applicant, of course, may not be appointed an agent by any of the member lines. This requirement of a show of interest by a member line is referred to as the "sponsorship" practice (Sponsorship Rule). Although lines individually often interview prospective agents by the use of questionnaires or of "travelers," who are representatives of the various member lines and who personally visit applicants at their places of business, the conference as a body has no organized system for the uniform gathering of information concerning each applicant. It is left to the "sponsoring" line to bring forward such favorable information as the line deems necessary to secure favorable action on the applicant. The conference has never officially informed applicants of the Sponsorship Rule, some applicants learning of it through the lines, others through ASTA.

Once "sponsored," the applicant is then given consideration by the Control Committee. If the applicant is not voted favorably upon by the Control Committee, he is transferred to a "Preferred List," and his application is considered at subsequent meetings. No application is denied outright, but applicants must often spend several years on the Preferred List before securing the unanimous vote of the Control Committee necessary for placement on the Eligible List. Although the Control Committee supposedly determines whether or not to place applicants upon the Eligible List by the consideration of such factors as potential ability to produce business, financial stability, business character, location of business, and national origin of the applicant in relation to national origin of the members of the community in which the applicant's business is located, these factors are not spelled out in the conference agreement, rules, or elsewhere. Applicants are not

officially informed by the conference as to the standards upon which they will be judged; however, in some instances they may obtain some idea of the standards employed by the members of the Control Committee from conversations with representatives of the lines or from the information requested on the questionnaires that some of the lines provide to some applicants. The Commission has never been informed of these standards. The record shows that the standards have not been applied uniformly, and agents often have had to wait long periods of time before learning of the standards.

Although anyone can book passage on common carriers, including agents not on the Eligible List, the lines are prohibited from appointing agents who have not been approved unanimously for the Eligible List by the Control Committee and commissions for bookings made may not be paid by the member lines to anyone but appointed agents. While under the terms of the conference agreement commissions may be paid retroactively from appointment for 1 year's bookings, retroactive payment is not mandatory and is left to the discretion of the individual line. Unappointed agents find it difficult to make bookings as, lacking prestige, they are not always able to obtain vessel space, nor do they have ready ticket supplies. The record indicates that these factors coupled with uncertainty of commissions tend to cause unappointed agents where possible to divert passengers from steamship travel to air travel.

b. The Quota System

The TAPC agreement provides that the number of agencies shall be limited, with due regard being given to the requirements of the traffic in various localities. The agreement places the responsibility for the establishment of these limitations with the Control Committee, and it has established quotas limiting the number of agents that can be placed upon the Eligible List for each Metropolitan List Territory. The effect of this provision is to prevent sponsored and otherwise eligible agents from being placed on the lists. Although agents are merely "deferred" to the so-called Preferred List rather than denied placement on the Eligible List, the deferral for extended periods is tantamount to a denial.

c. The Unanimity Rule

The requirement of a unanimous vote by the Control Committee has on many occasions prevented the placement of applicants on the "Eligible List." The record shows that as late as 1959, the local subcommittee for Philadelphia declined to recommend an appointment be-

cause of a single "nay" vote, despite eight votes cast in favor of the applicant. Similarly, the Los Angeles local subcommittee in 1951 declined four applications, of which three were approved by majorities of eight to two, and one was approved by a majority of nine to one. These actions caused the retiring chairman of the Los Angeles local subcommittee to record in the minutes of that committee:

> the one or two negative votes, resulting in the pending applications being declined under the * * * "unanimous agreement" clause, is extremely detrimental to the best interests of the majority lines. Further that such negative votes may be cast "on direct instructions" from principals or are actually mischievous rather than cooperative in intent. It is also obvious that the committee's negative action in these cases is being used to advantage to the fullest possible extent by the Trans-Atlantic Air services.

Although all final decisional authority for placement on the Eligible List rests with the Control Committee, and the local committees can merely recommend, it should be borne in mind, as noted above, that when local subcommittees reject applicants, the applications ordinarily do not even come to the attention of the Control Committee.

d. Other TAPC Selection Practices

Conference rules forbid the appointment of agents who are also freight forwarders, or whose places of business are in department stores and automobile clubs. In the Metropolitan List Territory of New York, appointment is prohibited to agencies located in the district south of Fulton Street in Manhattan (Fulton Street Rule). The record shows that these rules have not been uniformly applied. The rules regarding freight forwarders (Freight Forwarder Rule) and agencies located in department stores (Department Store Rule) are grounded on the contention that the agent's concentration on steamship bookings would be lessened by the agent's other activities. Under its authority to waive the rule, the Control Committee has approved about 100 agencies in department stores and 75 in automobile clubs. Also, the Fulton Street Rule may be waived in exceptional cases. There has been no uniformity of standard, however, in handling any of these supposedly exceptional cases.

2. *Control of Agencies After Appointment*

a. The Tieing Rule

Conference rules prohibit appointed agents from selling transportation on nonconference lines. All passenger lines operating in the transatlantic trade are members of TAPC. TAPC members carry 99 percent of the passengers moving by water in this trade. The only lines affected by the rule prohibiting sale of tickets via nonconference

lines are those freighter services which carry a limited number of passengers on their cargo vessels. Such carriers, like the TAPC lines, must rely on travel agents for the sale of ocean transportation. A main economic threat to the conference lines is that of the air carriers, but the Tieing Rule does not prohibit the agents from booking transatlantic travel via air carriers.

b. Sale or Transfer of Agency or Change in Officers or in Address or Name

The official conference rules require only that approval of the appointing lines be obtained prior to the transfer, sale, or change of name or address of an agency. However, in practice, the Control Committee has exercised authority over these transactions. Again precise standards have not been adopted, and the vague standards which have been utilized have not been uniformly applied. At one time, at least, it seems to have been a matter of conference policy to deny sale or transfer without going through termination and reappointment, but this is uncertain. The record contains several examples of cases in which a majority of lines were unable to permit a sale or change in personnel either because of the vague standards or the existence of the Unanimity Rule. Under the Unanimity Rule it is possible for a member of the Control Committee representing a line which has not appointed the agency in question to block a sale or transfer.

c. Fines and Penalties

Fines and penalties, called "liquidated damages" by the conference, are levied for breaches of conference rules by a Special Committee, the membership of which is the same as that of the Control Committee. No formal procedure has been adopted for determination of the truth of alleged violations. While it appears that the accused agent is afforded the right to tell his side of the story, usually in writing, it does not appear from the record that the agent is afforded any kind of hearing, or any reconsideration of or appeal from the decision of the Control Committee. During the period from 1952 through 1960, the Special Committee assessed penalties against some 28 agents totaling $3,500.

d. Bonding and Canceled Voyages

TAPC requires that agents who are appointed in Metropolitan List Territories be covered by surety bonds in amounts based on the expected sales of the agent. A single bond covers one agent for the

benefit of all appointing lines. The premium of the bond is paid by the conference, but the agents pay annual fees in amounts which vary in different cities. These fees help defray premium and other expenses of the conference in administering its agency program. The conference lines are not required to be bonded, and on at least one occasion a member line was unable to pay a commission because of financial difficulties. On other occasions, when sailings were canceled after bookings had been made, commissions were not paid to the agents even though they had fully performed the service of booking the passage and had nothing to do with the cancellation of the sailings. There appears to be no conference regulation relating to the payment of commissions on canceled voyages. However, some lines pay half commission, other full commission on canceled voyages.

e. Tenure and Cancellation of Eligibility

The conference rules provide that either an agent or its appointing line may terminate an agency at any time. In addition, the Control Committee may remove names from the Eligible List if it finds a breach of conference rules by the agent, unethical business standards, an inability on the part of the agent adequately to create and stimulate the sale of transportation, or failure of the agent to effect the sale of a sufficient number of bookings. In the years 1957 through 1960, 19 agencies were terminated due to an alleged insufficiency in the number of bookings produced by the agency and 17 for other reasons. Four of the latter were subsequently reinstated.

No precise standards relative to what might constitute a sufficient number of bookings by an agent have been set up. The local subcommittees have established minimum booking requirements for approved agents in their respective jurisdictions, but the standards were not considered absolute and the Control Committee has on occasion exercised an ad hoc judgment in the application of these requirements. In New York the minimum was set at 50 bookings per year within the city limits and 30 in the suburbs. Twenty-five was the minimum in Philadelphia and Chicago, 30 in San Francisco, 10 in Los Angeles, and no minimum was set for Boston. The agents were not informed of these standards. The Control Committee has exercised final authority in terminating the eligibility of agencies according to which, "Each case was handled on its own merits depending on the circumstances surrounding the case." Agents have not been afforded a hearing or a right to have the action of the Control Committee reviewed.

The standards of performance and other grounds for termination consist solely of the general norms quoted above.

D. Practices of APC With Respect to Level of Agents' Commissions

As noted above, the TAPC exercises authority over all agency relationships and practices at issue in this proceeding except the level of agents' commissions which is the province of the APC. Under the APC agreement, unanimous approval is required by the membership of the APC before the level of commissions paid to agents may be raised. Thus, an increase in the level of commissions requires the affirmative vote of the six member lines which serve only Canadian ports. Meetings of the APC are conducted on an informal basis and a vote of the members is neither taken, recorded, nor filed with the Commission. The conference records show that from about October 1950, all lines have shown a willingness in principle at least to increase the level of agency commissions. However, in 1950 and in 1951 subcommittees of the APC were unable, because of the conference's Unanimity Rule, to recommend a proposed increase in commissions, although the majority was prepared to increase the commission from 6 to 7½ percent on "all classes, all seasons." The 1951 subcommittee stated that "while there was a strong majority in favor of applying a 7½-percent commission to all classes throughout the year, it was not possible to reach unanimous agreement," and "it was, therefore, suggested that the matter be deferred for consideration at the statutory meeting in March 1952." The subcommittee did not have the power to take final action, but its function was to recommend action to the principals.

In 1951 the conference increased the commission to 7½ percent, except on passage booked during the high volume summer season where a 6-percent commission remained in effect. Proposals to increase commissions were taken up and action was deferred at meetings in 1952 and 1953. A 1952 subcommittee noted that "unanimity could not be reached on a proposal to extend the off-season commission basis (7½ percent) to bookings for seasonal sailings." The question was taken up again in 1956, when the present commission of 7 percent on all bookings was established. Since that time, representatives of travel agents have sought increases in the commission levels but have been told that commission levels have not been raised since 1956 because the APC has had difficulty in achieving unanimity.

Evidence adduced by the conference demonstrates that differences between members over agents' commissions are usually eliminated or compromised, the minority giving way eventually to the majority. Conference witnesses testified that neither a single member nor a small minority has ever vetoed proposed conference action on commissions.

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It is impossible to tell from the conference's sketchy minutes if this is true. However, it is certain that under the present Unanimity Rule a single member could veto an action to increase agents' commissions even though the action was desired by all the other members. The executives of the American-flag lines which are members of APC, and who testified at the hearing, stated that because the Americans were a minority in the conference, the Unanimity Rule was necessary to protect their interests. The record indicates, however, that the American lines have often been in the vanguard for commission increases and as near as can be determined have never blocked proposed increases. Under the conference agreements the decision to change the Unanimity Rule to a majority rule or some other rule that would require the consent of less than the full membership, would itself require the unanimous consent of all conference members.

E. Diversion of Passengers to Air Carriers

At present both air and ocean carriers pay 7 percent commissions on regular point-to-point bookings, and 10 percent on their respective portions of so-called foreign inclusive tours. It takes approximately three or four times as much of an agent's time to sell sea as compared with air space, and several years of experience are required to produce a really competent steamship passage salesman. Because of this, appointed agents tend to push air rather than sea travel. The record indicates that one of the primary factors in determining the level of commissions has been the competition of air travel.

THE EXAMINER'S DECISION

The parties agree that the initial decision of the examiner correctly disposes of most of the issues raised in this proceeding. We summarize below those portions of the decision to which no exception is taken:

After a brief discussion in which he approved of the exercise of some conference control over travel agents and noted that ASTA was also in favor of such control (Initial Decision, 49–50), the examiner adopted the following statement of Hearing Counsel as criteria for determining what constitutes a violation of section 15 of the Shipping Act, 1916:

> Any provisions of TAPC Agreement No. 120 or APC Agreement No. 7840, or any regulations or rules promulgated thereunder, which prevent travel agencies in the United States from rendering complete and effective service both to passengers and to ocean carriers operate to the detriment of the commerce of the United States. All conference-imposed restraints which prevent the travel agent

from properly performing his function of selling ocean transportation, for which no reasonable justification exists, should be eliminated by the Commission's disapproval, cancellation, or modification of the subject agreements * * *." (Initial decision, p. 52.)

In addition to the above, the examiner further concluded that "unreasonable restraints against qualified persons who seek to become travel agents would also be detrimental to commerce."

The examiner in light of these criteria then considered the areas of interaction between the conferences and the travel agents, discussed above in the factual statement, and reached the following conclusions:

A. TAPC Practices

1. *Appointment*

The conference (TAPC) has failed to adopt, publish, and promptly and consistently apply uniform standards of background and qualifications in its selection of applicants for placement on the list of eligible agents in Metropolitan List Territories. This failure is detrimental to commerce and contrary to the public interest, within the meaning of section 15, because it detracts from the ability and the willingness of the corps of agents, or potential agents, to foster and sell steamship travel. Thus, the conference must adopt, publish and apply a set of uniform, objective, standards in the screening of applicants that are sufficiently precise, and well defined to give adequate notice to applicants of the requirements. No other standards should or may be employed. The standards of eligibility must be published and made available to all applicants in order to give meaning and effect thereto and every applicant who meets them must be approved. Similarly, conference action on each application must be taken promptly and the applicant notified promptly of the decision and the reasons for whatever action is taken. These reasons should not be stated merely in general terms but must relate specifically to the adopted standards of eligibility.

Respondents have explicitly consented to revise their agreements so as to provide a set of uniform objective standards for screening applicants in the Metropolitan List Territories, sufficiently precise and well defined to give applicants adequate notice of the requirements they must meet. Respondents have further agreed to the publication of such standards and to prompt notification of the action taken with respect to all applicants for appointment as agents.

a. The Sponsorship Rule

The Sponsorship Rule must be discontinued as it has resulted in the exclusion from the Eligible Lists of qualified agents, to the detriment

of commerce. Respondents have agreed to remove the Sponsorship Rule.

b. The Quota System

The Quota System must also be discontinued for the same reason that requires discontinuance of the Sponsorship Rule. The number of agents already on the Eligible List has no bearing on the question of the qualifications of a new applicant. If an individual line has all the agents it feels that it requires, it is of course not required to appoint an agent newly placed by the Control Committee on the Eligible List. Respondents have agreed to remove the Quota System.

c. Other TAPC Selection Practices

The Fulton Street Rule and the Department Store and Automobile Club Rules must be abolished, as they have resulted in the arbitrary exclusion of agents to the detriment of commerce. The Freight Forwarder Rule must be submitted to the Commission for approval. The Commission can then consider the proposal under its customary procedures and after obtaining the views of all interested parties make a determination as to its validity under section 15. The respondents have agreed to abolish the Fulton Street Rule, the Department Store and Automobile Club Rule, and they have further agreed to file the Freight Forwarder Rule with the Commission.

2. *Control of Agencies After Appointment*

a. Sale or Transfer of Agency or Change in Officers or in Address or Name

The same administrative fairness must be afforded when the conference considers an application for approval of the sale, transfer, or change of the officers of an agency that is required in reference to the consideration of original applicants and for the same reasons. The conference rules must provide reasonable standards in regard to the consideration of sales and transfers and changes of officers, including adequate notice of the standards to applicants, and an opportunity for the agent to be heard. The rules must further provide for prompt action in accordance with the standards adopted and for prompt notice to the agent of the action taken together with the reasons therefor. A system of arbitration for review of conference action will not be required as, in the case of the screening of applicants, relief from arbitrary conference action or other violations by the conference will be afforded upon complaint filed with the Commission.

The respondents have agreed to the adoption and application of reasonable standards regarding the consideration of sales and trans-

fers, and of changes in name, address, or officers in appointed agencies, including procedures for notice thereof to applicants, for opportunity to be heard and for prompt action on such requests.

b. Fines and Penalties

The conference must adopt and apply definite standards for the assessment of liquidated damages, providing for adequate notice thereof and for opportunity of accused agents to be heard, and for prompt report to the Commission of any liquidated damages assessed. Respondents have agreed to adopt and apply definite standards for the assessment of liquidated damages, providing for adequate notice thereof and for opportunity for accused agents to be heard, and for prompt report to the Commission of any damages assessed.

c. Bonding

Bonding of carriers against loss of commissions caused by cancellation of voyages or line insolvency is not required. There is no evidence that suitable bonds are available, and instances of financial failure by the lines are very rare.

d. Tenure and Cancellation of Eligibility

The conference must adopt and apply definite objective standards for cancellation of the eligibility of agents. The agent against whom allegations are made should be notified of the delinquencies with which he is charged and afforded an opportunity to confront those who made the charge and to adduce evidence to refute it, or in the alternative a reasonable time to correct the delinquency. The rules should require that the conference secretary must be informed in writing of all cancellations by member lines individually including the reasons therefor, records of which must be kept for a reasonable time in order to permit the Commission to assure itself that multiple cancellations of a particular agent are not being employed to circumvent the restrictions on conference action. Respondents have agreed to adopt, publish, and apply a set of definite objective standards for the cancellation of the eligibility of agents, and to the provision of a reasonable time after warning to correct delinquencies or adduce evidence to refute them (except in the case of default by an agent or the cancellation of his surety bond).

B. Secrecy of Conference Action: Voting

Because of the public interest in the operations of the conferences, they should be required to take and record the votes of the members, keep detailed minutes of all matters coming before meetings, retain

records of meetings for a reasonable time and provide copies to the Commission. (Initial Decision, 68–69.) Respondents have agreed to provide the Commission with full minutes of meetings indicating votes of the member lines.

DISCUSSION AND CONCLUSIONS

We agree that the examiner correctly disposed of the foregoing issues and we adopt his findings and conclusions thereon as our own. We now turn to the issues raised on review by the parties in their exceptions to the initial decision.

A. The Unanimity Rule as Applied to the Level of Agents' Commissions

The examiner found that there was no showing that the Unanimity Rule as applied to agents' commissions had operated to the detriment of the commerce of the United States, and that there was no showing that a different voting rule would have allowed increased commissions.

In addition, he found that "there exists at present a substantial equilibrium between the commissions paid by the air and ocean carriers in this trade in that both pay 7 percent on regular point-to-point bookings." He said it could not be concluded that the failure of the conference to increase commissions as requested by the agents has led to a competitive disadvantage of the conference lines relative to the airlines. In the examiner's view it was more logical to conclude that if the adoption of a majority rule resulted in an increase in commissions, the airlines might find it necessary to succumb to pressures from the travel agents and meet this new competition caused by the disparity in the commission rates by an increase of their own and thus begin leapfrogging the steamship commission rate. The examiner further conjectured that increases in fares would probably follow, to the prejudice of the traveling public and the detriment of commerce.

The record in this proceeding compels us to overrule the examiner on these findings and conclusions. The record shows many instances in which the existence of the Unanimity Rule has blocked or at least delayed the fruition of a desire on the part of a majority of the lines to increase the levels of agents' commissons.[2]

Respondents' arguments that the evidence refers only to the desires of a subcommittee which did not have the power to take final action is of doubtful value here. The determinations of the subcommittee may not have been of the kind dictating final action, but they are

[2] See sec. D of the Statement of Facts, supra.

apparently conditions precedent to any conference action with respect to the level of commissions. Although it is true that the principals on occasion took actions other than those recommended by the subcommittee, these appear to have been in the nature of a watering down of actions favored by at least a majority of the lines. There is no indication from the record that the principals ever instituted any action regarding agents' commission levels without the concurrence of at least a majority of the subcommittee. The record, moreover, affirmatively shows that a lack of unanimity on several occasions prevented the subcommittee from even reporting the positions of the member lines to the principals.

The effect of the Unanimity Rule on the actions of the principals is of course rendered less clear because of the conference's failure to keep complete minutes of its meetings and to file them with the Commission. By its own admission, the conference purposely adopted this practice because of its concern over the American antitrust laws. It is undeniable, however, that under present conference procedures a single vote could block a proposal on commission matters even though the proposal was favored by an overwhelming majority of the member lines.

The record clearly shows that agents tend to push air travel rather than sea travel, mainly because it takes considerably longer to handle the details of sea travel. Time is money and the fact that the travel agent is able to sell more air than sea bookings in a given time period means, as ASTA correctly contends, that the effective commission rate of the steamship lines is lower than that of the airlines. Under this reasoning the "substantial equilibrium" found by the examiner becomes superficial.

The record contains some evidence of instances in which the diversion from sea to air passage has taken place against the best interest of the prospective passengers. However, this evidence related solely to the activities of agents who were not appointed by the conference lines. While it cannot be said these agents owed any duty to those lines, the fact remains that the diversion was not in the interests of the conference lines themselves. They have realized this and have attempted to solve the diversion problem by proposals to increase the level of agents' commissions. But the proposals have been blocked, delayed, or weakened because of the existence of the Unanimity Rule. Perhaps for economic reasons it is not feasible for the lines to raise commission levels at the present time. Nevertheless they should at

least be allowed to increase commissions unhampered by the veto power inherent in the Unanimity Rule should they desire to do so.

There is no evidence in the record indicating that the airlines could or would increase their commission level, or would in fact need to do so, if the steamship lines voted by majority rule or some other rule requiring less than unanimity to raise the commission level on sea passage.

We feel that the Unanimity Rule must be discontinued as it applies to the deliberations of the subcommittees and of the principals on the levels of agents' commissions. It is a regulation which prevents travel agents in the United States from rendering complete and effective service both to passengers and to ocean carriers. It has in some cases prevented the principals from even considering the question of commission levels and in others has defeated, or at least delayed or watered down the desires of the majority of the lines to raise commission levels, thus placing the steamship lines at a competitive disadvantage vis-a-vis the airlines. We think the Unanimity Rule plainly operates to the detriment of the commerce of the United States.

B. Jurisdiction Over the Level of Commissions Paid to Travel Agents

The examiner who presided at the hearings excluded evidence relating to commission levels. The precise reason for this is not certain, but it appears he either believed the issue was not meant to be included in the investigtion or that our jurisdiction does not extend to the level of agents' commissions. Subsequently, Examiner Seaver refused to rule on the jurisdictional question, as he found there was not in any event sufficient evidence in the record to support a finding that the present level of commissions is so low as to be detrimental to the commerce of the United States. The parties to this proceeding, however, have specifically raised the question of our jurisdiction in their exceptions and replies to exceptions and it seems to us it would be useful from a regulatory standpoint to deal with the question.

To begin with, it is clear that the order of investigation encompasses all activities in which the conferences engage affecting travel agents pursuant to the agreements here under consideration, and the fixing of the level of agents' commissions is one of such activities. We also think it is clear that we have jurisdiction over the level of agents' commissions set pursuant to conference agreements. We do not claim jurisdiction to set the specific level of compensation. Nor may we rule on the reasonableness of commissions fixed by individual carriers

operating in our foreign commerce. What we are here concerned with is concerted activity which is permissible solely by virtue of an agreement approved under section 15. That section provides in relevant part:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, * * *.

Thus, the jurisdiction here involved is that which directs us to disapprove, cancel, or modify an agreement when the activities of the parties thereunder are incompatible with any of these standards. If we were to find that the respondents acting pursuant to their respective agreements had in concert fixed commission levels which were, for example, detrimental to the commerce of the United States or contrary to the public interest within the meaning of section 15, we would not only be authorized but would have the duty to withdraw or modify our approval of the agreements under that section.

Respondents argue that our jurisdiction does not extend to the level of commissions because the commissions are paid to persons not subject to the Act. Without considering whether under any circumstances travel agents may be subject to the act, respondents' argument misses the point. Our jurisdiction under section 15 is over agreements. Respondents' argument is necessarily grounded on the premise that the agreement regarding commission levels is between the agents and the carriers, which of course is not the fact. It is between common carriers by water all of whom are subject to the Act. Our jurisdiction extends to the entire agreement and all of the activities thereunder and it necessarily embraces the very act of fixing the level of agents' commissions. This conclusion is by no means novel. The Commission and its predecessors have repeatedly asserted jurisdiction under section 15 over the concerted establishment of the levels of brokerage paid to brokers by conferences operating pursuant to approved agreements. It has been repeatedly held, moreover, that the use of conference power to invade or affect third party interests is subject to regulation and control under section 15. *Agreements and Practices Pertaining to Brokerage*, 3 U.S.M.C. 170 (1949); *Pacific Coast European Conference (Payment of Brokerage)*, 4 F.M.B. 696 (1955); *Practices and Agreements of Common Carriers*, 7 F.M.C. 51 (1962); *Pacific Coast Port Equalization Rule* 7 F.M.C. 623 (1963).

C. The Present Levels of Agents' Commissions

ASTA requests that we hold that the present level of agents' commissions is so low as to be detrimental to the commerce of the United States. We are unable to make such a finding upon the present record. ASTA itself points out that before such a finding could be made, it would be necessary to determine that the present level of commissions is so low as to be "unremunerative, noncompensatory, or a burden on ASTA's other services" and hence detrimental to commerce. *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 773 (1946).

Although there are many general statements in the record by travel agents about the difficulty of operating at the present commission levels, we agree with hearing counsel and the examiner that the record in this proceeding does not support a finding that the level of commissions is unreasonably low. Hearing Counsel takes the position, with which the examiner agreed, that the record "contains no direct and reliable evidence" upon which to disapprove the present level. This is, we think, of particular significance when it is borne in mind that (except for one minor exhibit mentioned below, exhibit 106) the evidence upon which ASTA asks us to make a determination is that adduced by hearing counsel.

The record does show a decrease in the relative number of steamship bookings in relation to total bookings. But it is not established that the level of commissions is the primary reason for this. The problem of diversion of passengers from sea to air does exist, and it is a problem which the lines have attempted to solve by increasing the commission level. But it is undisputed that the enormous growth in air travel is largely attributable to factors unrelated to the steamship passenger industry, such as the increased seating capacity and speed provided by the new jet aircraft, and the introduction of many new foreign air carriers serving the United States.

Exhibit 106, the only one which ASTA presses in its brief which it claims is not covered by the evidence introduced by hearing counsel, merely shows the rapid expansion of the airlines. It does not show that the agents are being forced out of business or losing money through the sale of sea bookings.

We do not imply that we feel the present commission levels are necessarily proper. We hold only that on this record there is not a sufficient showing for us to declare that such levels are detrimental to the commerce of the United States or otherwise unlawful under section 15.

D. The Unanimity Rule as It Applies To Selecting Agent Applicants for Metropolitan Eligible Lists

The examiner in his initial decision found that the Unanimity Rule as applied to the selection of agent applicants for the Eligible Lists in the Metropolitan List Territories was so detrimental to the interests of agents, or prospective agents, as to be detrimental to the commerce of the United States. He therefore concluded that rule should be discontinued. Respondents except to this conclusion.

We feel that the examiner was correct. The Unanimity Rule has acted as an unreasonable restraint against qualified persons who seek to become travel agents. It has on several occasions prevented the Control Committee from even considering applicants for the Eligible Lists because of its use by local committees. It is capable of allowing one representative on the Control Committee to "blackball" any applicant and exclude him from appointment by the rest of the lines, though all of them may favor his selection. The rule has been denounced by a chairman of a local committee as "extremely detrimental to the best interests of the majority lines," and it has been used on at least one occasion in an attempt by lines to trade votes.

We hold that the Unanimity Rule must be discontinued in all actions by the conference, both by local subcommittees and the Control Committee, relating to the selection of agent applicants for the Eligible Lists. The rule, of course, is unnecessary to protect the freedom of individual lines in the actual appointment of their agents since the individual lines are free to appoint or not, as they see fit, any applicant placed on the Eligible Lists.

E. The Unanimity Rule as It Applies to Voting on Agency Sales, Transfers or Changes of Officers or Locations

It is uncertain whether the examiner meant to outlaw the Unanimity Rule as its applies to agency sales, transfers, or changes of officers or locations. Hearing Counsel appear to feel that the examiner's conclusions against the Unanimity Rule extended to these matters. In the interest of clarity we think a specific ruling should be made.

Our opinion is that the Unanimity Rule must be discontinued with respect to sales, transfers, or changes of agency officers or locations. It has the same injurious effect in this area that it has in the selection of agents for the Eligible Lists. The record shows that the Unanimity Rule has been instrumental in allowing the veto of an agency transfer and makes it possible for a member of the Control Committee whose line has not appointed the agency in question to block a transfer or change in personnel. These consequences are unreasonable restraints

which deprive travel agents of the ability freely to dispose of property rights and interfere unduly in the conduct of their business. In our view, the Unanimity Rule is contrary to the public interest. It also may possibly operate in some instances to the detriment of the commerce of the United States.

F. The Tieing Rule

The examiner held that the so-called "Tieing Rule," the conference procedure which prohibits appointed agents from selling transportation on nonconference lines, was unlawful as the record did not demonstrate that it was necessary to promote stability in rates or to combat destructive competition. Such tieing arrangements generally run counter to antitrust principles. *United States* v. *General Motors Corporation*, 121 F. 2d 376 (7th Cir. 1941), *cert. den.* 314 U.S. 618, and *Vitagraph, Inc.* v. *Perelman*, 95 F. 2d 142 (3d Cir. 1936), *cert. den.* 305 U.S. 610.

Respondents object to the examiner's conclusions, arguing that he applied strict antitrust principles in determining the validity of the Tieing Rule. We think respondents have misconstrued the examiner's conclusions. He applied traditional Shipping Act concepts in determining that the rule was invalid. Section 15 affords antitrust exemption to the parties to an anticompetitive agreement when that agreement is approved by the Commission. Particularly where the rights of third persons are affected, this exemption should not be granted unless the purposes and policies of the Shipping Act are thereby furthered. As the examiner stated, "the Commission must make sure that the conduct it legalizes under section 15 does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the act." *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954), *cert. den.* 347 U.S. 990 (1954). The examiner considered those factors which respondents argue are the proper ones, namely rate stability and destructive outside competition, and he weighed the restriction imposed on agents by the Tieing Rule against the possibilities were the rule abolished. He concluded, as we do, that no adverse consequences would flow from the abolition of the rule.

Respondents now admit that the Tieing Rule is not necessary to protect the conference from outside competition, but claim that it is necessary to maintain stability within the conference. They argue that without the Tieing Rule the conference would disintegrate. The record, however, contains no evidence demonstrating that anything of that sort will happen. We note that respondent lines operate Carib-

bean cruises without the benefit of a tieing rule and no adverse consequenses have resulted.

G. Payment of Commissions on Strike-Canceled Voyages

The examiner found that the conference, as a collective practice, refused the payment of commissions on voyages voluntarily canceled. Finding such collective action to run counter to the interests of our foreign commerce, he ruled that the practice should be discontinued. ASTA supports this ruling and also urges that it be extended to cover the case of voyages canceled because of a strike.

Respondents state, and we agree with them, that the examiner erred in finding that the refusal to pay commissions on canceled voyages was the result of conference action. There is nothing in the record which would indicate that collective action of the respondents dictates the payment or nonpayment of commissions on canceled voyages. There is testimony that some lines pay half commission, others full commission, on canceled voyages. Hearing Counsel, in the course of the hearings, admitted that it "may be a fact" that there is no conference action with respect to commissions on canceled voyages.

There is nothing in the conference agreement that can be disapproved with respect to these payments or nonpayments. If some lines refuse to pay the commissions, they may have reached individual understandings with agents covering the matter. But in any event, we cannot say on this record that the refusal is unlawful.

H. Voting by Lines Which Do Not Engage in the Foreign Commerce of the United States on the Level of Commissions Paid to Their Agents in the United States

The examiner found that "while unanimous approval of the membership of APC would be required to raise the rate of commission, at least seven of the members engage in little or no service to or from the United States." His difficulty with the voting by lines serving the contiguous Canadian trade was their power to exercise, through the Unanimity Rule, a veto over matters affecting travel agents in the United States. He ruled that "lines which do not engage in the foreign commerce of the United States should not be permitted to vote on the level of commissions because the compensation paid to agents here is none of their concern."

Respondents contend that the examiner erred in this ruling if it was thereby intended to exclude lines calling only at Canadian ports from voting on levels of commissions paid to their agents in the United States. Both ASTA and hearing counsel state that they have no objection to such lines voting on commission levels if the Unanimity

Rule is discontinued. Since we have ordered the rule eliminated as it applies to the level of commissions, the question reduces itself to one of whether the lines serving only Canadian ports should be denied any voice respecting the level of commissions paid to their agents in the United States.

It is sufficient for our purposes here merely to say that, with the Unanimity Rule having been eliminated, we have no objection to such lines having some voice in commission matters, and that proposed solutions to this problem may be submitted with the amended agreements. It may be noted, also, that at least one line serving only Canadian ports has indicated that it does not desire to vote on commission levels for agents in the United States.

Our ultimate conclusion is that Agreement No. 7840 of APC and Agreement No. 120 of TAPC and the rules adopted thereunder, insofar as they relate to travel agents, are contrary to section 15 of the Shipping Act in the respects and for the reasons noted above and must be modified in accordance with this decision.

Respondents shall within 60 days submit to us for review and approval proposed modifications of the agreements and rules consistent with this decision, as per our order attached. The views and comments of interested parties will be invited upon the specific language of the proposed modifications and the proceeding will be held open pending further order of the Commission.

COMMISSIONER PATTERSON, *concurring and dissenting:*

Based on the record before me in this proceeding, my conclusions are as follows:

First, I concur in the result reached in the preceding report as to—

(1) The majority's concurrence with the initial decision of the examiner as summarized in its report to show those portions as to which no exception is taken. It is understood that the respondents have agreed to revise many of the provisions objected to by the travel agents (first paragraph under "The Examiner's Decision").

(2) The majority's agreement with the examiner on the requirement of unanimous consent in selecting among applicants for travel agent status to be placed on a list of eligible applicants for ticket selling agencies (item (4) under "Discussion and Conclusions").

(3) The majority's agreement with the examiner on the requirement of unanimous consent in voting on agency sales, transfers of agency locations, or changes of officers (item (5) under "Discussion and Conclusions").

(4) The majority's decision that there is nothing in the record to indicate that collective action of the lines dictates the payment or nonpayment of commissions on canceled voyages (item (7) under "Discussion and Conclusions").

(5) The majority's decision not to "rule on the interest which we feel it is necessary for a line to have in the foreign commerce of the United States before it can vote on the level of compensation paid to its agents here" (item (8) under "Discussion and Conclusions").

Second, I dissent from the Commission's majority decisions as follows:

(1) Disapproving, unless modified, of the agreement to apply a unanimity rule to the level of agents' commissions (item (1) under "Discussion and Conclusions").

(2) Disapproving, unless modified, of the agreement to prohibit travel agents from selling transportation on nonconference or independent carriers (item (6) under "Discussion and Conclusions").

(3) Deciding that we have authority to regulate the level of commissions paid to travel agents and that we should take no action at this time on the level of commissions (items (2) and (3) under "Discussion and Conclusions").

As regards my "Second" conclusion as stated above, the reasons for my dissent are advanced as follows:

INTRODUCTION

We are concerned with the approvability under section 15 of the act of certain terms of the Trans-Atlantic Passenger Steamship Conference General Agreement adopted January 14, 1929, and as amended to the latest approved amendment on March 13, 1961, and with the Atlantic Passenger Steamship Conference Agreement dated London, February 12, 1946, approved by a predecessor agency on August 29, 1946. According to the numbering, Agreement No. 120 has been amended 76 times, and as of December 21, 1960, Amendment 120–76 shows 24 signatory members. No amendments are in the record for Agreement No. 7840, which has 15 signatory members. Headquarters of the former are in New York, and of the latter, in Folkestone, England, Great Britain.

The proceeding involving both agreements is called a "general investigation" and was started by a predecessor agency on November 2, 1959, after an informal complaint on October 22, 1958, by

the American Society of Travel Agents, Inc., concerning certain practices of the Atlantic Passenger Steamship Conference.

As a result of this investigation, the majority has decided that certain provisions of these agreements now violate section 15 of the act, although before the date of its report these provisions have been lawful and predecessor agencies have been fully informed of all revisions of these agreements. The agreements relating to commissions which are now found to be illegal are:

(1) *Agreement No. 120.* Article D. "Passage fares and rates of commission and all conditions relating thereto, shall be in accordance with the provisions of the *Atlantic Passenger Steamship Conference* Agreement and the rules and regulations adopted thereunder" (exhibit 1, p. 9).

(Agreement No. 120 does not control commissions, but by this provision delegates the function to the body operating under Agreement No. 7840.)

(2) Article E. "*Agencies.* (a) The member lines shall confine the sale of their transportation to: (1) *Line's Own Offices.* * * * (2) *General Passenger Agencies*—i.e., agencies appointed by a Line on a commission basis to control a specified territory in which sub-agencies are appointed who must report to such agencies * * *" Paragraph (e) of Article E prohibits a subagency "* * * from selling passage tickets for any steamer not connected with the fleets of the member Lines for which it has been duly appointed * * * if such steamer is operating in any competitive trans-Atlantic trade * * *" The member Lines agree to use a uniform "Sub-Agency Appointment Agreement" (Rule E–2). The prescribed terms of such agreement obligate the agent "to adhere to and comply with * * * the annexed rules * * *" Rule 5 annexed, called the tying rule, provides that "the agent is prohibited from booking passengers for any steamer not connected with the fleets of any of the member lines" and otherwise closely follows the language quoted above from paragraph (e).

(3) *Agreement No. 7840.* Article 6. "(a) Rates of Commission and Handling Fees which Member Lines may pay to their General Agents or Sub-Agents shall be established by unanimous agreement of the Member Lines" (exhibit 2, p. 9).

DISSENT NUMBER (1)

The majority does not question the validity of establishing rates by majority agreement or, as far as I know, by some other ratio, but

concludes that the "unanimous agreement" obligation (the expression "unanimity rule as it applies to agents' commissions" is used) is invalid under section 15.

I dissent from this conclusion and the disapproval of the agreement under section 15 that results therefrom. First, the reasons adduced do not support such a conclusion; and, second, there are other reasons which support the unanimous agreement obligation in article 6, paragraph (a), of Agreement No. 7840.

The two respondent conferences are successors of conferences in the transatlantic passenger steamship industry going back to 1879 or before. The North Atlantic Steam Traffic Conference met for the first time on March 5, 1868, in New York. This conference's agreement of 1879 provided in clause 19 that "all questions that may come before the Conference for action, must be decided by the unanimous vote of all members present, to be of any effect" (exhibit 119). Unanimous consent clauses of one sort or another are in conference agreements of 1885, 1894, 1921, 1928, and 1930 (exhibit 119). The record showed that commissions to subagents were originally fixed at fixed dollar amounts per passenger depending on destinations.

A Continental Conference meeting was first held in New York on May 4, 1885. The minutes of the meeting showed commissions to subagents were fixed.

The Atlantic Conference was re-formed in 1921 after the First World War. Eight years later, in 1929, the formerly separate conferences of Mediterranean, Continental, and North Atlantic lines joined in the one Trans-Atlantic Passenger Conference.

During all this time a unanimous consent was required with respect to decisions affecting each member's business affairs. One would think that such a long tradition behind an historically established business practice would require fairly compelling reasons of public policy to overturn it at this late date. A review of the majority's reasoning is enough to show this is far from the case.

The majority's significant reasoning opposing the unanimity rule (or regulation) is in the following discussion:

> It is a regulation which prevents travel agents in the United States from rendering complete and effective service both to passengers and to ocean carriers. It has in some cases prevented the principals from even considering the question of commission levels and in others has defeated, or at least delayed or watered down desires of the majority of the lines to raise commission levels, thus placing the steamship lines at a competitive disadvantage vis-a-vis the airlines. We think the Unanimity Rule plainly operates to the detriment of the commerce of the United States.

As I understand the reasoning, preventing or delaying consideration

of commission levels, and delaying the desires of a majority to raise commission levels is thought to prevent complete and effective service and such a result is a detriment to commerce.

To me, this is tantamount to saying that the obligation has been effective in preventing increased commissions. The obligation has had a deterrent effect within the conference, as the majority recognizes. Effectiveness within the conference is not the issue. The effect of the obligation on the public and on our commerce is the relevant test. The majority seems to assume without the need to prove that if it can show the obligation allows "one single vote" to "block a proposal on commission matters even though the proposal was favored by an overwhelming majority of the member lines," then it has automatically shown public injury. This does not follow at all. Some connection between cause and effect has to be shown. The effect of a veto threat is to cause injury to carriers desiring a change, but not to commerce in general or to the public. Perhaps a causal link is thought to be provided when it is said the lines "should at least be allowed to increase commissions unhampered by the veto power inherent in the Unanimity Rule should they desire to do so." Significance is given to this statement only by the conclusion that such a regulation "prevents travel agencies in the United States from rendering complete and effective service both to passengers and ocean carriers * * *." One can only speculate that the twice-mentioned inability to increase, rather than reduce, rates has somehow prevented complete and effective service, but the way this happens as well as the effect it would have on the carriers and on the traveling public segment of our commerce should be clearly shown. It is doubtful much of a relation can be shown if it is based on increases, because the nonunanimity rule makes it equally easy to reduce commissions. At the moment, travel agents seem to be motivated by the apparent desire of many carriers to raise commission percentages. This is only a transitory economic factor. When we deal with a matter of principle such as this, or with a historically established general rule for conducting business, we ought to be governed by long-term economic factors. The closest we get to a relation to commerce and the public interest is the thought that steamship lines are "at a competitive disadvantage vis-a-vis the airlines." Even this is referred to only as "some evidence" and it "related solely to the activities of agents who were not appointed by conference lines * * *." Unfortunately, it is only a judgment that is not even supported by the most interested parties, the respondent carriers, much less the record herein.

Since the evidence of airline competition falls so short of conclusively

proving the point, it is said there is diversion anyway and this is "not in the interests of the conference lines themselves." Changing choices as to the method of travel involve only speculation as to the reasons for diversion. What causes the diversion is only theory, is not supported, and is even denied by the conferences. The airline diversion reasoning is at best inconclusive.

To the extent economics are relevant, this record is devoid of data showing the effect of a change in commissions either up or down on the respective parties or on the public. Naturally, the travel agents want more money, but we would have to know a great deal more than we can learn from this record as to the effect of an increase on passenger fares and on the precarious competitive balance that now seems to exist between ocean and air transportation. Passenger choices would seem to be governed as much by convenience and pleasure as by economics or passenger agent activity.

The second point is that the better public-interest arguments, if anything, favor the validity of the obligation to not change commission rate levels without unanimous consent. The rule of group action by majority vote actually strengthens the power of the group, because it puts the full power and influence of all the members of the group behind an action affecting the public even though some of the individual members do not agree with the action. Less than all the members have the power to direct group action. A unanimity requirement, on the other hand, weakens the group's power to act by giving a power to prevent action by a veto over decisions. If antitrust law overtones are to be injected into our policy considerations, then anything which lessens the power of a group which makes dominating pricing decisions is to be favored. U.S.-flag lines are a minority in most conferences, and the rule enhances their power to influence group decisions or to protect themselves from oppression by the business needs of non-American lines. Generally the business needs of non-American member lines are dictated by more favorable cost considerations than our own. There is a serious question as to whether the undoubted loss of flexibility of action implicit in a unanimity rule is overcome by the detriments that may be caused by the economic power of a group dominated by majority votes of non-American lines.

DISSENT NUMBER (2)

The majority disapproves the so-called tieing rule of article E. I dissent from this disapproval.

Both article E of Agreement No. 120 and the related "rule" and prescribed terms of agency agreement, with minor revisions and with

the approval of our predecessors, have existed since 1933. Other forms of the obligation have existed even before then. The so-called Alexander report, which preceded the enactment of the Shipping Act, acknowledged that agreements existing in 1913 provided that: "(11) Agents of the lines which are parties to the agreement shall not interest themselves in the booking of passengers for new outside competing lines." (*Investigation of Shipping Combinations Under House Resolution 587*, Hearings Before the House Committee on Merchant Marine and Fisheries, 62d Cong., 2d sess. (1913), vol. 4, pp. 31–34 at p. 33.) The obligation and rule were not shown to have been disapproved between 1916 and 1933, nor subsequently, so the tieing obligation also has long historic acquiescence behind it. One would expect new factors and compelling reasons to overturn such an obligation after at least 48 years of use in one form or another, but this is not the case here either.

Against this background the majority refers to the examiner's statements that (1) there is no need for the rule; and (2) "tieing arrangements generally run counter to antitrust principles." The majority says the respondents have misconstrued these statements. The further comment is made that the antitrust "exemption should not be granted unless the purposes and policies of the Shipping Act are thereby furthered."

On the first point, the need or necessity test is not expressly made a standard of approval or disapproval under section 15. Lack of competitive "need" or "necessity", or because the agreements can be characterized as "tieing" arrangements which "generally run counter to antitrust principles," may have been equated with detriment to commerce as being against the public interest, but the link is not revealed.

The competitive necessity problem was not explored nor developed in this record. Even assuming this to be a valid test, the absence of any demonstration in this record proves nothing; it simply is not a basis for decision. If competitive necessity is to be a test, some effort should have been made to develop the facts on the point. Without the facts, it is no wonder the record "did not demonstrate" anything. Since the burden is on the Commission to approve unless we can show detriment or contrariety with public interest, we may not invert the burden at the last minute and say the respondent did not prove enough. It is up to the Commission to do the proving and disproving on this issue.

The second point, that tieing agreements generally run counter to antitrust principles and are an anticompetitive practice, is not estab-

lished. There was no exploration of what antitrust law might be applicable to the facts herein. Some tieing agreements may be contrary and some not, but it is necessary to establish what type this one is and what law applies to it. Section 15 exempts agreements from these laws unless we can bring the agreement within the expressly stated standards, which has not been done except for the majority's effort to interpret "detriment" or "public policy" using a partial statement in *Isbrandtsen Co., Inc.* v. *United States et al.*, 211 F. 2d 51 (D.C. Cir. 1951) at p. 57 (*cert. den.*, 347 U.S. 990). The full statement is: "The condition upon which such authority [to approve agreements under section 15 of the Act] is granted is that the agency entrusted with the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." The court equates consistency with an antitrust prohibition (itself difficult to determine) with a "public interest" standard. Such a standard was later put in section 15 in 1961 by Public Law 87-346 (75 Stat. 762). There is no way of telling which antitrust prohibition is to be used to test invasion, nor any way of balancing the prohibition against the purposes of the act.

Scrutinizing the intercarrier obligation alone, it is impossible to say that the record and briefing in this case establishes that this long-established and approved agreement clearly invades the prohibitions of the antitrust laws or to what extent. Absent such a demonstration by the Commission, section 15 compels approval.

The majority's comment establishes as a standard that approval of agreements under section 15 now involves a grant of an antitrust exemption privilege on condition that certain objectives are "furthered." A test, such as furthering "policies and purposes," is not expressly prescribed in section 15 or elsewhere. The agreement provision, as with any other intercarrier agreement, *must be approved unless* the Commission can show it is detrimental to commerce, unjustly discriminatory or unfair as between carriers or ports or contrary to the public interest or otherwise in violation of the Act. Detriment, contrariety, and violation, not furthering, are the tests.

The majority shows no connection between detriments to commerce or contrariety with public interest and the necessity to combat destructive carrier competition or furtherance of "regulatory purposes" or "purposes and policies" of the act. Perhaps the connection is implicit, but even with an implicit connection we need a statement of how to measure stifling of competition and of what the purposes and policies thus set up as measurements consist of, plus a few facts to be measured

by the standard tests. The needed tests cannot be determined from this record, much less the facts. One party recognized as much by falling back on illegality under section 14, subparagraph "Third," as interpreted in *Federal Maritime Board* v. *Isbrandtsen*, 356 U.S. 481 (1958). Section 14 prohibits a carrier from retaliating against shippers by certain methods because of specified reasons. The *Isbrandtsen* interpretation of section 14 establishes as a violation a contract requirement that a shipper not patronize independent on nonconference member carriers when such a contract is demanded in a context of being a "necessary competitive measure to offset the effect of nonconference competition," because in such circumstance the demand becomes a "resort to other discriminating or unfair methods." Such a context of offsetting needs and demands does not exist here. All that has been done is, by some reverse logic of negatives, to argue that the absence of a showing of competitive necessity by the respondent conference carriers proves there is no need for the rule and without such need the rule is illegal, and besides tieing agreements are generally illegal. Whatever is relied on, we are again faced with the necessity of supporting the burden of disapproval and of not relying on deficiencies in the respondent's case to support our burden.

For these reasons, I dissent from the majority's disapproval of the conference's tieing agreement.

DISSENT NUMBER (3)

The majority has reversed the examiner's conclusion that no ruling should be made on the Commission's authority to regulate the levels of compensation paid to travel agents by the carriers. This issue is entirely outside the scope of the issues as defined by our predecessor agency, the Federal Maritime Board, in its order of November 2, 1959: "to determine whether the aforementioned Agreements 120 and 7840 should be disapproved, canceled, or modified, insofar as they relate to travel agents in accordance with section 15 of the Shipping Act, 1916." Neither agreement sets levels of compensation nor requires any disapproval, cancellation, or modification of compensation levels. The agreements only provide a procedure for deciding how much or what percentage of the passage fare the members are willing to allow agents as compensation for the sale of tickets. The issue of levels was first raised in the brief of the travel agents, which stated: "Contrary to sweeping assertions of Conference counsel, the Maritime Commission has both the right and the responsibility to approve or disapprove the commission level established by the collective action of the respondents." It is possible that the level so established might

violate the Shipping Act, but such an issue is not before us and the record is totally inadequate for such a serious decision. Here we are asked to pass on the reasonableness of rate levels and the majority says it is unable to make a finding that the present level of commissions is so low as to be detrimental to the commerce of the United States. The most that is provided by the majority, therefore, is a volunteer legal opinion regarding what is thought to be our authority, but there is no realistic application of the power because no change is made in the existing levels. Absent an application of the power, vouchsafing the opinion is frivolous. Apparently, now that the decision as to our jurisdiction is out of the way, we are free to proceed later to decide on a satisfactory level of commissions set pursuant to conference agreements, in spite of the disclaimer of "jurisdiction to set the specific level of compensation," assuming a difference between these two types of jurisdiction. When this time comes I anticipate the issue will be just as present and unresolved as it is now and will necessitate a decision with more practical issues at stake. Nothing is accomplished by a decision at this time.

The examiner's decision not to pass on the question until more significant issues are at stake should be sustained.

In concurring as to the results in items (4) and (5) of the majority report, I do not necessarily approve the reasoning. The restraints imposed by the conference, whether by unanimity or any other percentage of votes, on the travel agents' freedom to enter business, sell their business, transfer ownership, or change officers or locations, were not justified by any corresponding advantage to the traveling public. I would decide without further proof that such freedom existed and that a restraint thereon by means of "control" committee clearances was against the public interest unless justified as an effective protection for the purchasers of tickets. These restraints can not be justified as reasonably related to the production of business or to an agent's capacity to perform his sales functions for the public. The respondents' carrier members may refuse to enter contracts or terminate contracts with agents they do not trust or consider to be improperly located for the generation of sales, but this is quite different from requiring prior consent to, or even consultation about, business decisions of travel agencies. The intrusion is against the public interest.

COMMISSIONER DAY, *concurring and dissenting:*

I concur with the results reached in the majority report in this proceeding as set forth under "First" in the preceding opinion of Commissioner John S. Patterson, and for reasons advanced by Commissioner Patterson I am in accord with the remainder of his opinion.

FEDERAL MARITIME COMMISSION

No. 873

INVESTIGATION OF PASSENGER STEAMSHIP CONFERENCES REGARDING TRAVEL AGENTS

ORDER

This proceeding having been instituted by the Commission to determine whether Agreement No. 120, Trans-Atlantic Passenger Steamship Conference, and Agreement No. 7840, Atlantic Passenger Steamship Conference, should be disapproved, canceled, or modified pursuant to section 15 of the Shipping Act, 1916, and the Commission having this date made and entered its report stating its findings and conclusions, which report is made a part hereof by reference, and having found that said agreements in certain respects violate section 15 and must be modified, as set forth in said report:

It is ordered, That the parties to Agreements Nos. 120 and 7840, being the member lines of the Trans-Atlantic Passenger Steamship Conference and the Atlantic Passenger Steamship Conference, respectively, shall within 60 days from the date of this order file with the Commission for its review and approval under section 15 of the act, modifications of said agreements and the rules thereunder consistent with the said report;

It is further ordered, That this proceeding shall be held open pending the Commission's further order following its consideration of the modifications so filed and the comments thereon which will be invited from interested parties.

By the Commission, January 30, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1123

MATSON NAVIGATION COMPANY PALLETS AND CONTAINERS
PACIFIC COAST/HAWAII TRADE

Matson Navigation Company rates for transportation of pallets and containers from Pacific coast ports of the continental United States to Hawaii held just and reasonable.

Gordon E. Davis and *David F. Anderson* for respondent Matson Navigation Company.

Richard Sasaki, Special Deputy Attorney General for intervener State of Hawaii.

William W. Schwarzer for intervener Pineapple Growers Association of Hawaii.

William H. Sardo, Jr. for intervener National Wooden Pallet Manufacturers Association.

Norman D. Kline and *Robert J. Blackwell*, Hearing Counsel.

INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER [1]

The contested issue here is whether the rate of Matson Navigation Company (Matson) of $2.35 per pallet for the transportation of empty pallets from Pacific coast ports of the continental United States to Hawaii is just and reasonable. Matson has the burden of proving that it is just and reasonable, as it was suspended by the Commission, although it has since become effective (*Section 3, Intercoastal Shipping Act, 1933*).

A pallet is a wooden platform or bed upon which such comparatively small cargo units as cans or cartons are placed and held together for transportation as a unit. The use of pallets in the shipment of Hawaiian canned pineapple and pineapple juice to the mainland, which began in 1958, has proved directly beneficial to the carrier,

[1] This decision became the decision of the Commission on February 25, 1964, and an order was entered discontinuing the proceeding.

shipper, and receiver of cargo, and to pallet manufacturers, and indirectly to the State (then the Territory) of Hawaii where the pineapples are grown, and the states where pallets used in the pineapple trade are manufactured, predominantly in the Pacific Northwest.[2] Here, as in all such cases coming before this Commission, careful attention has been given to the representations of all parties affected by the rate increase. With respect to disapproving a rate however, the Commission's power is strictly limited. It can disapprove *only* if it finds that the rate exceeds a just and reasonable figure. A rate which yields the cost of loading, carrying, and delivering the cargo, plus the cargo's pro rata share of general expense, a moderate contribution to profit, *and no more*, is certainly a just and reasonable rate which the Commission is not authorized to disapprove in the circumstances of this case. With respect to cargo interests who are hard pressed by just and reasonable rates (and often some are) a regulatory body finds itself in the position of the Supreme Court in *Matthews* v. *Zane*, 7 Wheat. 164, 211 (1822) which caused Chief Justice Marshall to say: "The case of the plaintiff may be, and probably is, a hard one. But to relieve him is not within the power of this court."

The facts of this case preclude application of *B. & O. R.R. Co.* v. *United States*, 345 U.S. 146 (1953) and similar cases. There is not and there cannot be a finding here that the $2.35 rate must be adjusted to meet a public need.

It is probable that if in 1958 Matson had charged a compensatory rate for carrying pallets to Hawaii, pallets would not have begun moving in the trade. Initially, Matson carried them free, and subsequently and until November 27, 1963, when the $2.35 rate under investigation became effective it carried them for less than a compensatory charge. Palletization of cargo carried in conventional holds was immediately beneficial to the carrier as well as shippers and consignees.

As listed by the National Wooden Pallet Manufacturers Association (Pallets) the principal advantages of handling ocean cargo in pallets are: (1) more rapid loading and discharge; (2) decreased handling costs; (3) decrease in ship turn-around time; (4) fewer injuries to cargo handlers; (5) substantially less damage and pilferage; and (6) better cargo ventilation. These advantages exist when cargo is stowed in conventional holds. There would appear, however, to be minimal advantage to the ocean carrier in using pallets to carry cargo in containers now in use by Matson. No substantial decrease in the per-

[2] The world's largest producer of wooden pallets (D & M Products Company) is located in Portland, Oreg. Mr. Edward Lay testified that his Lay-Rite Lumber Co., located at McMinnville, Oreg., shipped more than 100,000 pallets in this trade from June to September, 1962.

missible rate can be predicated on money saved by the carrier by the use of pallets.[3]

It is presumably true, as contended by interveners, that as a result of the favorable 1958–1963 treatment accorded by Matson to shipment of pallets to Hawaii, pineapple shippers and receivers such as chain stores and supermarkets have geared their cargo handling operations to pallets at considerable cost, including the installation of automatic palletizers and pallet conveyors. It is suggested, if not explicitly argued, that this obligates Matson to continue its old noncompensatory rate for carrying empty pallets westbound to Hawaii. This argument does not hold water. Even if Matson had entered into explicit contracts with pallet and pineapple interests to maintain the 63 cent rate—which it has not—this would not invalidate the increased rate of $2.35. As the Commission said in *Matson Navigation Company-Van Measurement/Heavy Cargo Rules*, 1 S.R.R. 769, 770e (1962): "changes in rates are not invalidated by a pre-existing contract of a carrier not to change its rates" citing *Com. Club, etc.* v. *Chicago & Northwestern Ry. Co.*, 71 I.C.C. 386, 401 (1897). The Commission's decision was affirmed *sub nom. Wilsey Bennett Company* v. *Federal Maritime Commission*, 315 F. 2d 374 (9th Cir., 1963).

As the issue then is whether the $2.35 pallet rate is just and reasonable, comparison of carrier costs attributable to transporting a pallet with the $2.35 it receives for performing the service is traditionally the best evidence, and Matson introduced such evidence which its brief correctly summarizes as follows:

Transportation cost of empty pallets

		Per pallet
1. Stevedoring and terminal service:		
Loading cost	$0.67	
Discharging cost	.42	$1.09
2. Vessel expense		.96
3. Administrative and general expense		.31
4. Total cost		2.36
5. Previous rate		.63
Net before taxes		(1.73)
6. Proposed rate		2.35
Net before taxes		(.01)

[3] It is contended that using pallets in containers speeds loading, which is, of course, beneficial to Matson. Matson shows, however, that any benefit from saving in loading a container (as estimated by pallets) would be more than offset by a loss in revenue of approximately $96 per container.

The cost figures utilized by Matson are not disputed, and are sufficiently supported by expert testimony. The intervener Pineapple Growers Association of Hawaii (PGAH) objects to full allocation of vessel expense and of administrative and general expense to pallets upon the theory that Matson has in the past booked and will in the future book pallets only upon a "space available" basis. The fact that Matson has been disinclined in the past to carry pallets at a noncompensatory rate, and apparently has at times left pallets on the dock, does not mean that its tariff should be judged by actions unauthorized by tariff provisions. Past rates for pallets were not and the tariff provisions before us are not an excuse for treating pallets differently from other cargo, and full distribution of costs to pallets is not only authorized but required.

Only two possible adjustments in Matson's cost statement are perceptible. One would be in depreciation, which Matson includes in "vessel expense and overhead allowances" (Matson's Reply Brief, footnote on page 7). If, as customary with Matson, depreciation has been calculated on a 20-year life, it is possible that this may be changed to a 25-year life, in Docket No. 960, not yet decided. Although the record therefore does not support computation, such a correction should decrease the vessel expense figure by approximately 3¢ per pallet.

The other could be made if the second step of Matson's three-step allocation was taken on a vessel operating expense ratio rather than on a revenue prorate formula. This the Commission ruled against in Docket No. 941, but the question has arisen again in No. 960. It would decrease Matson's administrative and general expense figure by approximately 3¢ per pallet.

An item which must be considered is found in the savings effected by using as dunnage pallets being carried as cargo. On at least some voyages by Matson's C–3 vessels Matson effected a saving of $300, or 7¢ per pallet by this means. (There would also be minimal correction in stevedoring cost, as apparently stevedoring time spent in placing pallets as dunnage is allocated to pallets as cargo.)

If the foregoing adjustments are made (and in making them, doubtful points are resolved against the carrier) Matson's position on pallet cargo works out as follows:

Proposed freight rate—per pallet			$2.35
Less: Stevedoring and terminal services		$1.09	
Vessel expense	$0.96		
Less: Excess depreciation	.03	.93	
Administrative and general expense	.31		
Less: Excess expense	.03	.28	2.30
			.05
Add: Savings from dunnaging			[4] .07
Net profit per pallet			.12

[4] Upon this record only the 7 cent adjustment for dunnage can be made. The result of the other two adjustments has been shown in order that if the Commission authorizes them in Docket No. 960, it will be clear that such action does not invalidate this rate.

A profit of 12¢ per pallet is well within the permissible range, and Matson's evidence therefore sustains the burden of proving that the $2.35 rate is just and reasonable.

The representatives of PGAH and Pallets have done all that could be done to offset Matson's evidence, but it is not enough. PGAH argues that the impact of the increased cost of moving empty pallets to Hawaii by liner will be adverse and severe. Adverse it is, but even if its impact is "severe" that would not authorize the Commission to strike it down. And its severity is highly questionable.

First, it is wholly unreasonable to assume, as PGAH does in calculating increased costs, that all pallets will move to Hawaii by self-propelled vessel at the $2.35 rate. It seems practically certain that almost all will move by barge at rates of 95¢ per pallet (Olson) and $1.23 per pallet (Matson), and that only in unforeseeable emergency situations, which should be rare in the pineapple business, will pallets move otherwise. It also appears probable that barge service, which now leaves considerable to be desired in sailing frequency and port coverage, will expand and improve. PGAH has estimated that the increase in the rate for pallets carried on self-propelled vessels will represent a 3 percent increase in shipping costs to pineapple shippers, but this assumes (1) that the same number of pallets will be used, which is questionable, because it will be considerably cheaper to ship by containers without pallets, and (2) that all pallets will move at

$2.35 per pallet, and none by barge at 95¢ to $1.23 per pallet.[5] A more complete calculation made by Matson, and not controverted, indicates that the pineapple shippers could utilize the same number of pallets and ship the same amount of their product in 1964 as in 1963, at a cost more than half a million dollars less than the 1963 cost. This results from the advent of container service at lower rates than conventional service which it is replacing.

Certainly, no precise prediction can be made as to the net effect of the increased cost of moving pallets by self-propelled vessels. Pineapple growers may prefer, because of their investment in palletizing equipment and the desires of their customers, to continue using pallets in shipping to Pacific ports, and almost certainly will continue their use in shipping to Gulf and Atlantic ports, most of the pallets moving to Hawaii by barge. Probably the future is not as bright as pictured by Matson, and it seems sure that it is not as bleak as indicated by PGAH. If it were the latter, Matson would hardly name a rate which would kill the goose that lays the golden eggs, and the State of Hawaii, which is fully advised in the matter but takes no position, would undoubtedly be loud in opposition to the rate.

The pallet manufacturers are, of course, in worse position than the pineapple industry. The latter may prefer to drop palletization on shipments to Pacific ports, to use the cheaper (although apparently less desired) slipsheet, or to stimulate pallet production in Hawaii or Canada.[6] As heretofore indicated, it appears more probable that pallets will continue to move, although in reduced quantity, and by barge rather than by self-propelled vessels. To the extent that the use of pallets dwindles in the pineapple trade it will be the result of progress in transportation, the coming of the container, which has practically destroyed the value of pallets to this carrier. A pallet is now from the carrier's point of view, just cargo, which like all cargo, must pay its way,[7] and payment at the rate of $2.35 has been shown just and reasonable. The value of the pallet to shipper and consignee to a considerable extent continues, and its use may therefore continue also.

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[5] Even at the 63¢ rate it was cheaper to ship by containers without pallets. But in the Hawaii-to-continental-U.S. Atlantic ports (where there is no container service), it was and should for some time at least, remain advantageous to use pallets, even at the liner rate of $2.35, and much more so with pallets moving at the 95¢–$1.23 barge rate.

[6] Past history indicates that the success of such an enterprise in Hawaii would be doubtful at best, and such a Canadian industry highly speculative.

[7] This is particularly true in view of the fact that many pallets have neither returned loaded to Pacific ports nor traveled to Gulf or Atlantic ports via the joint service in which Matson participates with Isthmian.

Matson's rates for knockdown vans and containers (westbound) and knockdown flour bulk pak bins (eastbound) were not opposed. Costs and rate comparisons based upon its evidence are accurately summarized by Matson in its brief as follows:

Transportation cost of knockdown vans and containers—westbound

	Per measurement ton	
1. Stevedoring and terminal services		
Loading cost	$6. 50	
Discharging cost	4. 00	
		$10. 50
2. Vessel expense		6. 71
3. Administrative and general expense		2. 58
4. Total cost		$19. 79
5. Previous rate		$5. 53
Net before taxes		(14. 26)
6. Proposed rate		$16. 52
Net before taxes		(3. 27)

Transportation cost of knockdown flour bulk pak bins—eastbound

	Per measurement ton	
1. Stevedoring and terminal services		
Loading cost	$4. 52	
Discharging cost	4. 59	
		$9. 11
2. Vessel expense		6. 71
3. Administrative and general expense		2. 37
4. Total cost		$18. 19
5. Previous rate		$5. 53
Net before taxes		(12. 66)
6. Proposed rate		$16. 52
Net before taxes		(1. 67)

Even if adjustments similar to those discussed with reference to the pallet rate were made, it is clear that the increased rates would not exceed just and reasonable levels. It is also true that the uncontroverted evidence is that the commodity movement is very small, and is expected to disappear entirely as Matson's container service is extended to all the islands.

Matson has fully sustained its statutory burden of proof. There is nothing in the record which overcomes the force of Matson's testimony and exhibits. The rates under review are held just and reasonable, and the proceeding will be discontinued. Proposed findings and conclusions not reflected herein are denied as not supported by substantial evidence, contrary to the weight of the evidence, or irrelevant to the decision.

Both Pallets and PGAH understandably complain of cavalier treatment of pallet cargo by Matson in the past. Such treatment was not denied by Matson, but certainly under the increased rate it should disappear, and pallet cargo should receive first-class service at all times.

(Signed) PAUL D. PAGE, Jr.,
Presiding Examiner.

JANUARY 29, 1964.

FEDERAL MARITIME COMMISSION

No. 732

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 733

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 734

GALVESTON COTTON COMPANY

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 735

TEXAS COTTON INDUSTRIES

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

Complaints against respondent Lykes Bros. Steamship Co., Inc. dismissed with prejudice as result of settlement, between complainants and Lykes only, of claim for reparation on shipments of cotton from U.S. Gulf ports to ports in the Mediterranean and Far East areas.

Appearances as previously noted.

SECOND INITIAL DECISION ON REMAND OF GUS O. BASHAM, CHIEF EXAMINER, DETERMINING REPARATION DUE COMPLAINANTS [1]

The first initial decision on remand herein, issued on January 15, 1964, dismissed with prejudice the complaints against respondent

[1] See Notice and Order of the Commission, *infra*.

775-794 O-65-51

Lykes Bros. Steamship Co., Inc. only, as the result of a settlement evidenced by Stipulation and Agreement by and between Lykes and complainants executed on December 18, 1963. Said report reduced the proposed settlement of $55,000 to $48,800 by eliminating reparation claimed on certain shipments found to be time barred.

As a result of the first decision, the parties involved have filed a revised Stipulation and Agreement executed on January 22, 1964, which eliminates the claims on the barred shipments, and computes reparation on the remaining shipments applying 6% interest from date of payment of freights through January 15, 1964, and arrives at an amount of $54,600 as reparation.[2] Except for this change the revised stipulation is substantially the same as the first one, which is set forth in the first decision.

The second or revised stipulation supersedes and is submitted in lieu of the first one which is expressly withdrawn by the parties, who request that the first decision issued on January 15, 1964, also be withdrawn.

[2] The detailed changes from the first stipulation and from the figures shown on pages 2 and 4 of the first decision are reflected in the table below.

Docket No.	Reparation claimed	Settlement	Distribution
732	$6,861.19	$11,689.50	$36,000, H. Kempner.
733	16,016.50	27,361.32	
734	8,043.31	13,707.80	13,700, Galveston Cotton.
735	1,139.30	1,931.77	1,900, Texas Cotton.
Total	32,060.30	54,690.39	54,600

The first decision will not be withdrawn since it contains the essential facts of the case except as modified and supplemented by this decision.[3] However, since the barred shipments have been eliminated, any discussion relating to them may be considered moot at this juncture of the proceeding.

Upon the facts recited in the first decision herein, as modified by this decision, it is found that the proposed settlement will not contravene the applicable provisions of the Shipping Act, 1916, or related Acts. An order will be entered dismissing the complaints as to Lykes only, with prejudice.

[3] Although the Commission has by notice of January 28, 1964, postponed indefinitely the time for filing exceptions to the first decision, exceptions may be filed to the combined decisions within the usual time after service of this decision.

As stated in the first decision, this action should not be construed as an approval of any particular amount of interest on the claims involved; and is without prejudice to any findings which may be made with reference to the remaining claims for reparation against the remaining respondents.

(Signed) GUS O. BASHAM,
Presiding Examiner.

January 29, 1964.

FEDERAL MARITIME COMMISSION

No. 732

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 733

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 734

GALVESTON COTTON COMPANY

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 735

TEXAS COTTON INDUSTRIES

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

NOTICE AND ORDER

No exceptions having been filed to the Examiner's Second Initial Decision and it appearing therefrom that the discussion of "time-barred" shipments in the Examiner's First Initial Decision is now

moot, notice is hereby given that the Commission has determined not to review the Second Initial Decision and said decision (also the First Initial Decision to the extent it sets forth the essential facts) became the decision of the Commission on February 25, 1964, pursuant to Rule 13(d) of the Commission's Rules of Practice and Procedure.

It is ordered, That as to Lykes Bros. Steamship Co. the complaints be, and they are hereby, dismissed with prejudice.

By the Commission, February 25, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Docket No. 1050

EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT INTERIM APPROVAL OF AMENDMENT TO EXCLUSIVE PATRONAGE (DUAL RATE) SYSTEM

Trans Pacific Freight Conference (Hong Kong) Agreement No. 14 has filed a request for permission under Section 14b of the Shipping Act, 1916, to increase the scope of its exclusive patronage (dual rate) system.

This conference amended its dual rate contract and filed such amended contract with the Commission pursuant to Section 3 of Public Law 87–346. Said Section 3 provides that such contract shall remain lawful for a period not beyond April 3, 1964, and that prior to such time the Commission shall approve, disapprove, cancel or modify such dual rate contract.

Notice of the filing of the request for permission to increase the scope of the contract rate system was published in the Federal Register on October 26, 1963, and interested persons were invited to comment thereon. No comments were received by the Commission pursuant to such publication. However, an issue has been raised in the docketed proceeding as to the propriety of including ports in Hawaii, Canada, and Alaska, as destination ports for this contract rate system.

Whereas, examination fails to show the modification insofar as it pertains to Pacific Coast ports in California, Oregon, and Washington to be unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest or violative of the Shipping Act, 1916;

Now therefore, by virtue of the authority vested in the Commission,

It is ordered, that pursuant to Section 14b of the Shipping Act, 1916, and without prejudice to the future action of the Commission pursuant to Section 3 of Public Law 87–346, as amended, permission is granted to extend the scope of the Conference dual rate system to

include as destination ports the Pacific coast ports in California, Oregon, and Washington, and the conference request to include additional ports in Hawaii, Canada, and Alaska will be held in abeyance pending settlement of the issue raised in the docketed proceeding.

By the Commission, March 17, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 282

BARR SHIPPING COMPANY, AGENT FOR PROCTER & GAMBLE A. G.

v.

ROYAL NETHERLANDS STEAMSHIP COMPANY

An application for voluntary payment of reparation filed pursuant to Rule 6(b) and based on rate mistake may be granted upon proof that a conference or carrier failed to effectuate an intended tariff filing through inadvertent omission or error, that discrimination will not result if relief is granted, and that equity and justice warrant the relief requested.

A shipper will not be relieved of the consequences of a conference's inadvertent omission or error in filing a rate in the absence of affirmative proof that the shipper and carrier acting in good faith agreed, or the shipper had otherwise been led to believe, that such rate would apply.

W. O'Hara for complainant.

J. R. Hooyberg for respondent.

SUPPLEMENTAL INITIAL DECISION OF HERBERT K. GREER, EXAMINER [1]

This proceeding was initiated by an application filed pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure whereby the respondent Royal Netherlands Steamship Company sought permission to pay reparation to the complainant Barr Shipping Company as agent for Procter & Gamble A.G., in the sum of $321.25 for alleged overcharges on shipments of soap powder and bleach from New York to Aruba and Curacao. The application disclosed that the U.S. Atlantic and Gulf-Venezuela and Netherlands Antilles Conference (the conference) of which respondent is a member, at a meeting held on February 6, 1963, adopted a resolution to lower the rates on soap powder and bleach effective February 18, 1963; and that the conference through error and omission

[1] This decision became the decision of the Commission on March 12, 1964. See order and dissenting opinion of Commissioner Patterson, *infra*.

failed to effecuate the reduction by a proper filing with the Commission. The Initial Decision authorized respondent to make payment to complainant in the sum of $264.66 as reparation, that amount being the difference between the rate charged and the reduced rate on the shipments made between February 18 and March 3, 1963 (the February shipments). On shipments made subsequent to March 4, 1963, the date the reduction in rates became effective in accordance with the erroneously filed tariff, respondent was directed to make refund of straight overcharges in the amount of $56.69

The proceeding was remanded for a determination of whether, as to the February shipments, the shipper paid more than it expected to pay or had any agreement or understanding with the carrier that the rates for soap powder and bleach were to be reduced before such shipments were made. The Initial Decision was based on the concept that it would be unjust and inequitable to permit a carrier to profit by virtue of its own error or omission at the expense of an innocent shipper regardless of whether the shipper had been misled as to the legal rate. The Order of Remand points out that in the past the Commission has relieved a shipper of the consequences of a carrier's inadvertence or oversight in filing a rate only "when the parties acting in good faith had agreed, or the shipper had otherwise been led to believe, that said rate would apply." The order refers to "the necessity of submitting affirmative proof on that point."

ADDITIONAL EVIDENCE

In compliance with the Order of Remand, evidence has been adduced that on February 7, 1963, the conference of which respondent is a member advised Procter & Gamble Manufacturing Company, which company handles all rate negotiations for complainant, that:

> we are amending our Tariff effective February 18, 1963, through June 30, 1963, to provide the rate of $22.00 per 2,000 pounds on Detergent and $20.00 per 2,000 pounds on Laundry Bleach to Aruba and Curacao.

On the basis of this evidence, it is found and determined that complainant had been led to believe the rates for soap powder and bleach were to be reduced before the two February shipments were made, and, that complainant paid more than it expected to pay.

DISCUSSION

The additional finding brings this case within the factual category of cases in which relief has been granted. In summary, the record now discloses that as to the two February shipments:

1. The conference of which respondent is a member resolved to reduce the rates on detergent (soap powder) and bleach effective February 18, 1963 and that respondent participated in the conference action reducing such rates.

2. Through error and omission, the reduction was not effectuated by proper filing with the Commission and that the error and omission were inadvertent.

3. Complainant was led to believe that its shipments made subsequent to February 18, 1963, would be subject to the reduced rates.

4. Complainant's shipments of soap powder and bleach via respondent's vessels were subjected to the rate of $25.00 per 2,000 pounds, which was the legal rate according to the tariff then on file with the Commission.

5. Had the carrier applied the rate the shipper had been led to believe would be applicable and which would have been the legal rate had not the conference neglected to effectuate the intended reduction, the charges would have been $264.66 less than the charges actually collected.

6. There were no shipments of others than complainant of the same or similar commodity which moved via respondent's vessels during the approximate period of time at the legal rate.

The Commission's authority to award relief is stated in *Martini & Rossi et al.* v. *Lykes Bros. S.S. Co.*, 7 F.M.C. 453 (1962), as follows:

> We have the responsibility for administering that Act [Shipping Act, 1916] and also the Intercoastal Shipping Act, 1933, and empowered among other things to see that equity and justice are done in the matter of reparations.

The authority has been exercised only when:

> 1. There has been an error or omission whereby the Commission's records have not correctly reflected the actual intent of the party responsible for effectuating a proper filing;
>
> 2. Discrimination will not result if relief is granted; and
>
> 3. The principles of equity and justice warrant relief.

In addition to other facts addressed to the Commission's discretion in applying the principles of equity and justice, it is made clear by the Order of Remand that to warrant the relief of a shipper from the consequences of a carrier's oversight or inadvertence in filing a rate, there must be affirmative proof that the parties acting in good faith had agreed, or the shipper otherwise had been led to believe, such rate would apply. The additional evidence presented in this proceeding satisfies this requirement. Further facts relating to equitable considerations are that the shipper is an innocent party and that a conference member, by virtue of the conference's error, will receive more than it intended to receive at the expense of the shipper.

The essential facts warranting relief having been established respondent is authorized to pay complainant $264.66 as reparation on shipments of soap powder and bleach via respondent's vessels on February 21 and 24, 1963. The direction to make refund of straight

overcharges in the amount of $56.59 on shipments made subsequent to March 4, 1963 was not subject to the Order of Remand and respondent will make such refund as ordered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

FEBRUARY 4, 1964.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 282

BARR SHIPPING COMPANY, AGENT FOR PROCTER & GAMBLE, A.G.

v.

ROYAL NETHERLANDS STEAMSHIP COMPANY

NOTICE OF EFFECTIVE DATE OF DECISION AND ORDER AUTHORIZING REPAYMENT

No exceptions having been filed to the supplemental initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the decision became the decision of the Commission on March 12, 1964.

It is ordered, that the application of Royal Netherlands Company to repay to Barr Shipping Company, agent for Procter & Gamble, A.G., the sum of $321.25 as reparation and refund for overcharges be and is hereby granted.

COMMISSIONER PATTERSON, *dissenting:*

The Commission has ordered that the application of the Royal Netherlands Steamship Company to repay to a shipper certain overcharges should be granted. The Commission has determined not to review the Examiner's decision that the Royal Netherlands Steamship Company may refund to a shipper the amount of $321.25, because the shipper was required to pay freight on the basis of the rates and charges specified in the carrier's tariffs on file with the Commission and published and in effect at the time, instead of a rate established by the same carrier which "the conference through error and omission failed to effectuate by a proper filing with the Commission." The facts are clear that the rate the shipper is being required to pay is not based on the duly published effective tariffs.

Section 18(b)(3) of the Shipping Act, 1916, enacted by Congress in Public Law 87-346, approved October 3, 1961, provides as follows:

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

Whatever rights Rule 6(b) of the Commission's "Rules of Practice and Procedure", effective July 31, 1953, may give, the rule may not sanction disregard of the clear terms of the above Congressional enactment.

It is my opinion that the facts before me in this case, as disclosed by the Examiner's decision, show beyond any doubt that the carrier is refunding and remitting a portion of the rates or charges specified in its tariffs on file with the Commission and duly published and in effect at the time. The carrier is also collecting and receiving a less and different compensation for the transportation of property than the aforesaid filed tariffs. For these reasons I dissent from the determination of the majority of the Commission to not review and reverse the decision of the Examiner in this docket.

By the Commission, March 12, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1097

IN THE MATTER OF AGREEMENT NO. 8905
PORT OF SEATTLE—ALASKA STEAMSHIP CO.

Decided March 19, 1964

1. Respondent Port of Seattle found to be a person subject to the Shipping Act of 1916 with respect to Agreement No. 8905 between it and respondent Alaska Steamship Company, assignee of Alaska Terminal and Stevedoring Company, leasing the Port's Pier 42 and adjacent areas to Alaska Steamship Company.
2. Said agreement, under which the lessor has the right among others to regulate lessee's charges for terminal services and the lessee is granted special rates, accommodations, privileges or advantages, is subject to the filing and approval requirements of section 15 of the Shipping Act of 1916.
3. The temporary and interim agreements between the respondents effective from September 1, 1962, which incorporate substantially all of the provisions of Agreement No. 8905, are subject to the requirements of section 15 and were effectuated by the respondents in violation thereof.
4. Agreement No. 8905 is not unlawful merely because it fails to follow Port's tariff charges. It has not been shown to be unjustly discriminatory or unfair or otherwise violative of section 15 and is therefore approved.

Edward G. Dobrin and *Peter D. Byrnes*, for Alaska Steamship Company and the Port of Seattle, respondents.

Mark P. Schlefer, for Puget Sound Tug and Barge Company, Puget Sound-Alaska Van Lines Division, intervener.

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

Herbert K. Greer, Hearing Examiner.

REPORT

BY THE COMMISSION (JOHN HARLLEE, *Chairman;* THOS. E. STAKEM, *Vice Chairman;* ASHTON C. BARRETT, JAMES V. DAY, JOHN S. PATTERSON, *Commissioners.*)

This proceeding was instituted by the Federal Maritime Commission (Commission), on its own motion, to determine whether a lease arrangement (Agreement No. 8905, hereinafter sometimes referred to

as "8905") between the Port of Seattle (Port) and Alaska Terminal and Stevedoring Company (AT&S) should be approved, disapproved or modified pursuant to section 15, Shipping Act, 1916 (Act).

Port is a municipal corporation of the State of Washington and furnishes wharfage, dockage, warehouse and other terminal facilities in connection with common carriers by water. AT&S furnished terminal facilities at Seattle until, by corporate reorganization effective December 31, 1962, it became a division of Alaska Steamship Company (Alaska Steam), the latter a common carrier by water operating between Seattle and various ports in Alaska.

On August 28, 1962, Port and AT&S entered into the lease (8905) by which Port leased to AT&S a terminal facility known as Pier 42, together with certain adjacent land areas.[1] The lease is dated August 28, 1962, and covers the period September 1, 1962, through December 31, 1967, except that it is not effective until approved by the Commission, if approval is required. The agreement was filed with the Commission and, after public notice, Puget Sound-Alaska Van Lines (PSAVL), a common carrier by water competing with Alaska Steam between Seattle and Seward, Alaska, entered a protest and the Commission thereafter instituted this proceeding. Port, AT&S and Alaska Steam were made respondents and PSAVL intervened. (Alaska Freight Lines, also a competitor of Alaska Steam, intervened but did not participate in the proceedings.)

On May 28, 1963 the Commission amended its investigative order to include three amendments to 8905 filed in April and May, 1963.[2] In June, 1963, respondents filed with the Commission three "interim" agreements intended to govern their relations from September 1, 1962, until such time as 8905 would be approved by the Commission.[3] The Commission again amended its order of investigation to determine whether the parties were carrying out 8905 (or other agreements con-

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[1] Rental is defined in para. 3(b) as,

"An annual sum equal to 100% of all dockage revenues * * * at Pier 42 in accordance with [Port's tariff] plus 100% of all revenues for Wharf Demurrage assessed in accordance with [Port's tariff]; plus 100% of all revenues for Wharfage assessed in accordance with [Alaska Steam's tariff] up to a maximum annual sum of $150,000 per lease year * * * [I]n no event shall the rental paid by Lessee for each lease year be less than the minimum annual rental of $100,000."

[2] 8905–1 is an assignment of the lease by AT&S to Alaska Steam effective December 31, 1963; 8905–2 provides for review by Port of Alaska Steam wharfage charges; and 8905–3 provides for the installation of a truck scale on the premises.

[3] The first interim agreement covered the period September 1, 1962 through December 31, 1962; the second covers the period from January 1, 1963 forward; and the third provides for rental payments on the truck scale. The terms of the interim agreements are discussed *infra*.

cerning the same subject matter) prior to approval by the Commission.

Respondents challenge the Commission's jurisdiction over the Port of Seattle in its capacity as lessor and further assert that neither 8905, its amendments, nor the interim agreements are within the scope of section 15 of the Act. PSAVL contends that the agreements are within the scope of section 15 and that they should be disapproved as unjustly discriminatory and otherwise violative of the Act. Hearing Counsel takes the position that the agreements are within the scope of section 15 and that 8905 as amended should be approved with a modification.

The Hearing Examiner held that,

1. The parties to Agreement 8905 and the interim agreements are persons subject to the Shipping Act of 1916, as amended.

2. Agreement 8905, as amended, and the interim agreements * * * are within the scope of section 15 * * *

3. The parties to the interim agreements have operated under such agreements since September 1, 1962, and prior to approval of the Commission in violation of the Shipping Act 1916, as amended.

4. Agreement 8905, as amended, is not unjustly discriminatory or unfair as between persons subject to the Act or otherwise in violation of the Shipping Act of 1916, and should be approved.

Exceptions were filed to the Examiner's decision and oral argument was heard by the Commission. For the reasons set forth below, we agree with the above conclusions of the Examiner. Exceptions not discussed herein nor reflected in our findings have been considered by us and are denied as unsupported by reliable and probative evidence or as irrelevant to this decision.

DISCUSSION AND CONCLUSIONS

The Port of Seattle is an "other person" subject to the Shipping Act, 1916.

Section 1 of the Act provides in part:

> The term "other person subject to this act" means any person not included in the term "common carrier by water", carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

Respondents concede that Alaska Steam is subject to the Act and that, insofar as Port furnishes "wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water," Port also is a person subject to the Act. However, respondents deny that "furnishing" includes the leasing of terminal facilities and con-

tend that the lessor of such property stands in the same position as a vendor of realty and is not subject to the Act.

This argument, as we understand it, is that, by virtue of the lease arrangement with Alaska Steam, Port has abdicated its position as a terminal operator at Pier 42 and that Alaska Steam has assumed that function. In the first place, this argument overlooks the fact that the provisions of 8905 permit Port to continue to control to a large extent the level of the rates to be charged at Pier 42. Para. 3(f) provides that,

> As to all charges upon which rental payments are to be computed as provided in paragraph 3 (b) and (c) of this lease, the Lessee's applicable tariff provision shall be the same as the Port of Seattle's tariff provisions with respect to the same or similar terminal operations.

Furthermore, para. 3(b), as amended by 8905–2, provides that,

> Inasmuch as the Lessee is required to pay to the Port as rental herein certain amounts based upon charges established in the Lessee's own terminal tariff * * * all such tariff charges shall be subject to review at all times on behalf of the Port. If, in the opinion of the Port, any rates or changes applicable to Pier 42, Seattle, named in the Lessee's tariff are considered detrimental to the interests of the Port, the Lessee agrees to change said rates and/or charges to a figure satisfactory to the Port, or in the event such figure is not satisfactory to the Lessee, Lessee may cancel this agreement * * *

Also, para. 4 reserves to Port "the right to order the berthing of vessels and the loading or discharging of cargo to or from such vessels at the leased premises, provided only that such operations shall not unreasonably interfere with the rights of the Lessee" at Pier 42.

We think it clear, therefore, that Port has not abandoned its function of furnishing terminal facilities at Pier 42.[4]

Respondents' argument also fails for a more fundamental reason. The leasing of a terminal facility in connection with a common carrier by water is a function—and a common one—of a terminal owner or operator which cannot be separated or distinguished from the "furnishing" of "wharfage, dock, warehouse, or other terminal facilities" within the meaning of section 1 of the Act.

The legislative history of the Shipping Act, 1916, makes clear that Congress was seriously concerned with terminal leases. The recommendations of the so-called "Alexander Committee" were followed in large part in framing the Act.[5] One of these recommendations

[4] This view is strengthened by a reading of the Port's current "leasing policy," which contains the statement that it is the Port's policy to retain a degree of control over its leased facilities, including the right "to establish the rates to be charged."

[5] House Report 659 on H.R. 15455 (64th Cong.), p. 27.

was that terminal owners "be required to make their terminal facilities available to water carriers on equal terms * * *" [6]

Again, during the House debates and proceedings on the Shipping Act, Representative Alexander, in opposing a proposed amendment which would have deleted the words "wharfage, dock, warehouse, or other terminal facilities" from section 1, said,

> Hence, if the board effectually regulates water carriers, it must also have supervision of all those incidental facilities connected with the main carriers.

The proposed amendment was rejected (53 Cong. Rec. 8276).

To hold that the Commission has no authority over a terminal operator who leases its facilities under terms and conditions similar to those embodied in 8905 would thus emasculate the very powers which Congress intended the Commission to have in order properly to supervise the shipping industry. Our conclusion is that the lease agreement was entered into between two persons subject to the Act. We turn next to the question of whether the agreement itself requires Commission approval under section 15 of the Act.

Agreement 8905, as amended, is an agreement which is subject to section 15 of the Act.

In order to be subject to section 15, an agreement must either, (1) fix or regulate transportation rates or fares; (2) give special rates, accommodations, or other sepcial privileges or advantages; (3) control, regulate, prevent or destroy competition; (4) pool or apportion earnings, losses or traffic; (5) allot ports or restrict or otherwise regulate the number and character of sailings between ports; (6) limit or regulate in any way the volume or character of freight or passenger traffic to be carried; or (7) in any manner provide for an exclusive, preferential, or cooperative working arrangement.[7]

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[6] Report of the House Committee on Merchant Marine and Fisheries (63d Cong.), Investigation of Shipping Combinations, vol. 4, p. 32.

[7] 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."

Respondents contend that 8905 contains no provisions which would render it subject to section 15. Their specific contentions will be discussed as pertinent to our findings.

Agreement 8095 regulates transportation rates.

Respondents argue that wharfage, dockage, and wharf demurrage are not "transportation rates" within the meaning of section 15 and that, in any event, 8905 in no way regulates or fixes such rates. This contention is contrary to past decisions of this agency and the courts.

As indicated above, paras. 3(b) and 3(f) of the agreement require that Alaska Steam's wharfage, dockage and wharf demurrage charges be the same as those assessed by Port for like services, and give to Port the right to review and change such charges. Such an agreement is clearly the fixing and regulating of those charges. In *Greater Baton Rouge Port Comm. et al.* v. *FMB*, 287 F. 2d 86 (CA 5, 1961), the Court cited with approval the Board's determination that a lease agreement between two persons subject to the Act, whereby the rates of the lessee would be competitive with rates for similar services at other Gulf ports, was a "regulation of rates" within the meaning of section 15. In addition, several dockets decided by this agency have involved terminal agreements fixing terminal charges [e.g. *Terminal Charges at Norfolk* 1 USSB 357 (1935); *Associated—Banning Co.* v. *Matson*, 5 FMB 336 (1957)], and there are presently on file with the Commission a number of approved agreements which cover the fixing of rates and charges by terminals. There has never been any question that the charges fixed pursuant to those agreements—charges similar to those before us in 8905—are "transportation" rates.[8]

Agreement 8905 gives special rates, accommodations, privileges or advantages.

Under the terms of the lease agreement, Alaska Steam pays to Port as rent an amount equal to 100% of the charges assessed for wharfage, dockage and wharf demurrage at Pier 42 up to a maximum of $150,000 per annum. It retains the overage, which the record indicates will be substantial. Even though additional risks and expenses for overhead and superintendence are imposed on Alaska Steam under the lease, it appears the net result of the lease's operation may be finan-

[8] Respondents contend that in any event they are merely acting in accordance with approved Terminal Conference Agreement No. 6785, to which they are signatories, which allows the parties thereto to "establish and maintain just and reasonable, and, so far as practicable, uniform tariff rates * * *." But 8905 goes farther. It requires that Alaska Steam's tariff will at all times be the same as Port's, whereas 6785 allows the parties the right to act independently without abrogating the agreement.

cially advantageous to Steam. It also appears that the parties believed the wharfage, dockage and wharf demurrage charges would likely exceed the $150,000 maximum, although the possibility that they might not was considered and a minimum rental of $100,000 annually was therefore provided. But whether or not Alaska Steam derives a dollar advantage from the lease, section 15 is not limited to such benefits. It extends as well to agreements giving special rates, accommodations or privileges and 8905 obviously does that.[9]

The provisions of the agreement which regulate rates and grant special rates, accommodations, privileges or advantages to the lessee amply bring it within the filing and approval provisions of section 15 of the Act. We therefore find it unnecessary to deal with the exceptions of the parties which relate to other provisions of 8905 which might also render it subject to section 15.

The interim agreements are subject to section 15 and have been effectuated prior to approval.

As indicated above, in June, 1963, respondents filed with the Commission three "interim" agreements intended by the parties to govern their relations from September 1, 1962, until such time as 8905 would be approved by the Commission.[10] Since it has been found that 8905 is subject to section 15, the interim agreements are also subject if they correspond in substance to 8905. We find that they do.

Under the interim agreements the premises are held by Alaska Steam—

> under a month-to-month tenancy; subject, however, to all of the terms and conditions [of 8905] except the provisions relating to the term of the lease and the provisions of paragraphs 4 and 5 relating to secondary berthing rights and the application of the U.S. Shipping Act.

The interim arrangement also provides that,

> in lieu of the rental provisions [in 8905], it is agreed that the rental provided in 3(a) and the minimum monthly rental of $12,500.00 as provided in 3(b) will apply without further restrictions.

It was further provided that, upon approval of 8905 by the Commission, the terms of 8905 would become operative and relate back to September 1, 1962.

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[9] The fact that the arrangement is termed a "rental formula" by the parties makes it no less a section 15 agreement.

[10] The agreements were assigned Agreement Numbers 8905–A, 8905–B and 8905–C. 8905–A and –B are substantially the same, the difference being that B was executed because of the assignment of the lease from AT&S to Alaska Steam. 8905–C deals only with an additional rental for a truck scale installed by Port pursuant to 8905–3. We are here concerned primarily with A and B and will treat them as one.

The Examiner found, and we agree, that the only difference between the interim agreements and 8905 was the exclusion of the Port's secondary berthing rights and that this variance did not remove the interim agreements from within the scope of section 15.

Respondents except to this finding, contending that the interim agreements are merely an ordinary lease of property for a flat monthly rental of $12,500. But the $12,500 monthly rental still relieves Alaska Steam from paying the tariff charges for wharfage, dockage and wharf demurrage and therefore represents a special rate, accommodation or advantage for the reasons set out above in our discussion of the basic lease. Also, while respondents deny that it was their intention that Alaska Steam would observe the same rates as Port under the interim agreements, we think it clear that paragraph 3(f) of the basic lease (8905), which is applicable under the interim arrangement, required just that and the interim agreements constitute a regulation of rates in the same manner as the basic lease.

Respondents admit that the terms of the interim agreements have been carried out by them since September 1, 1962. Therefore, we find that the respondents have carried out agreements subject to section 15 of the Act without approval, contrary to the requirements of said section.

Agreement 8905 does not violate section 15.

Section 15 of the Act empowers the Commission to approve an agreement unless, after notice and hearing, it finds *inter alia* that the agreement is unjustly discriminatory or unfair as between carriers, shippers, or ports, or that it operates to the detriment of the commerce of the United States, or is in violation of the Act. The Examiner found that Agreement 8905 should be approved pursuant to section 15 because it is not unjustly discriminatory or unfair or otherwise violative of the Act.

Hearing Counsel support the Examiner's finding but suggest modification of the agreement in one respect, as later noted. PSAVL excepts to the Examiner's finding. It alleges that it requested from the Port but was refused a lease similar to the one given Alaska Steam, and that the rental provisions of 8905 confer a financial advantage and undue preference on Alaska Steam and result in unjust discrimination and undue prejudice against PSAVL, in violation of sections 15 and 16 First of the Act. It further alleges that the Port's

failure to charge Alaska Steam the Port's published tariff rates is an unjust and unreasonable practice violative of section 17 of the Act.[11]

An agreement for the use of a public terminal facility at a rental which deviates from the terminal's regular tariff provisions, may run afoul of the Shipping Act's proscriptions and is deserving of our scrutiny for any illegal discrimination or prejudice that may result. Such an agreement, however, is not unlawful or unreasonable merely because it does not follow the terminal's tariff charges. Nor can we condemn an arrangement like 8905 on the basis of mere allegation, as PSAVL in effect asks us to do here.

The record here is barren of proof that 8905 subjects PSAVL to unlawful discrimination or prejudice. It does show that a competitive relationship exists between PSAVL and Alaska Steam, but there is no evidence that PSAVL has been damaged by the agreement. There is no showing, for example, that cargo has been or will be diverted from PSAVL to Alaska Steam. Past decisions of the Commission and its predecessors make clear that the person claiming illegal prejudice or disadvantage must establish damage with respect to its ability to compete.[12] But here the facts at most reflect only that Alaska Steam may derive some monetary benefit from 8905, which obviously is not a sufficient basis for us to find that undue disadvantage, or indeed any disadvantage at all, will result to PSAVL.

The nature of PSAVL's position is further pointed up by reference to its own negotiations with the Port. In 1961 PSAVL undertook to obtain from the Port space for PSAVL's erection of a container crane on the Port's Pier 5, coupled with a reduced wharfage charge on PSAVL's containerized cargo. It later withdrew the crane proposal. Subsequently in 1961 PSAVL offered to lease from the Port for a

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[11] Section 16 of the Act reads in pertinent part:

"That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with an 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 tarffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 17 reads in pertinent part:

"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."

[12] *West Indies Fruit Co. et al.* v. *Flota Mercante Grancolombiana, S.A.*, 7 F.M.C. 66 (1962); *Port of New York Authority* v. *AB Svenska Amerika Linien, et al.*, 4 F.M.B. 202, 205 (1953); *The Paraffine Companies, Inc.* v. *American-Hawaiian Steamship Co., et al.*, 1 U.S.M.C. 628 (1936).

"lump sum rental," part of the dock frontage on Pier 5 and storage area adjacent thereto. However, the $1000 per month rental figure PSAVL finally named in connection with this offer was considered by the Port to be "quite unrealistic" in light of the property involved and the Port's investment therein. Meanwhile, PSAVL went ahead with plans to furnish its own facilities. It reconstructed terminal property belonging to one of its parent companies and located immediately adjacent to the Port's Pier 5, and has since conducted its operations from this facility. Thus PSAVL, although protesting the lease between the Port and Alaska Steam, apparently had ceased to have any interest itself in leasing from the Port.

At the time of the Port-PSAVL negotiations, Port had a policy of assessing 100% of wharfage, dockage and wharf demurrage in connection with its terminal rentals. This policy had been modified prior to the time of the Port's negotiations with Alaska Steam leading to Agreement 8905, and under the modification it was permissible to adopt a negotiated rental formula at less than full tariff charges in cases of inequity to the Port or its lessee. The Port had mentioned its previous 100% policy to PSAVL during the course of their negotiations, but whether it intended at all events to adhere to the policy is not clear. Even if it did, there is nothing in the subsequent policy change which suggests discrimination. Nor is there any evidence that the Port has refused to apply its new leasing policy to PSAVL or any other carrier, or indeed that the Port has been asked to do so.

Furthermore, it is clear, as the Examiner found, that the circumstances of the Port's negotiations with these two carriers "were entirely different." Different facilities and different cargo were involved. PSAVL at no time proposed to negotiate with the Port either for facilities or a rental formula similar to those covered by Agreement 8905. And for aught this record shows, what PSAVL did propose to the Port failed not because of any alleged discrimination but because PSAVL either withdrew its offer, tendered a rental figure which the Port considered grossly inadequate, and/or concluded that it would provide its own facilities.

Our conclusion is that Agreement 8905 should be approved. There has been no showing that the agreement is violative of any of the provisions of the Act. And, while we have nothing whatever to indicate that such will be the case, we point out that if during the approximately four years which remain of the agreement's life it can be shown to be having an unlawful impact or effect on a carrier or other interested person, we are authorized under section 15 to again review it.

Hearing Counsel request that in approving 8905 we order it modified so as to provide for a rental based upon a percentage of wharfage, dockage and wharf demurrage, and for a minimum rental "set at a point which takes into account maintenance costs and normal depreciation charges." Hearing Counsel believe Alaska Steam should pay a rental which bears a direct relationship to the amount of cargo moving over Pier 42, and they are concerned that the minimum rental may not in the future be sufficient to assure the Port a reasonable return because of rising costs.

Respondents contend we have no power to order such a modification and they also dispute the request on its merits. We need not pursue the question of our authority since we, like the Examiner, cannot subscribe to Hearing Counsel's view. This is essentially a section 15 proceeding. It is not a rate case where we could have a direct interest in the level of the Port's return on its terminal facilities. Beyond this, the Port of course is a public body, experienced in terminal management. We have no grounds for disputing its judgment in negotiating 8905 or for finding that it acted without prudent regard for the public's investment in Pier 42. We note, moreover, that both parties have in the agreement reserved the right to cancel on 90 days' notice, hence even if the Port should conclude that it has erred, it has an adequate recourse.

An appropriate order is attached approving Agreement 8905, as amended.

FEDERAL MARITIME COMMISSION

No. 1097

IN THE MATTER OF AGREEMENT NO. 8905

PORT OF SEATTLE—ALASKA STEAMSHIP CO.

ORDER

This proceeding having been instituted by the Commission to determine whether Agreement No. 8905, as amended, between the Port of Seattle and Alaska Steamship Co. should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916, and whether these parties were carrying out said Agreement or other agreements concerning the same subject matter without Commission approval, and the Commission having this date made and entered its Report stating its findings and conclusions, which Report is made a part hereof by reference, and the Commission having found that Agreement No. 8905, as amended, 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, nor detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916; therefore

It is ordered, That Agreement No. 8905, as amended, be and it is hereby approved effective this date, pursuant to section 15 of the Shipping Act, 1916.

By the Commission, March 19, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 312

THE DAYTON ART INSTITUTE

v.

AMERICAN EXPORT LINES, INC.

Application of American Export Lines for authority to refund the sum of $2,780.00 to Dayton Art Institute in connection with a shipment of paintings from Genoa to New York, denied.

T. Ravera, for applicant.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER [1]

American Export Lines, by application filed pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure, seeks authority to pay to Dayton Art Institute of Dayton, Ohio (the Institute), the sum of $2,780.00 as reparation in connection with the shipment of paintings from Genoa, Italy to New York City, U.S.A.

Applicant's vessel, the Constitution, sailed from Genoa on September 15, 1962, carrying a shipment of 27 paintings consigned to the Institute. The rate assessed and collected was in accordance with Freight Tariff No. 13 of the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference, of which applicant is a member and which tariff provides:

VALUABLE GOODS—the term "ad valorem" indicates a rate of 1.75% of the value of the shipment, unless any other percentage is specified, and shall be on the value as per invoice.

The declared value of the paintings, Old Genoese Masters, was $278,000.00 and applying the above tariff, applicant charged and collected from the Institute the sum of $4,865.00. The application does not disclose any offer or agreement to ship at a lesser rate nor does there appear to be any misunderstanding that the rate charged was in accordance with the lawful rate. However, applicant now alleges and

[1] This decision became the decision of the Commission on January 7, 1964, and an order was issued denying the application.

the Institute agrees, as does the conference, that the rate charged was excessive. The reason for the allegation is that the valuation of $278,000.00 was declared for the sole purpose of insurance coverage whereas, in fact, the paintings had no "commercial" value; further, that the total volume of the shipment did not exceed 12 cubic meters.

No change in the declared value is proposed. It is proposed that since the paintings had no "commercial" value, a rate of 1.75% of the declared value is excessive although a rate of 0.75% would not be excessive. The method by which the parties computed the proposed rate is left to conjecture. It is evident, however, that the declared value was used for insurance purposes and that had the paintings been lost, the amount of $278,000.00 would have been demanded.

Applicant and its conference did not file with the Commission, nor disclose an intent to file, a change in the rates, charges or classifications, rules or regulations to decrease the cost to the shipper pursuant to section 18(b)(2) of the Shipping Act, 1916, as amended (the Act). Their proposal is that although section 18(b)(3) of the Act prohibits a carrier to "refund, rebate, or remit in any manner or by any device any portion of the rates or charges so specified (by the tariff filed) nor extend or deny to any person any privilege or facility, except in accordance with such tariffs", the Commission authorize in this isolated instance, a refund by applying a rate, not published or filed with the Commission.

The Commission has taken a broad view of its authority under Rule 6(b). It has held that the power to prescribe a substitute rate for one appearing in a tariff is not a prerequisite to granting relief, however, the authority was geared to cases of bona fide rate mistake or inadvertence. *Martini & Rossi et al. v. Lykes Bros. S. S. Co.*, 7 F.M.C. 453 (1962). It has permitted refunds and waiver of undercharges in several cases, the most recent of which was *Corporation Autonoma Regional Del Cauca, et al. v. Dovar S. A. International Shipping & Trading Co.*, Special Docket 266, decided October 30, 1963 by Examiner Southworth and adopted by the Commission. However, these cases have been limited to the proposition that innocent shippers should not be made to bear the consequences of a carrier's neglect in filing a tariff rate that the parties, acting in good faith, had agreed would apply. This case does not fall within the category of cases in which relief has been permitted. Here, it cannot be found that applicant erred in filing its tariff. There was no misunderstanding as to the legally applicable rate.

However, in the *Martini & Rossi* case, *supra*, the Commission held that if granting relief will not result in discrimination (and there would be no discrimination involved here) that:

> We have the responsibility for administering that Act [Shipping Act, 1916] and also the Intercoastal Shipping Act, 1933, and are empowered among other things to see that equity and justice are done in the matter of reparations.

Further, in *Lykes Bros. S. S. Co.—Refund of Freight Charges*, 7 F.M.C. 602, it was held that: "the fact the rate charged is not shown to be unjust, unreasonable or otherwise unlawful is not determinative of an application under Rule 6(b)."

Viewing the situation in the light of the Commission's authority to apply equity and justice under Rule 6(b), there is still no basis for permitting a refund. The parties originally based the freight rate and the insurance coverage on the same valuation. Freight charges were computed in accordance with the legally applicable tariff. If the parties had then considered the rate excessive, applicant had the option of filing a lower rate under section 18(b)(2) of the Act and the rate would have become effective immediately on filing. No attempt was made to provide a lower rate. More than a year subsequent to the shipment, they propose that the rate was excessive because the shipment consisted of valuable objects which had no "commercial" value although the published tariff makes no such distinction. They do not propose that the declared value reflect this distinction; only the rate. Thus, they avoid applying one valuation for insurance purposes and a different valuation for rate purposes. However, they seek to accomplish the same purpose by indirection. The basis proposed for a different rate on various valuable articles is that one class has no "commercial" value while the other does have a "commercial" value. There is no practical basis for the difference in the proposed rates. Many shipments of valuable objects occupy but little space and this fact has been recognized by applicant's conference in establishing a rate for such objects based on value rather than on volume or weight. There is no difference in the method of handling and shipping valuable articles of no "commercial" value and other valuable articles, insofar as the record discloses. It cannot be held that the paintings had no "commercial" value in relation to the purposes for which the declared value was applied. A contract of insurance and a contract of affreightment are equally commercial transactions and the application of the

declared value to both contracts was not unjust or inequitable. There is no basis for a finding that the rate was excessive or that the shipper or consignee was treated unjustly.

The application is denied. An appropriate order will be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

DECEMBER 18, 1963.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 313

NYDIA FOODS CORPORATION

v.

JAVA PACIFIC LINE, GENERAL AGENTS FOR NEDLLOYD LINE

Application of Java Pacific Line for authority to refund to Nydia Foods Corporation the sum of $192.58 in connection with a shipment from Lisbon, Portugal to New York, denied.

W. G. del Campo Hartman for applicant.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER [1]

Java Pacific Line, as general agent for Nedlloyd Line seeks authority to pay to Nydia Foods Corporation the sum of $192.58 as a partial refund for alleged overcharges in connection with a shipment of dry biscuits from Lisbon, Portugal to New York, U.S.A. The application is filed pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure.

F. A. Caido of Lisbon, Portugal, by bill of lading dated August 16, 1963, consigned a shipment of 16 cases of dry biscuits to Nydia Foods Corporation (Nydia). The shipment was carried on a Nedlloyd vessel and delivered on September 4, 1963. The shipper, prior to the shipment, made no effort to determine the applicable rate. Nedlloyd had no commodity rate for biscuits covering the trade from Lisbon to United States Atlantic and Gulf ports. Consequently, the N.O.S. rate of $75.00 per 1000 kilos was applied and the consignee, Nydia, was required to pay total freight charges of $356.63. Nydia, after paying the freight charges, petitioned Nedlloyd to establish the commodity rate for biscuits at $34.50 per 1000 kilos and Nedlloyd agreed to do so. Nedlloyd has taken steps to insert the new rate in its tariff but rec-

[1] This decision became the decision of the Commission on January 7, 1964, and an order was issued denying the application.

ognizing that the new rate may not be applied retroactively, seeks authority to refund to Nydia the difference between the Tariff N.O.S. rate of $75.00 per 1000 kilos and the proposed rate of $34.50 per 1000 kilos, the difference amounting to $192.58.

No other shipments of the commodity involved have been made on applicant's vessels at the legally applicable rate and discrimination will not result if permission to refund is granted. The issue is limited to the question of whether the facts disclosed warrant relief under the principles of equity and justice which the Commission, in its discretion, may apply to applications under Rule 6(b). *Martini and Rossi* v. *Lykes Bros. S. S. Co.*, 7 F.M.C. 453. In general, to apply the principles of justice is to seek that end which ought to be reached in a case by the regular administration of the principles of law involved as applied to the fact. *Words & Phrases*, Volume 23 at page 463. The principles of equity relate to a moral right, the sense of what is just and equal, and fair dealing. *Words & Phrases*, Volume 15 at page 129. The Commission has applied these principles in a series of cases involving rates, beginning with *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line, Inc.*, 7 F.M.C. 62. The most recent case, *Corporacion Autonoma Regional del Cauca, et al.* v. *Dovar S. A. International Shipping & Trading Company*, Special Docket No. 266, decided October 30, 1963, and adopted by the Commission, affirms the principle that innocent shippers should not be made to bear the consequences of the carrier's neglect in filing a tariff rate that the parties, acting in good faith, agreed would apply. In all of these rate cases,[2] the facts disclosed a valid reason for shipper reliance on a rate other than that specified in the tariff. Further, the carrier was found to have failed or neglected, through inadvertence or error, to file a tariff it intended should apply.

The facts here disclosed do not bring this case within the category of cases in which the Commission has deemed relief to be just and equitable. It does appear that the rate charged was double the rate the parties subsequently agreed would apply to future shipments, but this fact alone would not justify permission for a newly filed rate to become effective retroactively. The equitable basis for relief should be that an innocent party has been wronged by some act or omission of another party and that the principles of fair dealing have been

[2] In addition to cases above cited, see: *Uddo & Taormina Corp.* (and 11 other complainants) v. *Concordia Line, etc.*, 7 F.M.C. 473; *UNICEF* v. *Columbus Line*, 7 F.M.C. 543; *Lutcher S.A.* v. *Columbus Line*, 7 F.M.C. 588; *Lykes Bros. SS Co.—Refund of Freight Charges*, 7 F.M.C. 602; *Jondi Inc.* (and 3 other complainants) v. *Hellenic Lines Limited*, 7 F.M.C. 522.

offended. Here, the applicant alleges that "shipment of subject 16 cases dry biscuits was made by shippers without having ascertained what freight rates would be applicable". Business men engaged in the import and export trade are not innocent, but negligent, when they make no effort whatsoever to determine the cost of a shipping service they intend to utilize. The shipper and the consignee were not misled. There was no error or inadvertence relating to the tariff on file and no failure of the carrier to file a tariff intended to be applicable to this shipment. These facts mark the distinction between this case and the cases hereinabove cited. The carrier was not unfair, or even negligent, in its dealings with the shipper or consignee. There has been no inequity or injustice which merits correction.

The application is denied. An appropriate order will be entered.

DECEMBER 18, 1963.

(Signed) HERBERT K. GREER,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 290

AICHMANN & HUBER

v.

BLOOMFIELD STEAMSHIP COMPANY

Respondent's application for authority to pay reparation to complainant in connection with a shipment from New Orleans to Hamburg, denied.

Misquotation of contract rate to consignee, not a party to a dual-rate contract, does not entitle consignee to ship at the contract rate and charging consignee non-contract rate does not discriminate against him in relation to contract shipments carried at the lower contract rate.

G. E. Wieckhoff for Applicant.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER [1]

Bloomfield Steamship Company, by application filed pursuant to Rule 6(b) of the Rules of Practice and Procedure, seeks authority to pay Aichmann & Huber the sum of $494.93 as reparation for an alleged overcharge on a shipment of 264,930 pounds of canned green beans from New Orleans, La. to Hamburg, Germany.

The nominal complainant, Aichmann & Huber, a West German importer, purchased from R. D. Pringle of San Francisco, Calif., 8,831 cases of canned green beans on terms f.a.s., freight collect. Incidental to the transaction, complainant requested a rate quotation for the shipment from Maritime Cargo Agency of Bremen, Germany, respondent's agent. The agent quoted a rate of $23.50 per 2,400 pounds, which was the rate available to signatories of a dual-rate contract, but did not advise complainant of the necessity of executing such a contract in order to be eligible for the rate quoted.

R. D. Pringle booked the shipment on respondent's vessel. Since Pringle, the shipper, was not a signatory to a dual-rate contract, respondent offered him the opportunity to sign a contract. When Pringle refused to sign, respondent became aware that freight charges would be paid by complainant, however, there was insufficient time,

[1] This decision became the decision of the Commission on March 12, 1964, and an order was issued denying the application.

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prior to the sailing date, to offer complainant an opportunity to execute a dual-rate contract. Respondent issued an order bill of lading to the shipper, Pringle, on February 23, 1963. Pringle was designated as the shipper, and the shipment was consigned to his order, with notice of arrival to be addressed to complainant. The bill of lading presented in evidence does not specify the rate or charges; however, when complainant's agent, Standard Uebersee Handels, G.m.b.H., received the shipment, the non-contract rate of $27.60 per 2,400 pounds had been applied and total freight charges of $3,264.31 were collected. Subsequently, when complainant was advised of the need to sign a dual-rate contract in order to obtain the lower rate, he immediately did so. Complainant mailed the contract to the Gulf/French Atlantic Hamburg Range Conference, of which respondent is a member, and requested that the contract be made effective as of January 1, 1963. The Conference executed the contract and returned it to complainant without action or comment as to the requested retroactive effective date. The contract became effective on March 18, 1963, subsequent to the shipments here involved.

Having calculated its transaction relating to the shipment of canned green beans on the basis of the lower contract rate and having been required to pay the higher non-contract rate, complainant will suffer a loss if required to remain liable for the freight collected. Respondent seeks to repair the loss on the following basis:

(a) Shipment (lbs)	(b) Legal rate (2,400 lbs)	(c) Charges collected	(d) Rate quoted (2,400 lbs)	(e) Charges at rate quoted	(f) Reparation (c) – (e)
264,930	$29.60	$3,264,31 [2]	$23.50	$2,779.39	$484.92

[2] Although the consignee (complainant) has not executed a concurrence on the application as set forth in form No. 5 of Appendix II of the Commission's Rules of Practice and Procedure, its concurrence is made evident by Exhibit 2 to the application which is a copy of its informal complaint to the Commission. The fact that payment was made is evidenced by Exhibit 5.

The application is submitted on the premise that respondent violated section 17 of the Shipping Act, 1916 (the Act) in charging and collecting the non-contract rate. Section 17 of the Act provides:

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, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the

same to the extent necessary to correct such unjust discrimination or prejudice * * *

Respondent's position is stated as follows:

Since it appears that Complainant through no fault of his own was not accorded a reasonable opportunity to avail himself of the contract rate by signing a Conference contract agreement prior to shipment, further since he has subsequently signed such a contract, and since other competitive shipments moved on the same voyage at the proper contract rate, it appears that it would be unreasonable and would constitute unjust discrimination against Complainant contrary to the provisions of the Shipping Act of 1916, as amended, if Respondent were compelled to charge the non-Contract rate in the circumstances of this case.

Therefore the undersigned respondent carrier believes that the freight charges as collected may be unjustly discriminatory within the meaning of Section 17 of the Shipping Act, 1916, as amended.

Although respondent has not elaborated, its contention appears to be that a different rate as between contract and non-contract shippers or consignees is not *per se* unjustly discriminatory but that the rate differential becomes so when a non-contract consignee [3] is not afforded a reasonable opportunity to avail himself of the same rate which is available to his competitors.

The competitive shipments referred to in the application are by Jack Gomperts & Co., Inc., consigned to order of the shipper, arrival notice to be addressed to Edeka Import, Hamburg, Germany, The application further alleges that these shipments were accorded the contract rate since the shipper was a contract signatory. There is no basis for a finding of discrimination as between shippers for Pringle was the shipper and was afforded an opportunity to execute a conference contract. Nor does it appear that respondent discriminated against Complainant in relation to his competitor, Edeka Import. There is no basis for a conclusion that respondent offered, or did not offer, a contract to Edeka Import or did not accord Complainant any other opportunity it accorded Edeka Import. If there was a statutory obligation on respondent in relation to the consignees, it would arise from section 14b of the Act which provides that dual rate contracts must be available to all shippers and consignees on equal terms and conditions. In its common dictionary meaning "available" means "obtainable" and refers to something of which one may avail himself. There is no indication in the legislative history of section 14b which would contradict the application of the common

[3] Complainant, being the person to be notified under the terms of order bill of lading, is herein considered as the "actual" consignee. See *McDowell and Gibbs, Ocean Transportation*, 1954 Edition, at page 135.

meaning of the term. Respondent did not have the statutory duty to affirmatively offer Complainant an opportunity to execute a dual-rate contract as a condition precedent to charging the non-contract rate.

Discrimination in relation to other shipments is not found.

No violation of the Act is found. Although the parties rely on an alleged violation of the Act, the application has been submitted under Rule 6(b) and may be considered in relation to the Commission's policy in permitting voluntary reparations. It has been held the failure to show that a rate charged is unjust, unreasonable or otherwise unlawful is not determinative of an application under Rule 6(b). *Lykes Bros. S.S. Co.—Refund of Freight Charges*, 7 F.M.C. 602; and further that if discrimination will not result, the Commission is empowered to see that equity and justice are done in the matter of reparations. *Martini & Rossi et al* v. *Lykes Bros. S.S. Co.*, 7 F.M.C. 453. In applying these principles, refunds and waiver of undercharges have been permitted in several cases; however, relief has been limited to factual situations where innocent shippers would have borne the consequences of a carrier's neglect or error in filing a tariff rate which the carrier had intended to file and which rate the parties, acting in good faith, had agreed would apply to the contract of affreightment. *Y. Higa Enterprises, Ltd.*, v. *Pacific Far East Line, Inc.*, 7 F.M.C. 62; *Uddo & Taormina Corp. et al* v. *Concordia Line*, 7 F.M.C. 473; *Jondi Inc. et al* v. *Hellenic Lines Limited*, 7 F.M.C. 522; *UNICEF* v. *Columbus Line*, 7 F.M.C. 542; *Lutcher S.A.* v. *Columbus Line*, 7 F.M.C. 588; *Corporation Autonoma Regional Del Cauca et al.* v. *Dovar S.A. International Shipping & Trading Co.*, Special Docket 266, decided October 30, 1963.

Rule 6(b) has not been utilized as a panacea to cure every wrong which may occur in the business relations between carriers and their customers nor permitted to become a loophole for escape from the prohibitions of section 18(b)(3) of the Act, which prohibits rebates, refunds, or remittances in any manner or by any device.

The facts adduced do not bring this case within the category of cases wherein relief will be granted. There is no implication of error, injustice, or inequity in relation to the contract of affreightment. The contract was between respondent and the shipper Pringle. Pringle, the shipper, was accorded the opportunity to sign a dual-rate agreement and thus make the lower rate applicable to the shipment. Pringle refused to sign. It cannot be found, as it has been in cases where relief has been granted, that the parties to the contract of affreightment agreed in good faith that the lower rate would apply.

An error in the Commission's records due to failure of a carrier to file, or to corectly file, a rate which it intended in good faith to make applicable to the shipment is not here involved. There is no basis for a finding that the carrier, at any time, intended to apply other than the $27.60 rate to non-contract shipments. That rate was then, and still is, applicable to such shipments. It has been established that the consignee (complainant) did rely on a misquoted rate, but ignorance or misquotation of a rate is not an excuse for paying or charging more or less than the rate filed. As held in *Silent Sioux Corporation* v. *Chicago & N.W. Ry. Co.*, 262 F. 2d 474 (1959), the rule is undeniably strict, and it obviously may work a hardship in some cases, but it embodies the policy which has been adopted by Congress in regulating commerce in order to prevent unjust discrimination.

The application is denied. An appropriate order will be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner

FEBRUARY 13, 1964.

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that permitted activities would be subjected to constant and effective government control and regulation. Congress was also aware that its plan would be largely frustrated unless the Act were made broadly applicable to all agreements, understandings and arrangements including particularly a cooperative working arrangement for the joint fixing or regulating of rates. Id. (188–190).

Section 15 is an exception to the general philosophy of American jurisprudence as expressed in the antitrust laws that monopolistic or anticompetitive practices are per se contrary to the public interest. It grants antitrust immunity to certain agreements and actions authorized thereunder if the agency administering the Act approves such agreements. It follows that agreements authorized and approved under section 15 should be strictly construed, and the parties' actions must be limited to such conduct as is authorized under the agreement. States Marine Lines, Inc. *v.* Trans-Pacific Freight Conference of Japan, 204(210).

Agreement between a common carrier tug and barge operator and a non-vessel-operating common carrier, engaged in trade between Seattle and Anchorage, for transportation by the former of its own cargoes under its own tariffs, and for transportation by the former of the latter's common carriage cargoes at the latter's tariff rates, is not a section 15 arrangement providing for uniform rate action by the parties. While the parties would consult on amendments to the tug and barge operator's tariff which affect the income the other carrier would receive under a revenue division, this merely relates to the amounts to be charged for the combined service and such activity differs materially from rate-fixing among competitors offering the same service. The reasonableness of the rate to be charged under the combined service is not relevant to the question of approving the agreement. Agreement 8492 Between T. F. Kollmar, Inc., and Wagner Tug Boat Co., 511 (516).

Agreement by a port to lease terminal facilities to a carrier will not be required to be modified so as to provide for a rental based upon a percentage of wharfage, dockage and wharf demurrage, and for a minimum rental "set at a point which takes into account maintenance costs and normal depreciation charges." The proceeding is essentially a section 15 proceeding, and not a rate case. In any event, the port is a public body, experienced in terminal management, and there are no grounds for disputing its judgment in negotiating the lease. Moreover, the port may cancel the agreement on 90 days' notice. Agreement 8905—Port of Seattle—Alaska S.S. Co., 792 (802).

—Agreements required to be filed

Section 15 requires the filing of a copy, or if "oral" a true and complete memorandum, of "every agreement" covering any of the wide range of anticompetitive activities therein mentioned, "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The language of the section clearly embraces every agreement, understanding, or arrangement, whether formal or informal, written or oral, detailed or general. Unapproved Section 15 Agreements—South African Trade, 159 (190, 191).

The provision of section 15 which makes it unlawful "to carry out" agreements before approval or after disapproval does not affect the opening provision requiring agreements to be filed immediately. The final paragraph of the section imposes a penalty for violation of "any provision" thereof. The failure to file immediately an anticompetitive agreement was intended by Congress to be a distinct violation of section 15. Congress, apparently troubled by the language of certain Board decisions and the testimony of two Board officials before a Congressional committee, made this even plainer, if that is possible, by its recent revision of section 15 (P.L. 87–346). Id. (191, 192).

The routine provision in a subsidy contract requiring the operator to "coordinate the spacing, regularity and frequency of its sailings" in conjunction with other subsidized services on the trade route, and giving the government's consent to such prescribed coordination for the purpose of Article II–18(c) of the contract and any other contractual or statutory provision requiring that consent, does not justify a carrier's failing to file, pursuant to section 15 a cooperative working arrangement with other carriers regulating rates. The coordination clause does not mention rates. Id. (195, 196).

Subsidiary contracts awarded to two companies in 1938 which stipulated that they would "establish, publish, and maintain rates, charges," etc. on a basis "satisfactory to the [United States Maritime] Commission", which contracts were awarded following a decision of the Commission which referred to their cooperation "in competing against the foreign lines now carrying the bulk of the commerce in this trade", did not justify the failure of the carriers (and another carrier who subsequently received a subsidy contract and claimed that it was advised by Commission personnel to consult with other operators on rates) to file a cooperative working arrangement with respect to rates on their trade route. In no event was cooperation authorized to be undertaken without reference to section 15 requirements. One of the purposes of section 15 was to provide for competition against foreign lines. The carriers had the burden to file under section 15 and set forth the arrangement they had. In fact the arrangement which involved rate fixing among all the carriers in the trade, including foreign lines, was not at all in conformity with the provision of the subsidy contracts. The American carriers were not united to compete with foreign-flag lines, but were acting in concert with them to eliminate competition. It was for the agency administering the Act to decide such matters as whether the arrangement promoted stability, aided the subsidy program, was in the public interest, and was not objectionable under section 15. The section leaves little room for "technical" violations. The breadth and force of its language literally implore attention and obedience, or at the very least inquiry if any doubt exists as to the propriety of proposed conduct. Id. (195–197).

Even if a conference member knew that a Neutral Body selected by a committee of the conference was employed by another member, in violation of the terms of the conference agreement, the action of the committee would not be binding on it. Parties to agreements approved under section 15 are not empowered to alter their terms inter se. They must file an amendment and secure Commission approval. States Marine Lines, Inc. *v.* Trans-Pacific Freight Conf. of Japan, 204 (215).

Carriers which failed immediately to file an agreement fixing the rate on coal to Korea breached section 15, even in the absence of any effectuation of the agreement. Failure to file is a separate and distinct violation. The amendment to section 15 contained in Public Law 87–346 making a future unfiled agreement itself unlawful, whether carried out or not, was simply a clarification or reinforcing of the existing law, and not a substantial change therein. Unapproved Section 15 Agreement—Coal to Japan/Korea, 295 (301, 302).

Assuming that an agreement between Laly and Imica to create a berth operator in the Venezuelan trade provides for a cooperative working arrangement between them, the agreement is not subject to section 15. Laly and Imica were not and are not common carriers by water and were not and are not carrying on the business of forwarding or furnishing terminal facilities in connection with a common carrier by water. The fact that a carrier is engaged in common carriage by water does not make its owners common carriers by water within the meaning of section 15. Thus, the agreement was not required to be filed with or

approved by the Commission. Grace Line, Inc. *v.* Skips A/S Viking Line, 432 (448, 499).

An agreement which requires that a carrier's wharfage, dockage and wharf demurrage charges be the same as those assessed by a port (which leases a pier to the carrier) for like services, and gives to the port the right to review and change such charges, is an agreement fixing and regulationg those charges. Charges fixed pursuant to such an agreement are "transportation" rates within the meaning of section 15. Agreement 8905—Port of Seattle—Alaska S.S. Co., 792 (797).

Provisions of an agreement between a port and a carrier for lease to the carrier of terminal facilities, which provisions regulate wharfage, dockage and wharf demurrage charges and grant special rates, accommodations, privileges or advantages to the lessee amply bring the agreement within the filing and approval provisions of section 15. Id. (797, 798).

Interim agreements for the lease of terminal facilities which, while excluding the lessor's secondary berthing rights, still relieved the lessee from paying tariff charges for wharfage, dockage and wharf demurrage and provided that the lessee should observe the same rates as the lessor, constituted a regulation of rates in the same manner as the basic lease, and require approval prior to effectuation. Id. (798, 799).

—Apportioning earnings

Oral and written agreements between two common carriers providing for a division between them of the charges paid by cargo owners for moving cargo from Seattle to Alaska by barge (one carrier furnishing and towing the barges, the other soliciting cargo from the public and acting technically as sole shipper), and any oral agreements supplementing them were, and similar agreements will be, agreements between common carriers apportioning earnings and providing for a cooperative working arrangement and subject to the provisions of section 15. Puget Sound Tug & Barge Co. *v.* Foss Launch & Tug Co., 43 (48, 49).

—Approval of agreements

Based upon findings that an agreement between two carriers which would destroy competition between them on essential United States foreign trade routes, would result in increased economy and efficiency of operations; that the proportion of cargo carried by U.S.-flag ships has been steadily and substantially declining on one of the routes, but that the cargo-carryings of a U.S.-flag competitor protesting approval of the agreement have been rising percentage-wise on the route; and that there is no reasonable probability that the agreement will result in any substantial loss of revenue by the protesting carrier, or that it will be hampered in any wise in maintaining and improving its own service, or be otherwise injured, the agreement meets the section 15 criteria for Commission approval, will in fact operate to the advancement of the commerce of the United States and will be beneficial to the public interest. Agreement No. 8555 Between Isbrandtsen Steamship Co., Inc., et al. 15 (18–20); 125 (128–130).

Agreements providing for the sale of two containerized ships to a carrier for use in the Gulf/Puerto Rico trade, on condition that another carrier which had intended to use the vessels in its North Atlantic/Puerto Rico service would not compete for one year in the Gulf/Puerto Rico trade, would not be detrimental to the commerce of the United States, or contrary to the public interest. It would be distinctly beneficial to such commerce and public interest for shippers of both Gulf and North Atlantic areas to Puerto Rico to have container ships available, rather than to have container ships available from North Atlantic ports only, as at present. There was no indication that performance of the agreements would

Gulf/Puerto Rico service. Purchase of Vessels "Alicia" and "Dorothy", 199 (201).

Agreements for the sale to and use by a carrier of containerized vessels in the Gulf/Puerto Rico trade, conditioned on another carrier's refraining from competing in the trade for one year, are not unjustly discriminatory or unfair between carriers simply because at some future date the purchaser may put them into competition with vessels of another carrier operating on other routes, are not contrary to the public interest because this may happen, and will not operate to the detriment of the commerce of the United States if (and because) it does happen. Approval of the agreements will not be conditioned on the vendee's agreeing to operate the vessels in the United States/Puerto Rico trade for a period of years. Id. (201, 202).

Agreements within the scope of section 15 are approvable unless the Commission finds them to be contrary to the provisions of that section. Alcoa Steamship Co., Inc. *v.* CAVN, 345 (358).

Agreement between carriers engaged in trade between Seattle and Anchorage is not unfair, detrimental to commerce, or contrary to the public interest because the carriers will operate only seasonally and other regular carriers may be deprived of summer traffic now flowing through Seward and thence to Anchorage by rail. Any harm resulting from the seasonal operation is due to the winter ice at Anchorage, a condition not reasonably within the control of the carriers. Other carriers are not entitled to be protected from competition. Anchorage urged approval of the agreement to provide additional direct water service during the months of heavy traffic. Agreement 8492 between T. F. Kollmar, Inc. and Wagner Tug Boat Co., 511 (517, 518).

The fact that the Department of Agriculture is the principal shipper of the commodities involved in an agreement between carriers to observe conference rates is irrelevant to any issue of approvability of the agreement where, although Agriculture was able to save $174,000 by securing bookings at less than the conference rate, the saving was accomplished by undercutting a conference rate which was barely compensatory and was admitted by Agriculture to be reasonable. Agreement 8765—Gulf-Mediterranean Trade, 495 (499).

—Arbitration

Arbitration clause in Shipper's Rate Agreement cannot oust the Commission of jurisdiction to hear and determine complaints of violations of the Shipping Act. In this respect the decision of the District of Columbia Circuit in Swift & Co. *v.* FMC is controlling. Parsons and Whittemore, Inc. *v.* Johnson Line, 720 (730).

—Burden of proof

Disapproval of agreement on the basis that proponents of the agreement had the burden under Rule 10(o) of proving that it was not violative of any of the statutory provisions specified in the order of the Commission instituting the investigation, and that proponents had failed to meet the burden of proving that the agreement was lawful, was an oversimplification of the problem, and a misconstruction of Rule 10(o) as applied to the proceeding. Since there was ample evidence on which to base a decision on the merits, the case did not turn on, and it was unnecessary to discuss, questions involving burden of proof. Alcoa Steamship Co., Inc. *v.* CAVN, 345 (358).

—Controlling, regulating, preventing, and destroying competition

An agreement between two carriers, primary U.S.-flag liner operators on essential United States foreign trade routes, which agreement would result

other, with the former agreeing not to compete in the services transferred without consent of the latter, constitutes an agreement controlling, regulating, preventing, and destroying competition. Such an agreement must be approved, disapproved, cancelled or modified pursuant to section 15 of the Shipping Act, 1916. To read the language of the section as authorizing and requiring such Commission action on every agreement controlling, regulating, preventing or destroying competition except agreements of the nature of the above agreement would constitute statutory amendment masquerading as statutory construction. Agreement No. 8555 Between Isbrandtsen Steamship Co., Inc., et al., 15 (16–18) : 125 (127–129).

—Conference membership

Provision for admission fee of $2,500 for joining a conference was approved where the testimony established that a $2,500 admission fee would not deter carriers from joining the conference and considering the change in the value of the dollar since 1948, the fee was appreciably less than that disapproved by the USMC in 1948. While P.L. 87–346 amended section 15 by providing that no agreement shall be approved "which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership", the legislative history of the quoted provision indicates that Congress did not intend to prohibit establishment of a reasonable membership fee to be paid by new members. A new member obtains a pro rata ownership of an asset belonging to the conference which consists of the going concern value built up over the years. Persian Gulf Outward Freight Conf.—Agreement 7700–6, 707 (710, 711).

—Cooperative working arrangement

Oral and written agreements between two common carriers providing for a division between them of the charges paid by cargo owners for moving cargo from Seattle to Alaska by barge (one carrier furnishing and towing the barges, the other soliciting cargo from the public and acting technically as sole shipper), and any oral agreements supplementing them were, and similar agreements will be, agreements between common carriers apportioning earnings and providing for a cooperative working arrangement and subject to the provisions of section 15. Puget Sound Tug & Barge Co. *v.* Foss Launch & Tug Co., 43 (48, 49).

Agreements between a port and a company owning and operating public grain elevators, which agreements gave the port the exclusive right to provide stevedoring services on vessels loading or unloading bulk grain and other bulk commodities at the elevators, are agreements subject to section 15. Every agreement between persons subject to the Act, if such agreement gives special privileges or advantages, or in any manner provides for an exclusive, preferential, or cooperative working arrangement is subject to section 15. California Stevedore & Ballast Co. *v.* Stockton Port District, 75 (80, 81).

A finding that respondents did not violate section 15 because they had "no meeting of the minds" and were not "legally obligated" before they all became signatories to an approved agreement, was insupportable where the record, built largely of highly incriminating evidence from the files of each respondent, clearly indicated the existence of a cooperative rate arrangement; respondents' officers repeatedly referred to an "agreement", "commitment", "concurrence" or "understanding" in their correspondence with competitors regarding rate levels; and respondents' discussions and conferences generally, but not always, resulted in the quotation of similar or identical rates. Unapproved Section 15 Agreements—South African Trade, 159 (186, 187).

Anticompetitive activity cannot be regarded as though it were normal business activity. The use of parallel rates following joint rate discussions cannot be

just the result of business economics. Persons subject to the Shipping Act who expect the Commission to give credence to such claims should conduct their activities in a way consistent with the claims. Carriers, in their frequent communications regarding rates, were not simply keeping one another posted or exchanging reminiscences; they were engaged in a cooperative working arrangement for the joint fixing or regulating of rates, which was unauthorized and therefore improper. It was not material that their arrangements did not result in firm or complete accord in every instance. Even if no firm results had been reached, the agreement to cooperate would have been improper. Id. (187, 188).

—Cooperative working spirit

Evidence that two conferences exchanged information concerning rates prompted by requests from shippers for rate reductions or quotations, which requests referred in most instances to rates already independently adopted, although possibly not yet made effective, and that there were discussions of rates and rate considerations on a few occasions but not as an established practice, prior to the decision on the rate in question by either conference, established only the existence of a cooperative working spirit. A cooperative spirit does not quite achieve the status of an agreement or understanding or a cooperative working arrangements that would be included within the scope of section 15. However, it is a serious matter for parties subject to the Act to engage in exchanging rate information without knowledge of the Commission. 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. Unapproved Section 15 Agreements—West Coast South America Trade, 22 (24, 25).

—Effectuation of agreement

All parties to an unapproved agreement fixing rates for carrying coal are jointly responsible, under section 15, even though only one party carried the coal. A rate-fixing agreement is effectuated by presenting a united front, and participation by simply refusing to carry at less than the agreed rate quite effectively advances the cause of the parties. What is significant is that the parties jointly agreed to and did set a "floor" on the rate to which they adhered. Thus they restricted or eliminated competition. It is immaterial that some of the parties, though quoting the agreed rate, did not offer space, or did not have vessels in position, for the particular coal shipment. The rate agreement was not made for particular shipments but was generally applicable to Korean coal. Failure to file the agreement and carrying out of the agreement were violations of section 15. Unapproved Section 15 Agreement—Coal to Japan/Korea, 295 (300, 301).

A carrier which participated in a meeting at which a coal rate agreement was reached and under the conference unanimity rule must have voted for or assented to the arrangement, was a party to the agreement. Its claim that it was "disinterested" in the subject of coal, allegedly proved by the fact that it did not quote coal rates since coal was not compatible with its "ordinary" cargoes, came too late. The carrier did not express its alleged disinterest at the time of the meeting. Persons subject to the Act who participate in anticompetitive activity must be held responsible absent timely and positive steps evidencing their disinterest or disassociation. Moreover, it was not essential that the carrier be shown to have actually quoted the agreed coal rates. It entered into the unauthorized agreement to limit competition. It is sufficient that one or more of its colleagues in the plan quoted the agreed rates or took other action to carry out the plan. Id. (301).

Evidence (interoffice memoranda and surrounding circumstances) established the existence of an agreement or understanding between a carrier and a con-

ference and its members for the observance by the carrier of conference rates. The carrier, the conference, and its members violated section 15 both by failing to file their agreement or understanding and by carrying it out absent approval. Unapproved Section 15 Agreement—North Atlantic Spanish Trade, 337 (343, 344).

—Evidence of existence

A restricted or fragmented approach to the evidence in a section 15 investigation can defeat the purpose for which the investigation was instituted. The conduct proscribed by section 15 includes oral and informal agreements, understandings and arrangements which by their nature can be difficult to detect and prove and may well require the putting together of numerous individual evidentiary items so as to construct an integrated whole that will provide the basis for a conclusion. The respondents should not have been allowed to isolate and attempt to destroy the documentary proof link by link, in disregard of the interrelated and complimentary character of the various links as well as their cumulative delineation of respondents' common course of unapproved activity. Unapproved Section 15 Agreements—South African Trade, 159 (182, 183).

Exhibits relating to the question of whether respondents had entered into an agreement or understanding as to rates should have been admitted into evidence. They were authorized in the main by experienced, highly-placed officials. They were not expressions of legal opinion. The fact that the exhibits were intracompany communications in many cases enhanced rather than detracted from their evidentiary value because the communications contained completely candid utterances bearing directly on the subject of the inquiry. Id. (183).

Where a group of carriers was attempting to obtain a "commitment" from another carrier to use a certain rate [on tallow], and conversations were had on an agreement, and it was not clear that an agreement was reached, and the carrier had a record of disagreeing with the group rather than agreeing, the evidence was not sufficient to establish a violation of section 15. However, the carrier came close to potentially serious difficulty by failing to avoid questionable involvement with its competitors. Id. (194).

The language of a carrier's interoffice memoranda, referring to an "undertaking" to abide by a conference tariff and to a "verbal understanding" with the conference, together with surrounding circumstances such as the fact that the carrier after it had resigned from the conference continued to be consulted by the conference on rate changes, establishes the existence of an agreement or understanding between the carrier and the conference and its members within the meaning of section 15. Experienced and responsible corporate officials do not use terms like "undertaking" and "verbal understanding" especially when referring to their relations with competitors, without intending that the words convey their commonly accepted meaning. Unapproved Section 15 Agreement—North Atlantic Spanish Trade, 337 (341, 342).

Considering the penalty prescribed for illicit anticompetitive activity, it is not to be expected that proof of such activity will be obtained easily or in abundance. In such cases the solid evidence may consist of no more than a few contemporaneous memoranda or other documents. These are entitled to far greater weight than oral testimony given at a later date by those under investigation and whose "explanations" of the documents simply cannot be squared with their contents. Contemporaneous documents, particularly interoffice memoranda, are usually quite reliable evidence of the facts. Interoffice memoranda are entitled to the highest validity as evidence, and to the extent that oral testimony contradicts them, the contradiction only serves to affect the general credibility of the evidence. Testimony which is contradicted by contemporaneous documents

Interoffice memoranda of a carrier showing the existence of an agreement or understanding with a conference, although hearsay, were clearly admissible against the conference and its member lines and were reliable and substantial evidence in the light of the entire record. Id. (343).

—Extenuation of violations

Matters in extenuation of violations of section 15 may be material to the question of punishment for past violations but they are not relevant to anything within the jurisdiction or intent of an administrative investigation into such violations. Unapproved Section 15 Agreements—South African Trade, 159 (194).

Where respondents contended that even if they violated section 15, the infraction was "purely technical" in that they acted under a mistaken assumption and in good faith in using conference machinery to set coal rates, and that they could have accomplished the same agreement with no trouble had they employed the machinery of another conference, their testimony was not accepted, though it was uncontradicted. If respondents could have readily used the other conference to agree on rates, it was a fair question why they did not do so. In any event, the point is associated with an immaterial issue as to respondents' motives. While there might be an occasion where evidence of the parties' motive or intent is useful to the proper investigation by the Commission of unlawful conduct, where the objective is only to show a so-called "technical violation" which should not be punished, the subject is necessarily irrelevant. Id. Unapproved Section 15 Agreement—Coal to Japan/Korea, 295 (302, 303).

It is not necessary under section 15 to impute an evil motive. Nonfeasance is as objectionable as malfeasance. There is little, if any, excuse for failure to file an agreement with the Commission, or at least make inquiry as to whether an agreement comes within the scope of the section and thus must be filed and approved. Id. (304).

—Pooling agreement

Testimony on behalf of third-flag carriers precluded finding that operations under an agreement between U.S.-flag carrier and Venezuelan-flag carrier were intended or reasonably likely to drive third-flag carriers out of the trade. Failure of such carriers to show that the agreement would have specific results requiring that it be disapproved was in itself strong evidence that such results could not reasonably be foreseen. Something more than a fear of increased competition is necessary to justify a finding than an agreement is unjustly discriminatory or unfair as between carriers, contrary to the public interest, or otherwise merits disapproval under section 15. Alcoa Steamship Co., Inc. *v.* CAVN, 345 (360, 361).

The record, particularly in the light of the evidence with reference to traffic in the trade, did not show that there would be any unjust or unfair discrimination between carriers as a result of a pooling agreement between a United States and a Venezuelan carrier. Assuming the correctness of figures used by the Examiner on concluding that third-flag line carriers would be unjustly discriminated against, it did not follow that the revenues of these lines would shrink dangerously—they might well increase in view of the Alliance for Progress program and other factors. The carrier principally affected testified that it would not abandon its service. As to the possibility of further decrees by the Venezuelan government which would be advantageous to the parties to the agreement, the Commission has reserve powers under section 15 to reconsider and disapprove the agreement. Id. (362–364).

Agreement between U.S.-flag and Venezuelan-flag carrier providing, inter

entered into to counteract the effects of the Venezuela decrees resulting in loss of cargo by the U.S. carrier, was found not to violate the Shipping Act and was approved pursuant to the provisions of section 15. Id. (365).

—Public interest

The fact that an agreement combining the operations of two U.S.-flag carriers on a trade route would result in substantial economies and improved operating results is not basis for a protest by another U.S.-flag carrier operating on the route. The protesting carrier may have an interest in preventing U.S.-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 U.S.-flag carriers in foreign trade (especially, subsidized operations) operate as economically and efficiently as possible. Agreement No. 8555 Between Isbrandtsen Steamship Co., Inc., et al., 15 (19, 20) ; 125 (129, 130).

Public Law 87–346 did not write into section 15 a public convenience and necessity standard and the Commission has no authority to use the term "contrary to the public interest" in section 15 to require that a section 15 joint service agreement meet the prerequisites of a certificate of public convenience and necessity. Carriers individually may enter and serve a trade without establishing that their operation serves the public convenience and necessity. The fact that they propose a joint service in the same trade does not give the Commission a veto power on public convenience and necessity grounds. Agreement 8492 Between T. F. Kollmar, Inc. and Wagner Tug Boat Co., 511 (517).

—Rates and tariffs

Where carriers were authorized by their approved agreement to fix "open minima" rates and to maintain some control even though rates were "open"; tariffs on file with the Commission on commodities involved, during the years in question, showed rates as "open"; and the carriers insisted that they never agreed to open rates but that from the outset their decision was to open rates with minimums and that at all times the rates were in fact "open minima," the carriers did not agree to any action not authorized by the conference agreement or agree to relinquish their rate control. While their erroneous filings are to be condemned, the carriers were actually doing what they insist they had agreed to do, and the minimums were regularly publicized and quoted to all interested persons. Failure to apprise the Commission of the minimum rates where the fixing of such rates was within the authority of members under conference agreements, does not of itself render the action unlawful under section 15, and under the above circumstances, the carriers did not violate the section. They did violate General Order 83. Gulf/United Kingdom Conference, 536 (539–541).

—Reference to Justice Department

The Commission lacks the power to assess penalties and it manifestly cannot excuse their assessment, by omitting to refer to Justice or by any other means. Prosecution and the assessment or waiver of penalties are matters that rest within the province of the Attorney General and the courts. The Commission's policy is to refer violations to the Justice Department. Unapproved Section 15 Agreements—Coal to Japan/Korea, 295 (303).

—Scope of agreement

Where the first clause of a paragraph of an approved agreement provided for discussions and agreements on rates to be used as a basis for discussion with MSTS for the purpose of negotiating rates on cargo for MSTS and related services, a second clause making rates negotiated binding on all parties to the

more. When the parties agreed to fix rates on coal to Korea which was not MSTS cargo, the agreement was beyond the scope of the approved agreement. Unapproved Section 15 Agreement—Coal to Japan/Korea, 295 (299, 300).

Approval of agreement between carriers providing for exchange of manifests, and/or freight lists, and other pertinent shipping records, is not to be construed as permitting the parties to disclose or receive information in violation of section 20. The Commission lacks authority to permit such action. Alcoa Steamship Co., Inc. *v.* CAVN, 345 (365).

Where a conference agreement permits members to open and to close rates, and provides that when rates have been declared open on any commodity "the extent, if any, to which the Conference relinquishes control over the booking and transportation thereof will be shown in the Conference Tariffs", the conference is authorized to fix "open minima" rates. Unapproved Section 15 Agreements—Gulf/United Kingdom Conference and Gulf/French Atlantic Hamburg Range Conference, 536 (539).

Approval in 1948 of conference agreement providing for institution of dual rate system was not enough under section 15 to validate the institution of an actual dual rate scheme, nor the shipper's contract adopted as part thereof. Ever since the 1954 Isbrandtsen court decision approval of the system and of the contract itself has been required. The 1959 Anglo-Canadian court decision was merely a restatement of the law and not a first time holding that particular dual rate contracts required Commission approval. Parsons and Whittemore, Inc. *v.* Johnson Line, 720 (727–729).

—Self-policing

A provision of a conference agreement authorizing levies of from $500 to $10,000 against an offending member as well as possible expulsion for breaches of the agreement, is an important provision, directly bearing upon a conference's vitality as an instrument whose continuance is in the public interest. The recent amendment to section 15 requiring the Commission to disapprove any agreement "on a finding of inadequate policing of the obligations under it" alone suffices to support the right of the Commission to be fully informed and continuously informed as to the concerted activities under a section 15 agreement. Pacific Coast European Conference, 27 (37, 38).

Inauguration and adoption of neutral body plan by members of a conference operating under an approved agreement amounts to an amendment or modification of the basic conference agreement, and must be approved under section 15 before it can lawfully be carried out. States Marine Lines, Inc. *v.* Trans-Pacific Freight Conf. of Japan, 204 (210).

Where a conference agreement provided that a neutral body should be selected from "responsible accountants" not "employed by" any party to the agreement, an accounting firm regularly employed (on an independent contractor basis) by a member of the conference and its foreign correspondent or agent was clearly disqualified to act as a neutral body. The obvious purpose of the provision was to insure impartiality, and it would be inconsistent to construe the term "employed by" as applicable only to a master-servant situation, particularly since accountants are specifically named in the provision as persons who if appointed are to have no employment relationship with a conference member. The conference's attempt to interpret the provision as not applying to the foreign agent of the United States firm was in fact a modification or amendment of the provision and as such required agency approval before it could be lawfully effectuated. Id. (214).

Conference which appointed as a Neutral Body an accounting firm which was "employed by" a conference member, contrary to the neutral body provision of its agreement, was not required to amend the neutral body provision; it could

appoint a Neutral Body which conformed to requirements of its existing agreement or it could modify its agreement (subject to approval) to permit use of the firm employed by a conference member or another international accounting firm, or adopt some other effective method of self-policing. Id. (215).

Commission ruling that a Neutral Body was not qualified to act as such was not intended to condemn the neutral body concept in general. Congress by its recent amendment to section 15 (P.L. 87–346) to require self-policing of conference agreements has indicated quite specifically that a proper self-policing system is not only desirable but necessary. Id. (215).

If it is the intent of a conference to have its neutral body or other self-policing system deal with past events, this intent should be specifically included in the agreement establishing the self-policing system when it is submitted for approval. Id. (216).

Investigations and findings made by a Neutral Body do not in any way preclude a separate hearing before the Commission nor are the findings of a Neutral Body binding upon the Commission. The functions and powers of the Commission remain the same and the mere fact that conference members have elected to discipline themselves does not and cannot bar or control appropriate proceedings before the Commission. The neutral body system does not deprive members of a conference of a fair hearing; does not involve delegation of the Commission's functions to the Neutral Body; and does not involve deprivation of any right to appeal in violation of the Shipping Act, the Hobbs Act, or the Administrative Procedure Act. Id. (216).

The Commission had jurisdiction even before the 1961 amendments to section 15, to approve neutral body agreements and to regulate their effectuation. Self-policing agreements are major amendments to section 15 conference agreements. The enforcement of conference agreements is of primary concern to the Commission and the effectuation of neutral body arrangements is part and parcel of that concern. Such an arrangement is a basic part of the section 15 agreement and not a severable provision thereof. Conference agreements are not private contracts to be interpreted as the parties please, but have significant public aspects. The Commission not only must be cognizant of them but must approve them before they can have any legal effect. States Marine Lines, Inc. *v.* Trans-Pacific Freight Conf. of Japan, 257 (258, 259).

While section 15 requires self-policing modifications of agreements to be approved under that section as comprising part of the complete agreement of the parties, the Commission is not inclined when considering approval to specify the procedures by which the parties seek to insure that each will fulfill its obligations to the others. The prime concern is whether the agreement is unjustly discriminatory as between the carrier parties and whether it is reasonably probable that the agreement will insure adequate policing. Agreement No. 150–21, Trans-Pacific Freight Conference of Japan, 653 (658).

Self-policing provision of agreement will not be disapproved because the power vested in the neutral body is capable of abuse. The Commission must assume that the conference will live up to its obligation to apply the agreement so that it adequately and without discrimination polices conference obligations. Agreement No. 150–21, Trans-Pacific Freight Conference of Japan. Id. (658).

Proposed increase in the security deposit (from $15,000 to $25,000), required of conference members, was approved on a showing that it was not out of line with amounts required by other conferences; the deposit would not deter carriers from joining the conference; the increase would keep pace with the decrease in the buying power of the dollar since the time when the conference agreement was originally adopted; and the provision, which was intended to strengthen the self-policing program of the conference, was in keeping with the Congressional

policy expressed in the 1961 amendment to section 15 (P.L. 87-346). Persian Gulf Outward Freight Conf.—Agreement 7700-6, 707 (711, 712).

Modification of conference agreement to provide for mandatory, rather than discretionary, assessment of damages for breach of the agreement would strengthen the self-policing element of the agreement and would diminish the chance of discriminatory treatment of members, and was, therefore, approved. Id.(712).

Modification of conference agreement to provide that secretary of the conferences report to the conference the findings of any investigation conducted under self-policing provisions is approved. The amendment will assist in accomplishing the end of strengthening the self-policing system. Id.(708).

Modification of conference agreement to make assessment of damages for breach mandatory rather than permissive, to include a sliding scale of liquidated damages for breaches not involving nonobservance of the conference tariff, and to provide for liquidated damages in a sum equal to four times the freight the offending member would have earned had the proper conference rate been charged, is approved. The sliding scale should discourage repeated violations and strengthen the self-policing system. The amount of and measure of damages for rate cutting are not out of line with those employed by other conferences. The mandatory provision strengthens the self-policing element of the agreement and diminishes the chance of discriminatory treatment of members. Id.(709, 712).

—Stability of rates

Agreement between U.S.-flag conference members and U.S.-flag nonconference carriers in the trade between U.S. Gulf ports and Mediterranean ports, under which the nonconference carriers agree to observe the rates of the conference on certain agricultural commodities, is not to be condemned merely because the more desirable solution to the rate cutting by the nonconference carriers on the commodities would have been full conference participation. Stability of rates is needed to assure continuity and regularity of service, which is in the public interest, the interest of the commerce of the United States and in the interests of both carriers and shippers. Agreement 8765—Gulf-Mediterranean Trade, 495 (499).

—Supervision of agreements

Section 15 of the Shipping Act 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 is clear that a conference and its members lines may not frustrate the Commission's right and its duty to be informed at all times as to the nature of their conference activities. Section 15 expressly confers on the Commission the power of disapproval "whether or not previously approved" and thus necessarily imposes a continuing duty upon the Commission to insure that 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. Pacific Coast European Conference, 27 (32-34).

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 Alexander Report pointed out that Congress could either restore unrestricted competition or recognize anticompetitive agreements along lines which would eliminate the evils flowing therefrom. While admitting the advantages of allowing steamship agreements and conferences, the House Merchant Marine and

Fisheries Committee was not disposed to recognize them "unless the same are brought under some form of effective government supervision." By the enactment of P.L. 87–346, Congress has reasserted the original philosophy that exemptions from the antitrust laws must be accompanied by effective governmental supervision and control, and 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. Id. (34, 35).

It is not sufficient under the language of section 15 that the Commission be apprised merely as to the terms of a conference agreement. It is essential also that the Commission know at all times the nature of the activities of the conference and its members, for otherwise it cannot determine whether the agreement is being complied with, and is not being carried out in a way that violates the Act, and is not detrimental to commerce, or incompatible with the public interest. Id. (35).

The requirements of section 15 for effective supervision and control are not satisfied for all time when an agreement is originally filed and approved, and immunity from Commission surveillance, as well as from the antitrust laws does not set in. Section 15 demands that the Commission constantly inspect and if necessary regulate the activities of persons subject thereto. It imposes 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 the Commission shall "disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved" that the Commission finds to be contrary to the Act's provisions. Id. (35).

In conjunction with the grant of power to approve agreements that fall within the scope of section 15, Congress has imposed on the Commission the continuing responsibility of regulating and supervising action carrying out these agreements. It is vitally necessary that the Commission maintain a constant vigil over the operations of the parties under approved agreements to insure that their activities conform to the agreements as approved and warrant continued exemption from the antitrust laws. States Marine Lines, Inc., *v.* Trans-Pacific Freight Conference of Japan, 204 (210).

Where a neutral body plan as approved provided for an impartial individual or group independent of any conference member to serve as the Neutral Body, if the person selected was not actually neutral or impartial, there was a departure from that which the Board had approved. The agency was duty-bound to prevent such departure and any conference member was entitled to raise the same objection and could turn to the agency for relief. Whether or not a conference member protested or filed a complaint, section 22 empowered the ageucy to institute an investigation into the matter on its own motion. Id. (211, 212).

—Voting requirements

Analogies from the field of private contract law cannot be drawn to show that the majority voting requirements of a conference agreement are invalid, i.e., that a modification of the basic agreement to make changes in self-policing provisions could not be made without unanimous consent of the parties. An agreement providing for the organization of a conference to operate in our foreign commerce is necessarily an agreement which attempts to reconcile a number of divergent interests. Such an agreement must provide for the continuing commercial operations of a relatively large number of conference members with as little friction and obstruction as possible. The very

heart of such an agreement is that each individual line relinquishes some of its freedom of action, in exchange for the benefits resulting from participation in the conference arrangement. Agreement No. 150–21, Trans-Pacific Freight Conference of Japan, 653 (656).

The concept of majority rule is not uncommon in the ocean freight industry. A good many agreements on file provide for modification by majority rule. It is not unreasonable for a conference to make such a provision in its basic agreement, provided it is not applied so as to contravene the standards of section 15. There is nothing in the concept of majority rule as applied to proposed modifications to conferences' self-policing rules which renders it discriminatory as between carriers or shippers, detrimental to commerce, contrary to the public interest or otherwise contrary to section 15. A conference member is bound to the conference agreement, and so long as it chooses to remain a member it must conform to modifications which are regularly made and duly approved by the Commission. Id. (657).

Conferences' system of recording affirmative action on proposed modifications of agreement by indicating unanimous approval where, in fact, modification was not carried unanimously is misleading at best, and conferences should adopt a signature form to correct this situation. Id. (657).

ALASKA STATEHOOD ACT. See Jurisdiction.

ALEXANDER REPORT. See Agreements under Section 15.

ALLOWANCES. See Rate Making.

ARBITRATION. See Agreements Under Section 15.

AUTHORITY OF COMMISSION. See also Jurisdiction; Practice and Procedure.

Section 27, which gives the Commission subpoena power in complaint and violation proceedings, in no way impairs or relates to the Commission's power to demand information in other ways and for other purposes. The Commission has the right to require the submission of information simply because it wants to know whether the law is being complied with. The courts have upheld the power of the agency administering the Shipping Act to demand information on suspicion that the law is being violated or to assure itself that it is not, and have recognized the obligation to comply imposed on persons subject not only to section 15 but to the proscriptions embodied in the Act generally. Pacific Coast European Conference, 27 (36).

There is no distinction between the Commission's authority regarding breaches of a conference agreement and its authority regarding violations of the Shipping Act. If a conference departs from the approved rules under which it could lawfully operate, it is violating the Act, and if individual members do, it is more than likely that they too are violating the Act. 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. Id. (37).

An order to show cause why a conference and its members should not comply with requests for certain information made by the agency and its Office of Regulations, or in the alternative, why the conference agreement should not be disapproved, was expressly provided for by the agency's rules, fully specified the charges against the conference and alleged that the actions of the conference and its members had prevented the agency from carrying out its statutory duties,

and was well within the powers vested in the agency by the Shipping Act. Id. (38).

Statutes of limitation in 18 USC § 3282 and 28 USC § 2462 relate to proceedings, criminal or otherwise, brought in court, and are no bar to the authority of the Commission to proceed with an investigation. Agreements of North Atlantic Westbound Freight Assn, 228 (237).

Trans-Pacific Freight Conference of Japan *v.* FMB and United States, 302 F. 2d 875, cited for the proposition that the Commission cannot declare anything "unlawful", involved the validity of an interim cease and desist order, which had been issued in an attempt to maintain the status quo pending the outcome of proceedings before the Commission. It did not involve any question of the Commission's authority to issue an order to show cause why a tariff rule should not be declared unlawful for failure to obtain Commission approval under section 15, in circumstances where it has been determined in an appropriate proceeding that a conference proposes to exceed the scope of its approved section 15 agreement. Pacific Coast European Conference Port Equalization Rule, 623 (627).

BERTHING SPACE. See Discrimination.

BROKERAGE.

With respect to the payment of brokerage, the freight forwarder law is permissive. Congress neither directed that brokerage be paid nor proscribed agreements among carriers not to pay it or to restrict it to less than 1¼%. Thus, it cannot be argued that such agreements, in their impact upon an individual member with contrary desires respecting brokerage, run counter to the statute. Practices and Agreements of Common Carriers Re Brokerage, 51 (55).

Basically P.L. 87–254 was designed to overcome the Maritime 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 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. Id. (55).

The interpretation forwarders seek to give the frieight forwarder law that carriers as a group cannot agree not to pay brokerage is mainifestly inconsistent with their concession that the language of the law permits an individual carrier to compensate a forwarder or not, and their admission that conferences may agree to pay brokerage, may agree to set an upper limit so long as it is at least 1¼% of the freight charge, and may agree to prohibit brokerage in the domestic offshore trades, although the law expressly applies to these trades. Id. (56).

Brokerage agreements among carriers regulate competition and are within the plain compass of section 15. Whether they should be disapproved, cancelled or modified, in accordance with the amendment made by P.L. 87–346, depends upon whether they are detrimental to the commerce of the United States. There is no occasion for determining 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 to encompass the public interest. Id. (57).

In view of the Maritime Board's earlier findings in this proceeding that the forwarding industry makes a valuable contribution to foreign trade and that the industry's substantial revenue from brokerage is important, and in view of the fact that Congress thereafter provided its own remedy in the form of licensing, conditions precedent to payment, and increased regulatory authortiy for dealing

with malpractices (which the Board had found and which heavily influenced its decision prohibiting brokerage and thereby upsetting prior holdings), any revision of the prior holdings must come in a future proceeding as the result of some new or compelling factors which can stand the test under the several requirements of section 15. Agreements between common carriers by water in the export foreign commerce which prohibit brokerage or limit the amount to less than 1¼% of freight charges, operate to the detriment of the commerce of the United Stats and are contrary to the public interest, in violation of section 15. Agreements respecting brokerage in the offshore trades are excluded from this ruling since conditions in those trades are materially different and brokerage is not normally paid. Id. (59, 60).

An investigation to determine whether certain U.S. Atlantic ports were being unduly preferred to other such ports, by reason of agreements or practices of foreign steamship lines in the inbound trade from the United Kingdom and Eire to regulate payments of commissions to forwarders abroad, was within the scope of the regulatory authority of the Maritime Board. The order of investigation was clearly limited to the practices of respondents as common carriers in the foreign commerce of the United States, as to which they are subject to the agency's jurisdiction. Congress in enacting the freight forwarder law (P.L. 87-254), designed to license and regulate the business activities of freight forwarders in the United States, and in re-enacting section 15 of the same session, did not intend to limit the scope of section 15 to agreements covering payments of brokerage solely in the outbound trades. The freight forwarder law has no bearing on the application of section 15 to an agreement between carriers to regulate the payment of commissions abroad in such a manner as to prefer shipments to one port to the disadvantage of another. Agreements of North Atlantic Westbound Freight Assn, 228 (236, 237).

Payment of excessive brokerage is a pernicious practice, inimical to the best interest of shipping in our foreign trade and oppressive to the shipper who must eventually bear the cost. The Commission will review the matter on an industry-wide scale. Grace Line, Inc. *v.* Skips A/S Viking Line, 432 (451).

BROKERS. See Brokerage.

CEASE AND DESIST ORDER.

Issuance of a cease and desist order was not required where respondent had stopped a discriminatory assessment of storage charges. International Trading Corp. of Virginia *v.* Fall River Line Pier, Inc., 219 (226).

COMMON CARRIERS.

—Who is common carrier

Where there is an obvious prearrangement that one will gather cargo, and another will actually carry it, the holding-out by the former that the cargo will move to its destination is attributable to the latter to the extent necessary to make the latter's operations pursuant to the arrangement common carrier operations. Thus, where two companies have established a service for all who care to ship general cargo in the Alaskan trade at tariff rates on file with the Commission; one (as technical shipper) solicits, secures and assembles the cargo belonging to the general public, and the other (ostensibly as a contract carrier) furnishes and tows the barges which carry the cargo from port to port; and each receives 50% of the charges made for carrying the cargo, the one who solicits the cargo is not an ordinary shipper but an intermediary agent through which the barge operator holds itself out to the general public as a common carrier. This conclusion is not weakened by the fact that common carrier classification does not have the same significance (results) under the Interstate Commerce Act and the

Shipping Acts, or that the ICC may have a more liberal attitude. Prior decisions of the U.S. Maritime Commission, to the extent contrary, are overruled. Puget Sound Tug & Barge Co. *v.* Foss Launch & Tug Co., 43 (46, 47).

"Common carrier" 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. Where the "holding out" is indirect (through an agent, acting technically as sole shipper under an arrangement with the carrier), this holding out will nevertheless be attributed to the carrier, and considered to bring it within the scope of the ancient phrase that a common carrier is a carrier which "holds itself out" as willing to carry for the public. Where 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 to make it appear that vessels are serving one shipper, whereas they are actually serving many. Id. (48).

The fact that a carrier was required to make a special arrangement to secure the business of the sole shipper of sugar from Hawaii to Galveston did not convert the arrangement into one of contract carriage. While it was possible that in some instances a vessel would carry only sugar, it was equally possible under the tariff that others would carry general cargo. The tariff did not compel the carrier to exclude general cargo from vessels carrying the sugar. The carrier was faced with economical and practical problems necessitating the special arrangement. Pacific Coast/Hawaii and Atlantic-Gulf Hawaii (Rate Increases), 260 (279, 280).

Owner of power barge who chartered his vessel for use between Seattle and Alaska, operated it for the charterer under an informal agreement sometimes partaking of the nature of a joint venture, and did not conduct anything comparable to a recognized service, was not operating as a common carrier by water in the trade and was not required to file a tariff under section 2 of the Intercoastal Act. Investigation of Tariff Filing Practices of Carriers—U.S.-Alaska, 305 (306, 307).

Operator of tug and barge between Washington and Alaskan ports, who carried building materials, construction equipment, and used automobiles; who neither advertised nor solicited business; who utilized neither formal contracts of affreightment nor bills of lading; whose barge was unsuitable for carrying ordinary, dry cargo; who charged by the day and whose profits or losses depended on his estimates of the transportation time; and who operated on no fixed schedules or routes but would go at any time to any safe port in southeastern Alaska, was not operating as a common carrier by water in the trade and was not required to file tariffs under section 2 of the Intercoastal Act. Id. (307).

Operator of vessel between Seattle and certain ports in Alaska, carrying northbound any type of cargo; with northbound sailings dependent upon prior commitments from shippers for utilization of available cargo space on the return trip; with shipments covered by transportation agreements providing for hire of a stated amount of space for a specified sum of money and disclaimer by the operator of any responsibility for loss or damage to cargo; with no solicitation of cargo, advertisement of services or sailings, or sailings at regularly scheduled intervals; with shippers, nevertheless, knowing that on request the carrier would advise as to approximate sailing dates; with service provided at approximate monthly frequency; and with a weekly marine trade publication listing the carrier as sailing on a monthly schedule, is a common carrier in the trade and must file tariffs under section 2 of the Intercoastal Act. Id. (316–318).

It is not essential to common carrier status that the carrier haul or be willing to haul any type of cargo. A line may be a common carrier of certain com-

modities as long as it is willing to carry those commodities for any shipper. Id. (318).

Carrier operating between Seattle and ports in western Alaska would be a common carrier even it its sailings were considerably irregular. The carrier carried whatever cargo was offered northbound to the Alaska ports to be served on the voyage, and was assured on each voyage of cargo waiting in Alaska to be loaded for the return trip to Seattle. This is common carrier service. "One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, is a common carrier." Id. (319, 320).

A common carrier does not lose its status as such because it never advertises its services or solicits cargo, or publishes a sailing schedule, or has no regular routes or ports of call, or carries cargo only after it has initially secured a negotiated, written transportation agreement, or does not seek or assume an obligation to carry for others. Id. (320).

In view of other cargo carried by a carrier, it was of no significance on the question of common carrier, non-common carrier status, that its vessel was specially designed for carriage of frozen fish, and generally carried frozen fish and fishing industry supplies for a few fishing companies in Alaska. The carrier clearly was not a private or industrial carrier. Of even less importance was it that the carrier, operating under charter to one shipper, might make an occasional bona fide tramp sailing. It is not necessary to common carrier status for a carrier to have a freight agent, a particular place to load and unload cargo, or provide regular and complete terminal service. These are among the characteristics of liner, berth operators, but such operators are emphatically not the only common carriers. Id. (321).

A carrier may not avoid common carrier status by insisting on a transportation agreement with each shipper. All cargo carried for compensation moves on some form of transportation agreement, express or implied. Id. (321).

The fact that a carrier has not sought or willingly assumed common carrier status and obligations is unimportant, since such status and obligations are results of the carrier's operations, not its desires. Id. (321).

Carriage of cargo by an incorporated association for its membership, with the only restriction on membership that members shall be licensed to do business in Alaska and pay a nominal membership fee, is the carriage of cargo for the general public. A "private" as distinguished from a "common" carrier is essentially a carrier which carries for itself, as distinguished from a carrier which carries for others. Id. (326, 327).

The amendment of 46 USC § 404 by Public Law 85–739, which exempts vessels under 150 gross tons owned by cooperative or non-profit associations transporting cargo between southeastern Alaska and Seattle from common carrier status, specifically confines the exemption to the provisions of such section. It has no effect upon section 2 of the Intercoastal Act. The fact that associations are found to be common carriers under the Intercoastal Act does not deprive them of the exemption granted by Public Law 85–739. The exemption is not conditioned on non-common carrier status. Even if common carrier status would deprive them of the exemption, this fact would not determine that they are not common carriers. Id. (327–329).

Membership in an incorporated association, a carrier, which carries with it the right to ship, and pro-rata liability with respect to shipments by other members, is a reasonable condition of carriage, and so long as it is required of all shippers alike, will certainly not detract from common carrier status. Id. (329–330).

Failure of Commission personnel to advise that an organization which has furnished full operating details is a common carrier, and required to file tariffs,

in no way militates against Commission decision that the organization is a common carrier, and required to file. Neither would a direct statement by the staff that the organization is not a common carrier. However, an inquiry by a carrier as to its status is not evidence that it is a common carrier and proof of such inquiry is not admissible for that purpose. Id. (330).

—Contract carrier

Carriage of filler cargo by means of such devices as purchasing the cargo from the shipper in Seattle and reselling to the shipper in Alaska at a "profit" calculated to yield the carrier the amount it would have received as payment for carrying the cargo, or multiple-towing of barges, or carriage for principal shippers under contract (even when filler cargo was carried) was contract carriage. Puget Sound Tug & Barge Co. *v.* Foss Launch & Tug Co., 43 (48).

—Dual carriers

Agreement between carriers is not unlawful merely because of the possibility that a mixture of common and contract cargoes may be carried on one vessel, or barge tow, on the same voyage. The better approach is that such a mixture may not be used to evade regulation and must not result in a carrier's avoidance of its common carrier obligations with respect to the fair, nonpreferential and nondiscriminatory treatment of shippers. Agreement 8492 Between T. F. Kollmar, Inc. and Wagner Tug Boat Co., 511 (519).

Commission decision in Docket 976 [7 FMC 511] is a precedent for holding that tendem tow of Foss barge containing contract cargo with Northland barge containing common carrier cargo solicited by Northland, a non-vessel owning common carrier, is not illegal per se. Moreover, Foss' practice of hauling contract cargo southbound rather than returning empty after its equipment is employed to transport common carrier cargo north does not constitute an unlawful dual capacity operation. Puget Sound Tug and Barge Co. *v.* Foss Launch & Tug Co., 611(616).

—Duty of common carrier

To rely upon structural differences in vessels in the banana trade as an excuse to avoid common carrier obligations would go far toward eliminating such obligations. Nor is a refusal to carry goods for many justified by fear that they cannot cooperate in using available space. It is the common carrier's duty to offer the space and give the shippers the chance to devise cooperative means of using it. If multiple utilization proves impossible, shippers will recognize this and accept the fact that the space can only be utilized on an exclusive basis. Consolo *v.* Flota Mercante Grancolombiana, S. A., 635 (639).

—Engaging in other activities

The Shipping Act does not preclude a common carrier by water from performing services other than "transportation by water . . . on the high seas," but contemplates and authorizes the performance by such carrier of so-called incidental services, including pickup and delivery service. The definition of "other persons" in section 1 of the Act was not intended to preclude common carriers from engaging in the other specified activities but simply to bring within the ambit of the Act those persons who do engage therein. Matson Navigation Co.—Container Freight Tariffs, 480 (490).

CONTRACT RATES. See Dual Rates.

DAMAGES. See Reparations.

DEMURRAGE. See also Preference or Prejudice.

Position that a terminal operator may not increase its demurrage charges, regardless of the amount of notice given, as to shipments consigned to or already

on its facilities is untenable. It would be unreasonable to hold that a terminal must continue in effect the rates and rules applicable when a cargo first landed, no matter how long that cargo might be left on the facility. This would mean that a terminal could only change its rates when its facility had no cargo at all, or that a terminal could charge different rates for identical services depending on the date the cargo happened to arrive. A fortiori, it would be unreasonable to attempt to apply such a principle to cargoes merely routed to the facility but which have not arrived at the time of a rate change. Selden & Co. *v.* Galveston Wharves, 679 (681, 682).

Complainant could not escape liability for payment of increased demurrage charges for cargo left on respondent's terminal facility because of an alleged ambiguity in respondent's tariffs and invoices. Invoices referred to "storage" charges and a local tariff item provided for removal of cargo to storage without liability of the terminal and subject to a reasonable charge for storage, if the cargo was not removed by the owner within a reasonable time. The tariff item was to be construed as giving the terminal the option to remove goods to storage and as fixing liability, and the local tariff contained no charges for storage or pier demurrage. The terminal's tariff circular set forth the charges for cargo left on the pier after expiration of free time. Complainant could have removed its goods when it received notice that the charges, whatever they might have been termed on the invoices, were increased. Id. (682).

DEPARTMENT OF AGRICULTURE. See Agreements under Section 15; Discrimination.

DETRIMENT TO COMMERCE. See Agreements under Section 15; Brokerage; Rates; Stevedoring; Travel Agents.

DEVICES TO DEFEAT APPLICABLE RATES.

Where an officer of the shipper knew of an inspection report which showed that the rate applicable on a shipment of cotton was the rate originally charged by the carrier, and, nevertheless, the shipper continued to press for and eventually secured a lower rate, i.e., transportation "at less than the rates or charges that would otherwise be applicable", the shipper's successful campaign to compel the carrier to refund part of the original freight payment was conducted "knowingly and willfully", within the meaning of the first paragraph of section 16 of the Shipping Act. States Marine Lines—Hohenberg Brothers—Violation of Section 16, 1 (7).

A demand on a carrier 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 first paragraph of section 16 of the Shipping Act. Id. (7).

Where the carrier charged and collected the proper tariff rate on cotton shipped abroad, the applicability of the rate having been established by weighing of the cotton by a Bureau engaged to assist in enforcing tariff rates and charges of the conference of which the carrier was a member, and, thereafter, the carrier yielded to requests of the shipper and revised its charges to apply rates which it knew were not applicable by revising the correct billing as shown on its bill of lading through the substitution of an incorrect billing, such a "corrected" billing constituted false billing within the meaning of the second paragraph of section 16 of the Shipping Act. The agreement to make a refund was an unfair or unjust means of obtaining less than the regular rates established and enforced by the carrier. Id. (9, 10).

By a preponderance of credible evidence a shipper was shown to have knowingly and willfully, directly, by an unjust or unfair means, obtained transporta-

tion by water of cotton, at less than the rates or charges which would otherwise be applicable, in violation of section 16 of the Shipping Act. Id. (13).

By a preponderance of credible evidence a common carrier by water was shown to have directly and, in conjunction with another person, knowingly to have allowed a person to obtain transportation of cotton at less than the regular rates or charges then established and enforced by the carrier by means of false billing and by unjust or unfair device or means, in violation of section 16 of the Shipping Act. Id. (13).

Pro rata return of payments for carrying cargo, in order to avoid profit-making, will not be considered a violation of the Shipping Act, 1916. Tariff Filing Practices of Carriers—United States and Alaska, 305 (330).

Prior requirement of filing rates in the export trade within 30 days after they became effective does not mean that a carrier may publish and file a rate, and then charge a different rate at will and without ever filing such different rate. It is not consistent for a carrier to publish and maintain one rate ad infinitum and yet contend that its regular rate was something else. Under such theory which ignores the rate actually published and any need to perfect changes therein, the principle of a "regular" rate would vanish and a violation of section 16 could seldom be shown. United States Lines—Gondrand Bros.—Section 16 Violation, 464 (469).

The command of section 16 Second is absolute that a carrier shall not by false means or by other unfair or unjust means directly or indirectly allow a person to obtain transportation at less than the regular rate. It is not necessary to show discrimination as between shippers of the commodity involved. Id. (470).

The fact that a carrier practiced no deception upon the person receiving a rebate did not mean that the arrangement was "above board" so that there was no violation of section 16 Second. The fact that a rebate was being received was not known even to all of the carrier's officials who should have been aware of it, and was not known to or ascertainable by the shipping public. The carrier violated section 16 Second by using an "unjust or unfair device or means." Id. (470, 471).

The words "any person" as used in section 16 Second are fully as broad as the words "shipper, consignor, consignee, forwarder, broker, or other person" used in the first paragraph of the section. While the first paragraph was added to the section some 20 years after section 16 Second was enacted, section 16 Second uses the broad and unqualified language "any person", and it is clear that in enacting the first paragraph Congress sought parity of penalities for allowing and obtaining unlawful rates. Id. (471, 472).

While an arrangement under which a carrier charged and collected the conference rate on a shipment of logs and later refunded to the forwarder and agent of the consignee an amount sufficient to adjust the freight charges to reflect lower non-conference rates, might be described as "false billing" in view of the submission and payment in the first instance of bills of lading and freight bills that both parties knew did not reflect the rates ultimately charged, the arrangement unquestionably constituted an unjust or unfair device or means prohibited by section 16. Id. (472).

Repayment of a portion of the sums received from a carrier as a rebate does not cure the illegality and has no bearing on that matter. Id. (472).

DISCONTINUANCE OF SERVICE. See also Embargoes; Preference and Prejudice.

The Commission has no power to require that common carrier service be inaugurated, and its authority under section 16 First relative to discontinuance of an established service is at best restricted. The Commission lacks power to

prevent indefinitely a common carrier by water from abandoning service. There is a marked difference between the Commission's authority over discontinuance of service by water carriers, and the authority of agencies, such as the ICC, over carriers who hold certificates of public convenience and necessity and must secure permission to abandon service. San Diego Harbor Comm. *v.* Matson Navigation Co., 394 (400, 401).

DISCRIMINATION. See also Agreements under Section 15; Reparation; Preference and Prejudice; Surcharges; Volume Rates.

It is essential to establish an existing and effective competitive relationship in cases of port discrimination. The need for such a 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 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. West Indies Fruit Co. *v.* Flota Mercante Grancolombiana, S.A., 66 (72).

Where all of a carrier's space suitable for the carriage of bananas to both Galveston and Baltimore was contracted for pursuant to two-year forward-booking contracts, so that admittedly there was no diversion of cargo from Galveston to Baltimore, there is no existing and effective competitive relationship between the ports, and hence no discrimination between ports in violation of sections 16 and 17. An allegation that diversion from Galveston was merely delayed and would take place in the future was not supported by any evidence that such diversion, should it occur, would be to Baltimore. Id. (73).

One instance of refusal by a pier operator to allocate berthing space on the ground that another vessel with a prior reservation was due to arrive, followed by allocation of the space requested when the operator was confronted by complainant with information that no vessel was due to arrive on or near the date involved, did not constitute proof of undue or unjust discrimination or undue disadvantage. International Trading Corp. of Virginia *v.* Fall River Line Pier, Inc., 219 (222, 225).

Where a pier operator allocated a maximum of 25,000 square feet of storage space to complainant but permitted complainant's competitor to use twice that much space, and the space allocated to complainant was adequate for its needs, although in one instance complainant, after the pier operator objected, was allowed to unload a cargo requiring 30,000 square feet, there was no showing of undue or unjust discriminaton or undue disadvantage. Id. (222, 223, 225).

Practice of pier operator in billing complainant and a subsidiary corporation for storage charges assessed under rates and free time allowances different from rates charged and allowances given to complainant's competitor, was unjustly discriminatory. Id. (225, 226).

The fact that the sole shipper of sugar from Hawaii to Galveston was the only shipper which could qualify under a sugar freighting agreement did not mean that the agreement was an unjustly discriminatory special contract. A non-existent shipper cannot be discriminated against and there was no foreseeable prospect of a change in the situation. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (280).

Testimony failed to show port discrimination in violation of the Act. In order to justify conclusions of port discrimination, it must be found that the preferred port is actually competitive with the complaining port, that the discrimination complained of is the proximate cause of injury to the complaining

port, and that the discrimination is undue or unjust. Alcoa Steamship Co., Inc. *v.* CAVN, 345 (364).

It is contended that the agreement, by eliminating the possibility of rate competition on specified commodities while nonconference competition exists as to other commodities, discriminates against Agriculture vis-a-vis shippers of other commodities. This contention, even if valid, overlooks the fact that Agriculture has a number of alternatives if it decides these conference rates are too high. It has the legal right under the cargo preference laws to use foreign-flag vessels in any case up to 50 percent of the cargo, and if no U.S.-flag vessels are available at fair and reasonable rates it may use foreign-flag vessels for all of the cargo. Or it may, as it has done in the past, ship via U.S.-flag tramp vessels. These choices, in addition to Agriculture's ability to ship over alternative routes, are sufficient to insure that the rates on the commodities in question are kept reasonable.

While Agriculture is the predominant shipper, it is not the sole shipper of certain commodities as to which carriers agreed to observe conference rates, and the agreement applies with equal effect and without discrimination to all shippers of such commodities. There can be no unjust discrimination against a shipper under the Shipping Act unless another similarly situated shipper with whom the complaining shipper competes is preferred. The fact that shippers of other than the agreement commodities are in the same position before and after the agreement cannot be said to be a preference in favor of those shippers. For the same reasons the agreement does not cause undue or unreasonable prejudice or disadvantage to Agriculture under section 17 of the Act because "fixed noncompetitive" rates on the agreement commodities prefer shippers of other commodities on which there are "variable competitive" rates. If actual unjust discrimination or unreasonable prejudice or disadvantage results in the future, the Act provides means for remedying the situation including the power to modify or withdraw approval. Id. (500).

Where a carrier charged and collected different rates from similarly situated shippers on green coffee from French Somaliland to New York for the identical transportation service, it violated section 16 (First) with respect to undue preference and prejudice, and section 17 with respect to unjust discrimination. Hellenic Lines—Sections 16 and 17 Violations, 673 (674, 675).

A carrier is bound by the acts of its agent who, having authority to quote rates, booked cargo at different rates to users of the carrier's services identically situated. The carrier was not on trial for penalties, nor "charged" with a misdemeanor, and it cannot escape responsibility by contending that intent is a prerequisite to a finding of violations of sections 16 (First) and 17. The offense is committed by the mere doing of the act, and the queston of intent is not involved. As to the carrier's denial of any actual fault, it knew that an intensely competitive situation or rate war existed, and it failed to take precautionary steps in granting authority to its agent to quote whatever rates would meet the competition. Id. (675, 676).

An agreement for the use of a public terminal facility at a rental which deviates from the terminal's regular tariff provisions, may run afoul of the Shipping Act's proscriptions and must be scrutinized for any illegal discrimination or prejudice that may result. Such an agreement, however, is not unlawful or unreasonable merely because it does not follow the terminal's tariff charges. Agreement 8905—Port of Seattle-Alaska S.S. Co., 792 (800).

Where, inter alia, there was no showing that cargo had been or would be diverted from a carrier to another carrier which was the lessee of terminal facilities under an agreement providing for a rental formula at less than full

tariff charges, and the objecting carrier had not been refused a similar lease since the lessor modified its previous 100% policy, no unlawful discrimination or prejudice was shown. Id. (801).

Where respondent misquoted the contract rate to a shipper, not a party to a dual rate contract, and such rate was relied on by complainant consignee, also not a party to a dual rate contract, respondent did not violate section 17 in thereafter charging and collecting the non-contract rate. There was no discrimination as between shippers, since the shipper was afforded an opportunity to execute a conference contract. There was no discrimination as between consignees, since there was no evidence that respondent offered, or did not offer, a contract to complainant's competitor or did not accord complainant any other opportunity it accorded the competitor. As to a possible violation of section 14b which provides that dual rate contracts must be available to all shippers and consignees on equal terms and conditions, use by Congress of the term "available" did not require respondent to affirmatively offer complainant an opportunity to execute a dual rate contract as a condition precedent to charging the non-contract rate. Aichmann & Huber *v.* Bloomfield Steamship Co., 811 (813).

DUAL COMMON AND CONTRACT CARRIERS. See Common Carriers.

DUAL RATES. See also Discrimination.

Use of two rates on sugar from Hawaii to Galveston did not constitute a dual rate system. The carrier indicated its willingness to cancel the higher rate and the Commission would assume that it will do so. Therefore, the question of the existence of a dual rate system need not be considered. However, there was nothing in the tariff or in the sugar freighting agreement which required a shipper to ship all or any fixed portion of his sugar during the period of the agreement. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (280, 281).

Article of agreement which undertakes without qualification to bind nonconference lines to charge conference rates on certain commodities covered by the agreement must be clarified, in view of the fact that the commodities are covered by the conference's dual rate system and the nonconference lines cannot use such a system with the Commission's approval. Since the parties apparently intended that the nonconference lines adhere to one set of rates, the rates given by the conference to contract shippers, the agreement will be approved with a modification making clear that the rates quoted in the tariffs of the nonconference lines for agreement commodities are single rates and not an extension or application of the conference's dual rate system. Agreement 8765 Between U.S.-Flag Carriers in the Gulf/Mediterranean Trade, 495 (501).

Approval in 1948 of conference agreement providing for institution of dual rate system was not enough under section 15 to validate the institution of an actual dual rate scheme, nor the shipper's contract adopted as part thereof. Ever since the 1954 Isbrandtsen court decision, approval of the system and of the contract itself has been required. The 1959 Anglo-Canadian court decision was merely a restatement of the law and not a first time holding that particular dual rate contracts required Commission approval. Parsons and Whittemore, Inc. *v.* Johnson Line, 720 (727–729).

Permission granted to Trans-Pacific Freight Conference (Hong Kong) to extend the scope of its dual rate system to include as destination ports the Pacific Coast ports in California, Oregon, and Washington, holding in abeyance request to include ports in Hawaii, Canada and Alaska. Trans-Pacific Freight Conference (Hong Kong)—Dual Rate Contract, 784.

DUE PROCESS. See Practice and Procedure; Rate Making; Stevedoring.

ELEVATORS. See Terminal Facilities.

EMBARGOES.

Financial loss generally is not justification for the imposition of an embargo which is an emergency measure to be resorted to only where there is congestion of traffic, or when it is impossible to transport cargo offered because of physical limitations of the carrier. In the absence of a showing of emergency an offshore carrier must comply with the filing and time requirements of section 2 of the Intercoastal Act in order to discontinue any part or all of its common carrier service. Carrier was required to withdraw and cancel "embargoes" and substitute therefor new schedules filed pursuant to section 2. A. H. Bull Steamship Co., 133 (135, 136).

The conditions that warrant an embargo are limited and must constitute an impossibility to transport. Financial loss does not justify imposition of an embargo. An embargo notice which stated that future shipments would not be accepted because of the carrier's failure to succeed in establishing minimum charges was illegal. In order to discontinue service the carrier must withdraw and cancel its notice and file with the Commission, pursuant to section 2 of the Intercoastal Act, new tariff schedules which must be filed at least thirty days prior to the effective date of discontinuance of service. Sea-Land Service, Inc.—Discontinuance of Jacksonville/Puerto Rico Service, 646 (648).

EQUALIZATION. See Port Equalization.

EVIDENCE. See also Agreements under Section 15; Devices to Defeat Applicable Rates; Practice and Procedure.

A report of the Cargo Inspection Division of the Pacific Cargo Inspection Bureau as to the density of bales of cotton involved, affecting the applicability of a tariff rate, was entitled to probative force. No objection was made to its receipt in evidence, its accuracy was never effectively challenged, its authenticity was corroborated by the conduct of the parties and there was no valid evidence to counteract its force. Dock receipts showing a different density were not conclusive in the absence of any showing that the information therein was based on inspection and measurement of bales. Measurement by longshoremen does not impeach the accuracy of measurements in the absence of proof that longshoremen are incapable of taking accurate measurements. States Marine Lines—Hohenberg Brothers—Violation of Section 16, 1 (10–12).

The technical evidentiary requirements, sometimes called the common law exclusionary rules, do not apply in proceedings before the Commission. The efficient performance of the Commission's regulatory functions demands that the Commission find the truth as expeditiously as possible. Strict evidentiary rules are not conducive to expedition if they are made the vehicle for innumerable objections which result in much delay and confusion. If upon consideration of the whole record it is found that some of the evidence admitted is not substantial and should be disregarded in formulating the proposed agency action, that can readily be done. The harm that may flow from ignoring evidentiary niceties and formalities is small in comparison with that occasioned by needless squabbles over strict evidentiary principles. Unapproved Section 15 Agreements—South African Trade, 159 (167, 168).

Neither the Administrative Procedure Act nor the Commission's Rules exclude hearsay evidence and the hearsay rule has been expressly held inapplicable in administrative proceedings. The weight to be accorded hearsay should not be confused with its admissibility. If competent under the criteria applicable

in an administrative proceeding, the statement is receivable in evidence and may be used to support agency action if there is at least some other supporting proof in the record of a direct nature. Id. (169).

Testimony does not become sacrosanct when uncontradicted nor is self-serving testimony automatically to be discredited. These are factors to be considered in determining the validity and probative value of the testimony and the inferences that may properly be drawn therefrom in light of all the evidence. Unapproved Section 15 Agreement—Coal to Japan/Korea, 295 (302).

EXCEPTIONS.

A "statement of facts" submitted as an exception to the Examiner's findings, which did not specify the findings excepted to, or the findings which the Examiner should have made, does not comply with Rule 13(h) which requires that exceptions "indicate with particularity alleged errors" in the initial decision. United States Lines and Gondrand Brothers—Violation of Section 16, 464 (468).

EXCLUSIVE PATRONAGE CONTRACTS. See Dual Rates.

FAIR RETURN. See Rate Making.

FALSE BILLING. See Devices to Defeat Applicable Rates.

FIGHTING SHIP.

Carriers which considered taking measures against another carrier, such as "blanketing" its sailings and which might have made threats to do so, in retaliation for the carrier's giving them a "hard time" by undercutting their rates and by refusing to join in an approved agreement unless given rate concessions, did not violate section 14, Second of the Shipping Act. Unapproved Section 15 Agreements—South African Trade, 159 (193).

Due regard to the intention of Congress makes the Commission hold that operating fighting ships on one hand, and cutting rates for cargo carried on vessels regularly employed on the other, are two different methods of competitive operation. The Alexander Committee's recommendation, which Congress followed in enacting section 14 Second, was intended to and does prohibit putting in steamers to fight the competition, but was not intended to and does not prohibit the cutting of rates on regular boats, even to an unremunerative level. Respondent did not increase sailings, change sailing dates, or in any way change its normal operating pattern. Skips A/S Viking Line *v.* Grace Line, Inc., 432 (449, 450).

FINDINGS IN FORMER CASES. See Brokerage; Common Carriers; Rate Making; Rates, Filing of; Reparation.

FORWARD BOOKING. See Discrimination.

FORWARDERS AND FORWARDING. See Brokerage.

FREIGHT FORWARDERS. See Brokerage.

GENERAL ORDER 83. See Agreements Under Section 15.

HEARINGS. See Practice and Procedure.

HOBBS ACT. See Agreements Under Section 15.

INITIAL OR RECOMMENDED DECISIONS. See Practice and Procedure.

INTERCOASTAL SHIPPING ACT, 1933. See Common Carriers; Embargoes; Jurisdiction; Rate Making; Rates, Filing of; Reparation; Terminal Areas.

INTERSTATE COMMERCE ACT. See Common Carriers; Discontinuance of Service; Jurisdiction; Rates, Filing of; Single Factor Rates.

JURISDICTION.

Section 303(e)(3) of the Interstate Commerce Act which provides that any common carrier by motor vehicle which was also engaged in operations between the United States and Alaska as a common carrier by water subject to regulation by the Commission under the Shipping Act of 1916 and the Intercoastal Shipping Act of 1933, prior to January 3, 1959, and has so operated since that time, shall as to such operations, remain subject to the jurisdiction of the Maritime Commission, does not change a non-vessel-owning common carrier in the Alaskan trade to a forwarder subject to ICC jurisdiction. The legislative history of the section together with the firmly-fixed Congressional policy evidenced by section 57 of the Alaska Statehood Act are conclusive as to the jurisdiction of the Maritime Commission. Puget Sound Tug & Barge Co. *v.* Foss Launch & Tug Co., 43 (49, 50).

A grain elevator carrying on the business of furnishing terminal facilities in connection with common carriers by water is a person subject to regulation by the Maritime Commission under the 1916 Act, although in its grain storage functions it can be regulated by the Secretary of Agriculture under the United States Warehouse Act. California Stevedore & Ballast Co. *v.* Stockton Port District, 75 (81).

Agreement between two carriers, operators on essential United States foreign trade routes, which agreement would result in the transfer of the liner fleet and the entire business of one carrier to the other, with the former agreeing not to compete in the services transferred without consent of the latter, is subject to the Commission's jurisdiction, must be filed with the Commission, may not be carried out until approved, may be approved by the Commission with modifications if required, and may be disapproved if found to operate to the detriment of commerce of the United States or contrary to the public interest. Agreement No. 8555 Between Isbrandtsen Steamship Co., Inc., Isbrandtsen Co., Inc., and American Export Lines, Inc., 125 (131).

Where a Neutral Body assessed fines against a conference member solely because it refused to grant the Neutral Body access to its records, and the member challenged the qualifications of the Neutral Body to act as a neutral body, thus raising as a principal issue the question of whether the conference had carried out its neutral body system in conformity with the agreement which the agency had approved, the Commission's jurisdiction over the issues was not defeated because the controversy had its inception in the Neutral Body's efforts to investigate alleged malpractices in a foreign-to-foreign trade. The conference agreement itself covered foreign-to-foreign trade and the United States commerce (which predominated in the trade) and the Neutral Body was set up to function in exactly the same manner in both trades. The agreement and its amendments (of which the neutral body system was one) therefore required the Agency's approval and continuing supervision. Having failed to establish a separate conference for the foreign-to-foreign trade, the members cannot persuasively or validly contend that the agreement must be treated as if it were really two agreements. States Marine Lines, Inc. *v.* Trans-Pacific Freight Conf. of Japan, 204 (212, 213).

A pier operator which held itself out as a modern terminal capable of servicing any type of ocean common carrier, which made no effort to restrict its services to contract carriers, and at whose pier some general cargo was discharged over a three year period is an "other person" subject to the Shipping Act. International Trading Corp. of Virginia *v.* Falls River Line Pier, Inc., 219 (225).

The second paragraph of section 17 referring to "other persons subject to this act," applies to domestic commerce insofar as terminal operators are concerned. J. M. Altieri *v.* Puerto Rico Ports Authority, 416 (418).

Maritime Commission finding that single factor rates of an ocean carrier, which include pickup and delivery service performed by motor carriers as agents, are valid, does not remove the motor carrier from ICC jurisdiction, and does not mean that the Maritime Commission is attempting to exercise concurrent jurisdiction over the motor carriers contrary to section 33 of the Shipping Act. The pickup and delivery service is subject to regulation by the Maritime Commission as a service authorized by the Shipping Act offered by a common carrier subject to that Act. The motor carrier remains subject to ICC regulation. Matson Navigation Co.—Container Freight Tariffs, 480 (491).

An investigation of possible violations of the Shipping Act is a regulatory and administrative proceeding. The Act is not a criminal statute. Provisions of the Act giving the Government the right to seek monetary penalties in appropriate cases does not transform the Act into a criminal or penal statute. The function of adjudicating such penalties is confided to the courts. The Commission is empowered solely to regulate and its jurisdiction and functions are purely regulatory and administrative. Hellenic Lines—Sections 16 and 17 Violations, 673 (675).

Arbitration clause in Shipper's Rate Agreement cannot oust the Commission of jurisdiction to hear and determine complaints of violations of the Shipping Act. In this respect the decision of the District of Columbia Circuit in Swift & Co. *v.* FMC is controlling. Parsons and Whittemore, Inc. *v.* Johnson Line, 720 (730).

The Commission has jurisdiction over the level of travel agents' commissions set pursuant to conference agreements. The Commission does not claim jurisdiction to set the specific level of compensation, nor may it rule on the reasonableness of commissions fixed by individual carriers operating in United States foreign commerce. The jurisdiction involved is that which directs the Commission to disapprove, cancel or modify an agreement when the activities of the parties thereunder are incompatible with any of the section 15 standards. The fact that commissions are paid to persons who may not be subject to the Act is beside the point, since the agreement regarding commission levels is between common carriers by water all of whom are subject to the Act. Investigation of Passenger Steamship Conferences Regarding Travel Agents, 737 (754, 755).

OTHER PERSONS. See Common Carriers; Jurisdiction.

OVERCHARGES. See Reparation.

PASSENGER STEAMSHIP CONFERENCES. See Travel Agents.

PICKUP AND DELIVERY SERVICE. See Rates, Filing Of; Terminal Areas.

POOLING AGREEMENTS. See Agreements Under Section 15.

PORT EQUALIZATION.

Provision in a conference agreement authorizing regulation of competition by the establishment of uniform rates for the transportation of cargo, does not authorize institution of a port equalization rule under which the conference members absorb part of a shipper's inland freight expense equal to the difference between the cost he would incur in delivering the shipment at the loading port nearest the shipment's point of origin and the cost in delivering at a more distant port. Such a plan is not conventional or routine rate making among carriers. It is a new arrangement for the regulation and control of competition. Port equalization raises questions of possible unfairness, unjust discrimination, and deterriment to commerce, all matters included in the standards for adjudging the approvability of agreements under section 15 and may bring into play the requirements of sections 16 and 17. Pacific Coast European Conference Port Equalization Rule, 623 (630).

Provisions of P.L. 87-346 added to section 15, authorizing a conference to effectuate, without prior Commission approval, "tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof," specifically bars effectuation of a port equalization plan in the absence of section 15 approval. Though worded as an "exception" to the approval requirements of section 15, the quoted lanuguage was intended by Congress, as shown by legislative history, to limit conference authority, absent additional approval, strictly to the rate-making activity therein provided for. Id. (631-632).

PORTS. See Discrimination; Port Equalization; Preference and Prejudice.

PRACTICE AND PROCEDURE. See also Evidence.

—In general

The Commission will not hold (on motion of an opponent of a rate decrease, supported by Hearing Counsel and unopposed by the proponents of the rate) that a suspended but presently effective rate for the carriage of zinc from the United States to Puerto Rico is unjust and unreasonable when the record made was wholly unsatisfactory. To enter an order under such circumstances would be detrimental to the public interest and contravene sound regulatory principles. While the failure of the proponents of the rate decrease to sustain their burden of proof would normally result in cancellation of the rate and while the proponents were unconcerned about the consequences, the Commission is very much concerned with the merits of the matter and not with procedural technicalities. Considering the special dependence of Puerto Rico (and Alaska and Hawaii) on ocean shipping, coupled with the continuing regulatory responsibility placed upon the Commission by Congress, it is basic that just and reasonable rates and practices by carriers serving their ports must be assured to the full extent legally possible. Therefore, the matter must be remanded to the Examiner for further hearing, even though this will give proponents of the rate a second chance to meet their burden of proof. Rates and Practices in Atlantic Gulf/Puerto Rico Trade, 141 (142-148).

—Burden of proof

Disapproval of agreement on the basis that proponents of the agreement had the burden under Rule 10(o) of proving that it was not violative of any of the statutory provisions specified in the order of the Commission instituting the investigation, and that proponents had failed to meet the burden of proving that the agreement was lawful, was an oversimplification of the problem, and a misconstruction of Rule 10(o) as applied to the proceeding. Since there was ample evidence on which to base a decision on the merits, the case did not turn on, and it was unnecessary to discuss, questions involving burden of proof. Alcoa Steamship Co., Inc. *v.* CAVN, 345 (358).

Under section 7(c) of the Administrative Procedure Act and Rule 10(o) of the Commission's Rules, the burden of proving that a rate is unjust and unreasonable, is on complainant. Alaska Livestock & Trading Co., Inc., *v.* Aleutian Marine Transport Co., Inc., 387 (391).

—Complaints

Where the extent of injury suffered by complainant could not be determined because of the confusion in the record concerning the relationship of complainant and its alleged wholly-owned subsidiary (which should have been allowed to become a party complainant), the proceeding was remanded to the Examiner to authorize an amendment to the complaint to bring in the subsidiary and to determine the amount of reparation due. International Trading Corp. of Virginia *v.* Falls River Line Pier, Inc., 219 (225, 226).

To determine in complaint proceeding whether respondent, a forwarder in connection with a common carrier by water, was a common carrier by water subject to section 18 would extend the proceeding beyond the scope of complainant's allegations. Assuming that respondent had been required, but failed, to file a tariff as a common carrier by water complainant failed to prove he was damaged thereby or entitled to reparation. Birnbach *v.* La Flor De Mayo Express Co., 716 (719).

—Discovery and production of documents.

The Commission's Rule 12(k), relating to discovery and production of documents, is a valid exercise of authority under section 204(b) of the 1936 Act. The explicit grant by Congress of subpoena power to the Commission does not make needlessly duplicative any device for the discovery and production of documents, so that such device cannot be deemed "necessary" within the meaning of section 204(h) which authorizes the Commission "to adopt all necessary rules and regulations to carry out [its] powers, duties and functions". To attribute to Congress an intent to limit the Commission to the issuance of subpoenas in every investigation in which the Commission sought information would render nugatory the power granted in section 204(b). Moreover, Congress intended that "necessary" be given the meaning of convenient, useful, appropriate, suitable, proper or conducive to the end sought. Agreements, Etc. of North Atlantic Westbound Freight Assn., 228 (230, 231).

The power of the Commission to direct the production of documents in the manner prescribed by its Rule 12(k) is impliedly contained in the 1916 Act. Section 22 of that Act authorizes the Commission to investigate any alleged violation of the Act "in such manner and by such means, and make such order as it deems proper". The Rule is consistent with the regulatory system embodied in the Act. Id. (231, 232).

Failure of Congress, in enacting Public Law 87-346, to include (1) a proposed amendment to section 15 of the 1916 Act, which would have required that no agreement be approved unless it (a) designated a person for service of process within the United States, and (b) contained a provision that every signatory to the agreement would provide records wherever located in response to a proper section 21 order, and (2) a proposed amendment to section 21 to impose the same requirements upon "every common carrier engaged in the foreign commerce of the United States", did not declare the intent of Congress to deprive the Commission of the power to obtain documents overseas. The legislative history of the amendments clearly showed that Congress felt that the Commission already possessed the power sought, and chose to leave the law as it was. The use of the Commission's Rule 12(k) for the production of documents held overseas, far from being out of harmony with the Act, was in complete accord therewith. Id. (232, 233).

The Commission may require the production of documents held overseas by foreign steamship lines subject to its jurisdiction. Whether the documents are called for under section 21 of the 1916 Act or Rule 12(k) of the Commission's Rules is immaterial. There is no basis in law or reason for restricting the application of Rule 12(k) to the territorial confines of the United States. The courts have held that the Commission's powers under section 21 are not limited territorially. Id. (234, 235).

Good cause was shown for motion for production of documents held overseas when hearing counsel sought to secure the material requested by voluntary submission and the documents requested were specified with particularity and were prima facie relevant and material to the proper determination of the issues. Id. (237).

Production of documents located overseas will be required, notwithstanding the fact that the Government of the United Kingdom has forbidden respondent carriers to produce them. Should the documents not be forthcoming, the Commission will choose its course of action from several alternatives after careful consideration of the problem. Id. (237).

Motion of Japanese-flag carrier to vacate section 21 order requiring it to produce documents located overseas in connection with an investigation into the activities of the carrier relating to transportation aboard its ships of cargo moving from United States ports must be denied. The Commission has the duty to expend every effort compatible with sound regulation to obtain the information necessary to the determination that all who engage in our commerce do so in compliance with the law.

The carrier while admittedly obligated to obey the laws of Japan, chose to engage in the commerce of the United States, and is equally obligated to meet the terms and conditions imposed by Congress. The shipping laws must be administered impartially and this is impossible if their application is to turn on the incidental, or accidental, circumstance that needed information is not physically located within the United States. Mitsui Steamship Co., Ltd.—Alleged Rebates to A. Graf & Co., 248 (252, 253).

It cannot be emphasized too strongly that, as respects regulation of the competitive practices of water carriers, all carriers regardless of flag or nationality are placed on an equal footing under our laws. It is a prime concern of these laws to insure that competition among carriers for cargo moving in United States foreign commerce should be open and above board, with no curtain of secrecy preventing the disclosure of pertinent data to the Commission. Foreign flag carriers, although charged with the responsibilities imposed by our laws, are also the recipients of the benefits they confer. Id. (253).

There is no international custom or practice that would require the United States Government to resort to the courts of another country to obtain information needed in the exercise of its sovereign jurisdiction and functions. Moreover, the Japanese Government's aide memoire refers to such documents as might be found within the territorial jurisdiction of Japan, whereas the information sought here from a Japanese-flag carrier appears to be located in the United Kingdom. Other representations of the Japanese Government indicate that cooperation will be extended in those cases which do not prejudice the interests of Japan, but it is not indicated or shown how the interests of Japan are or can be prejudiced by the Commission's order for the Japanese carrier to produce documents located overseas, and such prejudice is certainly not self-evident. Even if the documents were located in Japan, the trade involved is not an import or export trade of Japan, but is the United States export trade from Pacific Coast ports to European ports. Id. (254).

While Japan has a legitimate interest in protecting its citizens from unjust or discriminatory treatment at the hands of a foreign government, where, in connection with a section 21 order requiring a Japanese-flag carrier to produce documents located overseas, there is no basis for any suggestion of such discrimination and, on the contrary, the sole purpose of the Commission's inquiry is to insure that the carrier as a participant in United States commerce is observing requirements of United States law which all other carriers operating in our foreign commerce must observe, it would be discriminatory in favor of the carrier and against all other carriers if the inquiry were not carried out. The Commission cannot believe that the purpose of the Japanese Government is to secure for its citizens either undue preference or unwarranted immunity under the laws of those countries in which they conduct their business. Id. (254).

—Hearing Counsel

Where respondents in an investigation of possible violations of the Shipping Act, 1916, were notified by the agency's orders of the possible proscribed activity, the areas of their operations, the periods of time to be investigated, and were given adequate opportunity to prepare, the Examiner was not warranted in requiring Public Counsel to furnish respondents on two separate occasions with detailed statements of "charges" or "violations" intended to be urged, or in postponing respondents' cross-examination until completion of Public Counsel's entire evidentiary presentation. The agency's orders clearly satisfied the requirements of subsection 5(a)(3) of the Administrative Procedure Act and the agency's Rule 10(c). In demanding statements from Public Counsel respondents were seeking to have them in effect modify the issues of law and facts. Only the agency has the power to amend its orders or to modify issues of law and facts stated in its orders. Unapproved Section 15 Agreements—South African Trade, 159 (166).

In a formal investigation ordered by the agency, Public Counsel has the duty to insure that relevant and probative evidence is developed to the fullest extent possible. His primary mission is to get the pertinent information, often from the persons least interested in giving it. Demands made on Public Counsel for statements particularizing "charges" or "violations" amounted to putting him on trial for the fact that an investigation had been ordered. The statements at best represented only estimates of possible findings, one being presented before and another during the hearings. Such statements are not provided for in the rules and the practice of requiring them should be discontinued. Id. (166, 167).

The exclusion of Hearing Counsel from an investigatory proceeding would leave respondents unopposed and free to state without fear of contradiction any and all contentions no matter how frivolous they may be. No cross-examination of witnesses, and no rebuttal testimony or evidence would be produced. Contentions for such a result cannot be taken seriously. Pacific Coast European Conference—Exclusive Patronage Contracts, 383 (384).

Section 22 of the Shipping Act 1916, authorizing the Commission to conduct investigations "in such manner and by such means, and make such order as it deems proper", clearly gives the Commission authority to allow participation of Hearing Counsel in an investigative proceeding. Decisions of the Commission relating to the practice of requiring from Hearing Counsel particularizations of "charges" against respondents to Commission orders of investigation are not inconsistent with Rule 3(b) and do not affect the "primary mission" of Hearing Counsel to obtain pertinent information in the discharge of his duty to the public interest to insure that all probative evidence relevant to matters under investigation is developed to the fullest possible extent. To argue that Hearing Counsel may not after developing a full and complete record take any position regarding what that record shows defies logic. Rule 3(b) provides that Hearing Counsel shall actively participate in any proceeding to which he is a party, to the extent required by the public interest. Hearing Counsel may file exceptions to the Recommended Decision in such a proceeding. Id. (384–386).

To whatever extent the issues and contentions made by Hearing Counsel in a statement made after completion of his case and before cross-examination or rebuttal, departed from his prehearing statements, they were clearly within the scope of the order of investigation and if respondents believed the order defective they should have petitioned the Commission for modification. The statement was an unexpected windfall to respondents which in no way prejudiced their case, or denied them due process. However, such statements should be discontinued. Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade, 606 (607).

—Hearings

Where an order to show cause gave a conference and its members notice of the issues involved (refusal to supply information to the Commission) and time to prepare to meet them, and the questions raised by the order, and by the correspondence between the conference and the agency which preceded the order, were purely legal, there was no factual issue and hence there was no occasion to compile an evidentiary record in a hearing. The conference and its members were given ample opportunity to submit additional material, on both the facts and the law, but they at no time offered anything else and were content to stand on their position as advanced in oral argument and in prior letters to the agency. The proceeding quite adequately satisfied the requirements of due process. Pacific Coast European Conference, 27 (39).

The Commission would not make findings or conclusions as to the common carrier, non-common carrier status of a respondent if the evidentiary hearing was unfair, even if such "unfairness" was not serious enough to amount to a denial of due process. Where the Examiner refused to permit counsel for respondent to argue orally the merits of its case, exercising his discretion under Rule 10(x), any possible disadvantage to respondent was cured by its written brief and exceptions, and the opportunity was declined to argue the case orally before the Commission. The Commission does not simply affirm, reverse or modify an initial decision; it finds the facts and applies the law after full consideration of a party's arguments. As to the claim that the Examiner heard oral argument from an intervener, the counsel for intervener was allowed to make a statement which was in no sense an argument on the merits of the case, and respondent's counsel was given the same right but proceeded to attempt to make a detailed, legal argument on the common carrier, non-common carrier status of respondent. The Examiner was not guilty of any "impropriety", or much less, denial of due process of law when he refused, on objection of another intervener, to permit oral argument. A claim that the Examiner refused to receive further testimony from respondent unless it elected to recall a certain witness was plainly contrary to the facts. Tariff Filing Practices of Carriers Between Contiguous States of United States and Alaska, 305 (310–316).

Where a conference and its members fail to file for approval a port equalization rule, and the Commission issued a show cause order why the rule, which had been filed as a tariff amendment, should not be declared unlawful and stricken from the tariff, the conference and its members were not entitled to an evidentiary hearing. No factual issues were involved but simply an inquiry as to whether the rule was authorized by the basic conference agreement, and if not, whether it was a new agreement or modification of an existing agreement subject to approval under section 15. Pacific Coast European Conference Port Equalization Rule, 623 (625, 626).

Rule 10(n) does not give respondents the right to present evidence and cross-examine witnesses in show cause proceedings, since the rule is not applicable to such proceedings. Rule 5(g) which governs such proceedings allows for discretion in adapting the show cause procedure to the requirements of a particular case. If it had been intended that Rule 10(n) be applicable to show cause proceedings, a specific reference to that effect would have been included in Rule 5(g). Id. (626, 627).

Order to show cause why a conference tariff rule should not be declared unlawful and providing for filing of affidavits and memoranda of law and oral argument, but not for an evidentiary hearing, was not inconsistent with Commission position in asking court to remand a case where petitioners were seeking review of a staff letter as a "final order" of the Commission. No hearing had been held,

respondents were accorded opportunity for a hearing consonant with the issues to be determined. Id. (627).

Rule 5(e) relating to answers to complaints, and Rule 7(b) relating to additional time to file documents, are not applicable to show cause proceedings. Rule 5(g) which governs such proceedings does not specify a time limit for replies to show cause orders. Thus, where respondents made no application for an enlargement of time to file replies, nor asserted why they were unable to reply to an order in the time allotted, their claims that they were not timely notified of matters of fact and law asserted in the order were frivolous. Id. (627, 628).

Motion to dismiss show cause proceeding on the ground that an evidentiary hearing was not provided was denied. The Federal Maritime Board had previously held that such a hearing was not required where the sole questions were of law. Court cases have affirmed the power of the agency to determine whether an agreement subject to section 15 approval exists and to take appropriate action. Id. (628, 629).

—Initial and recommended decisions

While entitled to weight, any recommended or initial decision which comes before the Commission for review remains only a recommendation. Upon review thereof the Commission must exercise all the powers it would have in making the initial decision including determinations of law, fact, policy and discretion. Where the Commission finds upon consideration of the entire record that substantial errors were committed, it must alter the Examiner's disposition of the case to whatever extent is necessary in its judgment to cure the errors and discharge its responsibility for insuring that the ultimate decision is correct. Unapproved Section 15 Agreement—South African Trade, 159 (162).

—Investigation; violations

An investigation by the Commission of possible violations of the Shipping Act, 1916, is an administrative proceeding and not a penal or criminal trial. The Commission has no power to punish past conduct. It cannot impose penalties, monetary or otherwise. for violating the Act's provisions. That may be done only in a penalty suit brought in a district court by the Department of Justice. Unapproved Section 15 Agreements—South African Trade, 159 (165).

Where the Commission is formally investigating possible violations of the Shipping Act, 1916, the essentials of a full and fair hearing can easily be observed without attempting to convert the proceeding into some sort of penal or criminal trial. The procedures and evidentiary rules which govern a criminal trial are wholly unnecessary to the objectives and proper conduct of the Commission's proceedings. An investigation is indispensable to the administrative regulatory function and may be undertaken "merely on suspicion that the law is being violated. or even just because [the agency] wants assurance that it is not." Id. (165).

Where an order of investigation admittedly raised questions as to whether there was an unfiled agreemeut and whether it had been carried out, and called for an investigation under section 15, any activity violative of that section, including failure to file, was necessarily put in issue. If the order was not as exact as it might have been, it must be remembered tbat it was an order for an administrative investigation. and not a statement of charges in a penal action. It constituted adequate notice of the matters of fact and law under inquiry which is all that is required in this type of proceeding. Unapproved Section 15 Agreement—Coal to Japan/Korea, 295 (302).

PRACTICES. See also Discrimination; Reparation; Stevedoring.

The unjust and unreasonable practices, "relating to or connected with the receiving, handling, storing, or delivery of property," intended to fall within the coverage of section 17 are shipping practices. A terminal operator's refusal to refund an admitted overpayment of demurrage charges and unilaterally offsetting the amount against a disputed claim of the operator against complainant does not warrant relief under section 17. By the time the operator refused to refund the money, the purely shipping aspects of the transaction had been completed. The matter is one for the courts. If the action of the terminal operator were one of a series of such occurrences, a practice might be spelled out that would invoke the coverage of section 17. One instance of such conduct cannot be found to be a "practice within the meaning of the last paragraph of section 17. J. M. Altieri *v.* Puerto Rico Ports Authority, 416 (419, 420).

In view of the fact that the present method of declaring shipping weights for export purposes on green salted hides is not sufficiently set forth in carrier tariffs nor uniformly applied, the Commission proposes a rule which will allow carriers to adopt a scale or a scale-deduction rule, and to require shippers to furnish a weighing certificate or dock receipt from an inland carrier, the certificate to be certified or attested by the signature of the shipper's supplier of the hides. For purchase lots which are split by the shipper after purchase into two or more shipments, a weighing certificate covering the entire purchase lot may be provided and the shipping weight shall be determined from a computation of the average weight of the hides in said purchase lot. Weighing Practices in re Green Hide Shipments, 699 (703–705).

PREFERENCE AND PREJUDICE. See also Brokerage; Discrimination; Surcharges.

The manifest purpose of 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. Prejudice to one shipper to be unjust must ordinarily be such that it constitutes a source of positive advantage to another. 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. 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. In order to prove a violation of sections 16 and 17, it is necessary first to establish the competitive relationship itself. Proof of the character, intensity and effect of the relationship is necessary to prove the amount of damages and to sustain an award of reparations. West Indies Fruit Co. *v.* Flota Mercante Grancolombiana, S.A., 66 (69, 70).

Where (1) respondent carrier charged the same rate for the carriage of bananas from Ecuador to Galveston as to Baltimore which is 400 miles farther, (2) complainants' (shippers-importers at Galveston) total sales in the so-called common market were 6% of their total imports through Galveston, but only 3% of the fruit carried on respondent's vessels went to the common market, and (3) only 18 of hundreds of buyers in the common market purchased bananas from complainants and North Atlantic importers, there was no substantial evidence to show that complainants' bananas compete with bananas imported into Baltimore. Complainants' principal witness had no conception of the percentage of fruit imported into Baltimore on respondents' vessels actually purchased hy the 18 buyers in question. Complainants' burden under Rule 10(o) of proving the fact of the necessary competitive relationship cannot be satisfied by mere assertions of competition unsupported by substantial evidence of record. Id. (70).

Charges that a carrier discriminated against shippers-importers 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. Id. (71, 72).

Carrier's van measurement rule based on the outside measurement of the van did not subject a shipper using insulated vans to undue and unreasonable prejudice and disadvantage in violation of section 16, or to any discrimination. Matson Navigation Co.—Van Measurement/Heavy Cargo Rules, 239 (246).

It was unnecessary for the Commission to define the action it might properly take under section 16 First where an established service was sought to be discontinued, because neither undue or unreasonable preference to Los Angeles, nor undue or unreasonable prejudice to San Diego, was shown as a result of a carrier's withdrawal from inbound service to San Diego from Hawaii. The carrier was motivated by its judgment regarding the economics of the situation, not by intent to prefer or prejudice one port or the other. In the carrier's opinion, there was a lack of San Diego-Hawaii tonnage to support even a limited regular service, and the evidence did not warrant an opposite view. San Diego Harbor Comm. *v.* Matson Navigation Co., 394 (401).

It did not follow from the fact that a carrier's past San Diego service was inefficient and uneconomical because largely one way and irregularly offered, and that the carrier made no special effort to develop the San Diego trade, that the carrier had unjustly prejudiced San Diego when it discontinued inbound service from San Diego and refused to inaugurate outbound service. There were good reasons for the primarily inbound service and little in the way of tonnage to justify the time and expense of furnishing outbound service. Moreover, a significant portion of the San Diego cargo potential was not new Hawaiian traffic, but traffic moving through Los Angeles which would have been diverted to San Diego. Id. (402).

Undue preference and prejudice under section 16 First must be established by clear and convincing proof. Further, similarity of transportation conditions is a necessary element of undue preference and prejudice. Conditions need not be identical but should at least be comparable. So far as concerned Hawaiian cargo, there was no similarity but a great disparity between transportation conditions at the ports alleged to be prejudiced and preferred, San Diego and Los Angeles, by a carrier's action in discontinuing inbound service to San Diego from Hawaii and refusing to provide outbound service. No violation of section 16 First could be found. Id. (402).

Refusal of terminal operator to refund overpayment of $40.17 for demurrage charges is not a violation of section 16 since complainant importer failed to show a disparity between the treatment accorded him and that accorded other importers. J. M. Altieri *v.* Puerto Rico Ports Authority, 416 (418).

Respondent's rate-cutting in the Venezuelan trade was not shown to have subjected complainant to unreasonable prejudice and disadvantage in violation of section 16. Respondent's cut rates, if not met by rates as low or lower, were effective equally to take cargo away from all other operators, not just complainant. Skips A/S Viking Line *v.* Grace Line, Inc., 432 (450).

The fact that under an agreement between two carriers, the rate on the same commodity moving on the same barge, operated by one of the carriers, might be different does not mean that preference or prejudice to shippers would result. The carriers publish their rates and file them with the Commission, and thus shippers are aware of any rate variance and can exercise their choice of carriers. Agreement 8492 Between T. F. Kollmar, Inc. and Wagner Tug Boat Co., 511 (519, 520).

A carrier is bound by the acts of its agent who, having authority to quote rates, booked cargo at different rates to users of the carrier's services identically situated. The carrier was not on trial for penalties, nor "charged" with a misdemeanor, and it cannot escape responsibility by contending that intent is a prerequisite to a finding of violations of sections 16 First and 17. The offense is committed by the mere doing of the act, and the question of intent is not involved. As to the carrier's denial of any actual fault, it knew that an intensely competitive situation or rate war existed, and it failed to take precautionary steps in granting authority to its agent to quote whatever rates would meet the competition. Hellenic Lines—Sections 16 and 17 Violations, 673 (675, 676).

Where a carrier charged and collected different rates from similarly situated shippers on green coffee from French Somaliland to New York for the identical transportation service, it violated section 16 First with respect to undue preference and prejudice, and section 17 with respect to unjust discrimination. Id. (676, 677).

An agreement for the use of a public terminal facility at a rental which deviates from the terminal's regular tariff provisions, may run afoul of the Shipping Act's proscriptions and must be scrutinized for any illegal discrimination or prejudice that may result. Such an agreement, however, is not unlawful or unreasonable merely because it does not follow the terminal's tariff charges. Agreement 8905—Port of Seattle & Alaska S.S. Co., 792 (800).

Where, inter alia, there was no showing that cargo had been or would be diverted from a carrier to another carrier which was the lessee of terminal facilities under an agreement providing for a rental formula at less than full tariff charges, and the objecting carrier had not been refused a similar lease since the lessor modified its previous 100% policy, no unlawful discrimination or prejudice was shown. Id. (801).

PUBLIC INTEREST. See Agreements Under Section 15; Brokerage; Stevedoring.

PUBLIC LAW 87-254. See Brokerage.

PUBLIC LAW 87-346. See Agreements Under Section 15; Port Equalization; Practice and Procedure.

RATE MAKING.

—In general

The facts regarding the Alaska trade are so similar to those in the Puerto Rico trade as to justify following the principles laid down in Atlantic & Gulf-Puerto Rico General Increases in Rates and Charges, 7 FMC 87, i.e., the cost of property used but not owned by the carriers should not be included in the rate base, the prudent investment standard to determine fair value of property being devoted to the service in the domestic off-shore trades should be used, and working capital should be an amount approximately equal to one round average voyage expense of each ship in the service. General Increases in Alaskan Rates and Charges, 563 (581, 582).

—Affiliates of carrier

The shipping public is entitled to protection from the siphoning-off of revenues by affiliates of the regulated carrier. Thus the profits derived by the carrier's principal stockholders for services rendered to the carrier were credited to the carrier's net profit after taxes. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (282).

Profits realized from terminal and management operations performed by affiliates of the regulated carrier should be credited to the regulated trade.

—Allocation of expenses

In rate-making proceedings, where allocation of voyage expenses was necessary as between the regulated and non-regulated trades to determine the adequacy of revenue in the regulated trade, allocation made principally on the basis of ton-mile prorate formulae was proper. The use of revenue prorate formulae in the case of joint operations in the trade to Puerto Rico and to the Dominican Republic would cause distortion of the operating results in the Puerto Rican trade since the revenue per ton in this trade was lower and the costs of discharge of cargo higher than in the Dominican trade. Atlantic & Gulf-Puerto Rico Conference General Increase in Rates and Charges, 87 (97–100).

Where the question was whether a carrier's charge for transporting insulated cargo-vans from California to Hawaii was just and reasonable, determination of vessel expense per revenue ton by dividing the average vessel expense of voyages terminated during the applicable period carrying insulated vans by the average revenue tons carried was proper. The method resulted in allocation of vessel expense attributable to westbound movement to loaded cargo vans, which move west. The carrier correctly excluded both revenue and cost data on eastbound vans from its cost study. Matson Navigation Co.—Van Measurement/Heavy Cargo Rules, 239 (243, 244).

Where the question was whether a carrier's charge for transporting insulated cargo-vans from California to Hawaii was just and reasonable, determination of unloading costs utilizing the expense of an outside-owned derrick barge rather than a whirly crane on the carrier's container-ship dock at Honolulu was proper. The carrier could use the whirly crane on occasion, but the container ships must have first call on the dock and its equipment. The accuracy of an assumption that the container-ship dock and crane could be used part time would be highly questionable. In any event, any reasonable foreseeable use of the carrier-owned shoreside equipment instead of the derrick crane would not decrease future cargo-handling cost enough to make the proposed charge per van more than is just and reasonable. Id. (244, 245).

Division of administrative and general expense between a carrier's shipping and nonshipping activities was proper in rate-making proceeding. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (287).

Prorating of administrative and general expense as between a carrier in an offshore trade and its wholly-owned subsidized subsidiary on a revenue basis pursuant to the subsidiary's subsidy contract was proper. There was no showing that amounts chargeable to the offshore carrier were unreasonable or excessive. Id. (287).

Where direct allocations are impossible or impracticable, expenses should be allocated between passenger and freight services on the basis of the relation that the expenses incurred in the passenger and freight operations separately bear to the total expenses incurred in the operation of both. Administrative expenses should follow the expenses to which they relate. If revenues were used as a basis of allocating expenses, the increase in revenue resulting from a freight rate increase would result in an increased allocation of expenses. A rate increase might be used as the basis for a further increase in rates. Accordingly, administrative expenses were allocated on a voyage expense basis between passenger and freight services. Id. (287, 288).

Adoption of an allocation formula for operatinng expenses, based upon a ratio of the cubic measurement of sugar to total cargo carried, was not unreasonable or inaccurate, particularly when a major part of the over-all calculations was based upon direct costs. It was not necessary for the carrier to submit a breakdown of actual cost figures for every operating expense or to take into account

the factor of broken stowage. Increased Rates on Sugar—Atlantic/Gulf Puerto Rico Trade, 404 (410).

For rate-making purposes, it was necessary to separate the carrier's subsidized and unsubsidized voyages, and as to the unsubsidized voyages, the domestic operations to and from Guam and foreign operations, in order to determine the carrier's experience solely in the Guam trade. Since the unsubsidized operations were conducted with assigned ships, and separate voyage accounts were kept covering such operations, ship operating expenses and depreciation incurred relative to such ships were directly apportioned to that service. General Increases in Rates, Pacific-Atlantic/Guam Trade, 423 (425).

Income and expense of shipping operations not directly apportionable were divided between the subsidized and unsubsidized services in the ratio of terminated voyage expenses of the unsubsidized operations to terminated voyage expenses of all voyages terminating in the accounting period. The same ratio was used to apportion overhead expenses (less agency fees, commissions, and brokerage earned), and depreciation expense, other than ships. Overhead expenses were allocated on the basis of voyage expense. They should follow the expense to which they relate. Id. (425).

Allocation between the regulated (West Coast-Puerto Rico) and non-regulated (Round-the-World service) trades of vessel operating expenses, depreciation, overhead, vessel and other asset values on a modified revenue prorate basis was proper. Elimination of cargo expenses, which are higher in United States and Puerto Rican ports than in other ports served by the carrier, from both total revenues and West Coast-Puerto Rican revenues and determination of the revenue prorate from the remaining figures was reasonable since it resulted in an apportionment of expenses in a realistic manner. Pacific Coast/Puerto Rico General Increase in Rates, 525 (530).

Allocation of costs on an out-of-pocket basis to determine net income is improper. The carrier's Puerto Rican service is an integral part of its Round-the-World operation and each segment of the service should bear its proportionate share of the overall expenses of the carrier. Use unit method, under which voyage expenses on the West Coast-Puerto Rican leg would be allocated on the basis of days and then expenses on that leg allocated on the basis of Puerto Rican tonnage to total tonnage, fails to take into consideration the carrier's cost in repositioning vessels on the North Atlantic after calls at Puerto Rico, since it counts only the days consumed in the voyage from the West Coast to Puerto Rico, Id. (530, 531).

—Capital gains

Capital gains realized by the carrier from the sale of vessels used in the trade belong to investors, not to shippers. Depreciation expenses should not be diminished by a capital gain. There should be no deduction from the depreciation base of replacement ships by reason of such capital gains. Matson Navigation Co. (Hawaiian Rate Case), Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increase in Rates, 260 (287).

—Commodity rates

Application of Cleveland rates on commodities moving from Erie, Buffalo, Rochester, Oswego and Ogdensburg, whenever rates from those ports have not been established and in circumstances where carriers are receptive to requests for establishment of lower rates in advance of a prospective movement of a commodity not specifically described, is simply a refinement of the common and reasonable practice of carriers to publish a general cargo rate in their commodity tariffs, pending the development of some traffic movement. The fact that the distance from Cleveland to foreign destinations is farther than from the

other ports is only one important consideration in formulating a reasonable rate, and only if other factors are relatively equal does distance control. The Cleveland Rate Rule is not detrimental to commerce or otherwise unlawful, particularly in the light of the carriers' willingness to establish departures therefrom upon reasonable request. Rate Practices of Conferences—Great Lakes to Europe, 118 (119–123).

Tariff rates from Toronto or Hamilton which are lower than those on the same commodities from Erie, Buffalo, Rochester, Oswego and Ogdensburg, and rates from the latter ports which are lower on some commodities than rates from the Canadian ports, are not inherently unlawful. Where rates from Toronto and Hamilton are not made in consideration of or in relation to rates from United States ports, the former rates must meet competitive rates of a Canadian conference which publishes dual rates from Canadian ports, no competition with or loss of traffic to Toronto or Hamilton was shown, transportation via Toronto or Hamilton is uneconomical for goods prodnced in the United States, and rates from Oswego must be related to rates from the port of New York, higher rates from the United States ports than from the Canadian ports on the same commodities were not shown to be detrimental to the commerce of the United States or otherwise unlawful. Id. (119–123).

The Commission will not hold (on motion of an opponent of a rate decrease, supported by Hearing Counsel and unopposed by the proponents of the rate) that a suspended but presently effective rate for the carriage of zinc from the United States to Puerto Rico is unjust and unreasonable when the record made was wholly unsatisfactory. To enter an order under such circumstances would be detrimental to the public interest and contravene sound regulatory principles. While the failure of the proponents of the rate decrease to sustain their burden of proof would normally result in cancellation of the rate and while the proponents were unconcerned about the consequences, the Commission is very much concerned with the merits of the matter and not with procedural technicalities. Considering the special dependence of Puerto Rico (and Alaska and Hawaii) on ocean shipping, coupled with the continuing regulatory responsibility placed upon the Commission by Congress, it is basic that just and reasonable rates and practices by carriers serving their ports must be assured to the full extent legally possible. Therefore, the matter must be remanded to the Examiner for further hearing, even though this will give proponents of the rate a second chance to meet their burden of proof. Rates and Practices in Atlantic-Gulf/Puerto Rico Trade, 141 (142–148).

A proposed 26% rate increase on fruit and vegetables from Kailua and Kawaihae to Honolulu was not unjust or unreasonable where the carrier had suffered losses on such service in 1960, it was doubtful that the service would be profitable even at the new rates, the rates were half or less than half of the regular class rates at which most other traffic moved, and the carrier's rate of return on all of its operations, even under increased tariffs, would remain low. Increased Rates within Hawaii, 151 (157).

Carrier's rule which provides that when rates are applied on a measurement basis to cargo vans, they shall apply to the outside dimensions of the van, is clearly just and reasonable on its face. Space on shipboard is what an ocean carrier has to sell. It is just and reasonable for a carrier to measure ship-space occupied by the shipper's cargo-carrying van, and charge the shipper for that space. Matson Navigation Co.—Van Measurement/Heavy Cargo Rules, 239 (241–242).

Where a carrier's rate rule provided that charges for carrying cargo by van (uninsulated) should be based, in effect, on the inside measurement of the van, later shippers began shipping cargo in insulated vans, the ratio of inside to out-

side measurement of which was approximately 71% compared to 91–94% for uninsulated vans, with the result that the carrier's revenue for carrying an insulated van declined considerably; and the carrier changed the rule to provide that charges should be based on the outside measurement of the van which had been the rule at the beginning of van movement, the carrier's charge for transporting cargo-vans, which was determined by application of the changed rule to the rate which had remained unchanged (except for general rate increases) was just and reasonable when supported by its study of cost and operating results made along conventional lines. Id. (241–243).

Contention that a carrier reduced its van-cargo rate below a fair and remunerative basis with the intent of driving out or otherwise injuring a competing carrier, and hence according to section 19 of the Shipping Act, 1916, cannot increase such rate unless after hearing the Commission finds that the preposed increase rests upon changed conditions other than the elimination of competition failed for complete lack of proof. Assuming that the carrier did reduce its rates below a fair and remunerative basis, the record established that the competing carrier amended its rate rule so as to decrease charges before the carrier made its similar move. Id. (246).

Even if a shipper had been able to show that a carrier had induced it to build vans by some character of express or implied assurance that charges would remain at a certain level, such showing would have availed the shipper nothing. Changes in rates are not invalidated by a pre-existing contract of a carrier not to change its rates. Id. (246).

Failure to raise rates on tinplate, molasses in bulk, dry fertilizer, and fuel oil, while raising rates generally, was justified to retain recaptured business as to tinplate, meet rates of island shippers in their own tanker as to molasses, meet Japanese and Canadian competition as to dry fertilizer, and meet rates of oil companies' vessels as to fuel oil. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (273, 274).

Where, although the nature of shipments of military household goods by the van lines and by MSTS is the same, the services performed are identical, and the cargoes move side by side in the same ship, the carrier is justified in charging MSTS a lower rate because of differences in the expense burdens. In the case of MSTS cargo, the carrier has no solicitation costs, and its administrative costs are reduced in that stevedoring, tallying, and manifesting are performed at the expense of the Government, abbreviated tariff categories eliminate the necessity of classification, and the history of MSTS shipments shows lower damage costs. Id. (274, 275).

The competitive position of Hawaiian pineapple vis-a-vis foreign pineapple and California fruits is not a basis for establishing rates, nor a reason for treating pineapple differently than other general cargo commodities in connection with a general rate increase. Molasses and sugar (on which rates were not raised) are not comparable cargoes simply on the basis of their being backhaul cargoes. To create an unreasonable or unjust discrimination, more significant similarities than the mere fact of a backhaul must be shown. Similarities in handling and facilities used must be present. Id. (275–277).

Where respondent showed that its present rate on sugar (65¢ per 100 pounds, any quantity), refined or turbinated, in bags, from ports in Puerto Rico to Atlantic ports of the United States is insufficient by a wide margin to pay the full cost of carrying sugar; based on operating and financial data for 1961, proposed increased rates are not fully compensatory; respondent estimates that average handling costs would be reduced because of required palletization, and that on shipments of 500 tons or more clerical and accounting costs would be lower, the proposed rates (65¢, minimum 500 short tons, and 75¢, any quantity)

are found to be lower than just and reasonable maximum rates and are not otherwise shown to be unlawful. Accordingly, the proposed rates are just and reasonable. American Union Transport, Inc.—Rates on Sugar, 334 (335, 336).

Act of Congress (39 USC § 487a) authorizing the Postmaster General to enter into contracts for the carriage of mail between Seward and the Aleutians and providing that the contractor shall "furnish and use in the service a safe and seaworthy boat of sufficient size to provide adequate space for mail, passengers and freight", was not intended to amend the Shipping Act, 1916, by requiring the application of different standards as to the reasonableness of rates in the trade covered by the mail contract. Alaska Livestock & Trading Co., Inc. *v.* Aleutian Marine Transport Co., Inc., 387 (391, 392).

The fact that a carrier has operated at a loss in the service supports the view that the present rate on wool from Chernofski to Seattle is not too high. The fact that a carrier may lose money on its over-all operation is of some value in determining the reasonableness of the rate on a particular commodity, although it is not controlling Id. (392).

Where evidence as to the proper stowage factor to be used in determining the cubic measurement per gross ton of sugar varied from 43 cu. ft. to 56 cu. ft. per gross ton, it was reasonable to use a factor of 45 cu. ft. which was in conformity with an established reference manual. Increased Rates on Sugar in Atlantic/Gulf Puerto Rico Trade, 404 (410).

Cost finding is not an exact science. All that is required is that the results obtained represent a reasonably close approximation of the assignable costs Carriers' decision that a rate on sugar must reflect cargo handling costs and a proper allocation of vessel operating expense with some contribution toward overhead and depreciation and other expenses of operation is a decision within the province of the carrier's managerial discretion. Carrier is not required to base the rate for carrying sugar from Puerto Rico to North Atlantic ports on an added traffic theory because of the imbalance of the trade in favor of the southbound traffic. Id. (411, 412).

Carrier's tariffs contain a rate for the carriage of cement in bulk, which rate is available to all commercial shippers. The fact that it is carried in bulk and for only one shipper is not controlling in this proceeding. The controlling fact is that it is common carriage subject to tariff rates and available to any private shipper. While the carrier did not charge the proper tariff rate during 1959 and part of 1960, this does not warrant excluding it from consideration. An investigation into the lawfulness of rates is not a proper proceeding for an adjudication of alleged violations of law. Transportation of bulk cement is a part of the service covered by rates under investigation and the revenues and expenses therefrom will he considered in testing the reasonableness of the proposed rates. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (426).

The facts that increased rates on roofing and paint commodities would result in an almost complete cessation of traffic movement, are more than the traffic can bear and the carriers did not prove that existing rates were non-compensatory, and are not sufficient basis for holding that the increased rates will be unjust and unreasonable. A shipper's or a commodity's competitive position is not a basis for establishing rates nor a reason for treating them differently from other general cargo commodities, and where shippers fail to show that a commodity subsidizes other traffic or bears more than its fair share of carriers' expense, a justification for exemption from a general rate increase has not been established. Pacific Coast/Puerto Rico General Increase in Rates, 525 (534).

With respect to disapproving a rate, the Commission's power is strictly limited. It can disapprove a rate in domestic trade, but only if it finds that the rate exceeds a just and reasonable figure. A rate which yields the cost of loading,

carrying, and delivering the cargo, plus the cargo's pro rata share of general expense, a moderate contribution to profit, and no more, is a just and reasonable rate. Matson Navigation Co. Pallets and Containers—Pacific Coast/Hawaii Trade, 771 (772).

Carrier's rate of $2.35 per pallet for the transportation of empty pallets from Pacific Coast ports to Hawaii is just and reasonable where it yields the cost of loading, carrying and delivering, plus the cargo's pro rata share of general expense, and a moderate contribution to profit. Allowing for adjustments in cost figures by calculating vessel depreciation on a 25-year-life basis, by allocation on a revenue prorate formula rather than a vessel operating expense ratio, and by considering savings effected by using as dunnage pallets carried as cargo, the resulting profit of 12¢ per pallet would be well within the permissible range. The fact that the impact of the increased cost of moving empty pallets would be adverse, and perhaps severe, does not authorize the Commission to strike down the increased rate. Id. (772, 774, 775).

—Comparison with rates of other carrier

While a comparison of a rate under study with rates of other carriers is an acceptable test of the reasonableness of the former, the persuasiveness of the test varies directly with the similarity of the circumstances surrounding the rates of the different carriers. The passage of eight years in times of progressive inflation weakens the probative value of the comparison to the point where it is of little value, particularly where it has little or no support based on other record evidence. Alaska Livestock & Trading Co., Inc. *v.* Aleutian Marine Transport Co., Inc., 387 (391).

The fact that the rate of another carrier on wool from Chernofski, Alaska, to Seattle was the equivalent of approximately eight dollars per hundredweight does not establish that respondent's rate, equivalent to about ten dollars, is unreasonably high. The services that gave rise to the eight dollar charge are not now available and the service involved carriage by respondent to Kodiak and by another carrier to Seattle. At the time there was no direct service. A comparison of rates in these two situations is of only limited value, if any. Id. (391).

While the existence of a rate on wool from Chernofski, Alaska, to Seward of 75 cents per cubic foot in 1954 does not prove the reasonableness of the present rate of $1.10 from Chernofski to Seattle, a much greater distance, it is of some value in support of the reasonableness of the present rate. Id. (392).

Where comparison of respondent's rates with other carriers' rates in the trade showed that they averaged 15 per cent less than those of complainant, but when wharfage and delivery charges were added they were comparable, respondent's rates were not unreasonably low. Puget Sound Tug and Barge Co. *v.* Foss Launch & Tug Co., 611 (619).

—Depreciation

Where vessels were transferred from A. H. Bull New Jersey to A. H. Bull Delaware in a transaction involving another corporation organized to facilitate consummation of the transaction, the values placed upon the vessels when they were acquired by A. H. Bull Delaware, which values were higher than those carried on the books of A. H. Bull New Jersey, were not a proper basis for allowing depreciation. Such a basis would disregard and eliminate from consideration 10 years of depreciation which shippers have already paid. The same assets continued to serve the trade after as before the transaction. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (107, 108).

Residual scrap values accord with the conventional longstanding practice of vessel owners, are the bases of depreciation allowable to compute income tax liability, are the only certain standard upon which the Commission can rely, and

are not unreasonable for use in computing vessel depreciation in rate-making proceedings. Depreciation computed on the difference between original cost and the amount which it is estimated the carrier will realize at the end of the depreciation period would not be a proper basis since extreme fluctuations occur in market prices of vessels, and it would be impossible to forecast the probable disposal value of vessels at the end of the depreciation period. Id. (108).

Method of depreciation of vessels by using a residual value of 2½ per cent and an average useful life of 20 years is approved. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (283).

In constructing a rate base, carriers can charge annual vessel depreciation using a residual value equal to scrap value rather than an amount estimated to be realized when the vessels are disposed of. Id. (289).

Residual values utilized by carriers in accordance with the conventional long-standing practice of vessel owners are the most reasonable and equitable standards upon which to rely. Future depreciation charges will not be disallowed for rate purposes on the claimed basis that the vessels have already been depreciated below their value at the end of their useful service lives. Probable disposal value of vessels cannot be forecast even in the relatively near future. Pacific Coast/Puerto Rico General Increase in Rates, 525 (531).

Where vessels were shown to be durable for as much as 30 years with proper maintenance; the carrier had not indicated that it contemplated any vessel replacement for vessels nearing the end of a 20-year life; the carrier had assigned salvage values which appeared to represent minimum scrap values, and in some instances no salvage values; and in the case of two vessels it was taking depreciation on a 25-year life, the minimum vessel life reasonably attributable to the fleet was 25 years. Predictions of estimated useful life must meet the controlling test of experience, otherwise the amounts charged to operating expenses for depreciation are excessive, and to that extent users of the regulated service are required to provide, in effect, capital contributions, rather than amounts representing the consumption of capital on a cost basis. General Increases in Alaskan Rates and Charges, 563 (577, 578).

—Differentials

Where possible, it is desirable to maintain reasonable rate relationships. While a 10 percent rate increase would broaden the dollar differential between bulk grain and ingredients, on the one hand, and manufactured feed, feed ingredients and grain in bags or containers, on the other hand, a carrier generally is not required to equalize opportunities among shippers or nullify the advantage of a shipper whose plant is close to the market. The carrier's proposed rates were not shown to be unreasonable as a result of a percentage-across-the-board increase rather than a dollar-differential increase. The use of a percentage form of increase is presumptively fair because it apportions the increased revenue among all commodities in proportion to present participation in revenues. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (277–299).

A finding of a service disability may be a reason for allowing a rate differential between the carriers offering the superior and inferior services. The granting of such differential, however, depends upon a finding that the rates of one of the carriers are unlawful and must be adjusted. Where the rates of the carrier providing slower transit time were not shown to be unlawful, and the rates of the other carrier were non-compensatory, but it was a new carrier in the trade with prospects of achieving a profitable position, the rates of the new carrier could not be condemned as unlawful, i.e., unjust or unreasonable. Common Carrier Freight Rates and Practices in Florida/Puerto Rico Trade, 686 (694).

—Dominant carrier

Where there are five carriers serving the Puerto Rican trade, some from the Gulf and some from the North Atlantic, the rates are the same from North Atlantic and Gulf ports, and the alleged dominant carrier serves Puerto Rico only from the North Atlantic, findings based soley on operating results of such carrier would fail to give consideration to operations from the Gulf. If separate findings with regard to North Atlantic and Gulf rates might result in a disparity of rates disruptive of the trade and if such carrier did not overwhelmingly dominate the trade (its revenues for the first six months of 1958 were $11,682,207 vs. $10,806,796 for three other carriers combined), and if neither the strongest nor the weakest lines control rate determinations, the findings will be based on average conditions, confronted by the carriers as a group. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (105).

Where Matson carried 91.3 percent of the Pacific Coast/Hawaii cargo in 1957, 88 percent in 1958, and 90.1 percent in 1959, the lawfulness of proposed Pacific Coast/Hawaii rates will be determined on the results of Matson's operations. Shippers and consignees between the Pacific Coast and Hawaii are entitled to have the lawfulness of their rates determined on the basis of the results of Matson's operation in that particular trade. Carriers in the Atlantic-Gulf-Hawaii trade in the past have based rates in that trade on the competitive relationship between that trade and the Pacific Coast/Hawaii trade. Separate ships and separate solicitation services are needed and employed. There is no interdependence except in rate setting. In a proceeding to determine the lawfulness of rates, the shipping public on the Pacific Coast should have rates based on the cost of shipping their own commodities. Pacific Coast/Hawaii and Atlantic Gulf/Hawaii General Increases in Rates, 260 (262, 263).

The lawfulness of general increases in rates in the Pacific-Atlantic/Guam trade were to be determined in the light of traffic, operations, revenues and net profits and losses of the carrier which transported 87 percent of the revenue tons of non-military freight shipped from all ports in the United States to Guam, and 96 percent of such traffic from West Coast ports to Guam. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (424).

A 60–40 ratio of cargo lifted by two carriers is not such a sufficient differential as to justify the application of the dominant carrier theory. The projected revenues of one carrier would not exceed those of the other by an amount sufficient to justify adoption of the theory. Findings will be based on conditions confronted by the carriers as a group. Pacific Coast/Puerto Rico General Increase in Rates, 525 (533).

Past decisions affirming that the dominant carrier in a non-contiguous domestic trade will be taken as the rate-making line were not rules promulgated for use in the Alaskan trade, but were based on the facts of those proceedings. The difference in services offered by other carriers in the Alaskan trade and the lack of any dominance in the amount of tonnage carried in the areas where they are competitive justify the exclnsion of any rate-making carrier theory. General Increases in Alaskan Rates and Charges, 563 (585).

—Fair-return-on-fair-value standard

The fair-return-on-fair-value standard is proper in judging rates in the domestic offshore trades. The operating ratio theory will not be adopted. Atlantic & Gulf-Puerto Rico Geueral Increase in Rates and Charges, 87 (105).

The fair-return-on-fair-value standard is proper in determining the reasonableness of rates in domestic offshore trades. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (267).

On the record, fair-return-on-fair-value standard should be used in determining the reasonableness of rates in the Guam trade. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (427).

The fair-return-on-fair-value standard is proper in determining rates in the domestic offshore trade. Pacific Coast/Puerto Rico General Increase in Rates, 525 (533).

—Going concern value

Going concern value is not a proper item for inclusion in the rate base of a seasonal carrier. General Increases in Alaskan Rates and Charges, 563 (582).

—Noncompensatory rates

In evaluating a rate on sugar from Puerto Rico to North Atlantic ports, it was not necessary to give prime consideration to the value of the service because of the competitive predicament in which Puerto Rican sugar refiners find themselves, or the effects of the rate on Puerto Rico and the refinery workers. Value of service falls within the realm of public interest and may be the determining factor in resolving the question of reasonableness of a rate. However, the consideration and effect that must or should be given to the public interest is limited by the Due Process Clause of the 5th Amendment. Noncompensatory rates on some commodities are not barred if the carrier's rates as a whole afford it just compensation for its over-all services. It is not sound regulatory policy or in the public interest to require a carrier to sustain substantial losses on a large segment of the cargo it carries. Such a practice would result in either disproportionately high rates on other cargo or a substantial weakening of the carrier's economic position or both. Increased Rates on Sugar—Atlantic/Gulf Puerto Rico Trade, 404 (412, 413).

Reduced rate on wool is not unreasonably low in view of the value of the service to the wool shippers in the remote area of the Aleutian Islands, the infrequent shipments of wool, and the fact that the carrier is making an over-all profit. While the rate is not fully compensatory, it covers out-of-pocket costs, including insurance coverage, with some contribution toward other expenses. Aleutian Marine Transport Co., Inc.—Rates, Seattle and Ports in Alaska, 592 (596).

Where complainant's position that carriage of common and contract cargo on the same voyage (by means of tandem tow of barges) was illegal, was not sustained, it was not necessary to exclude revenues on contract cargo which exclusion would have made the operation unprofitable; and respondents engaging in the tandem operation each showed a profit, complainant failed to show that respondents' rates were noncompensatory. Puget Sound Tug and Barge Co. *v.* Foss Launch & Tug Co., 611 (618).

The fact that, as a result of past favorable treatment accorded by a carrier to shipment of pallets to Hawaii, pineapple shippers and receivers geared their cargo handling operations to pallets at considerable cost, did not obligate the carrier to continue a non-compensatory rate for carrying empty pallets westbound to Hawaii. Even if the carrier had entered into explicit contracts to maintain the old rate, this would not invalidate an increased rate. Matson Navigation Co. Pallets and Containers—Pacific Coast/Hawaii Trade, 771 (773).

—Operating expenses

In rate-making proceedings, general operating expenses, but not depreciation expenses, incurred by a carrier during a strike were to be excluded from expenses for the year in question since the strike was unrelated to the ordinary labor management controversies. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (112).

The expense of a carrier incurred as a result of actions brought in Puerto Rican courts for overtime wages by stevedore foremen were properly includable in operating expenses related to the carrier's Puerto Rican trade. The suits arose from a difference of opinion as to the carrier's liability for overtime payments and the resulting expense was not improperly included in operating expenses on the ground that it was attributable to a violation of law by the carrier. Id. (112, 113).

In rate-making proceedings the charter hire paid for a vessel not included in the rate base was properly included in operating expenses, but interest paid on a vessel mortgage was a cost of capital employed which must be borne out of profits earned. Id. (113).

A carrier may charge to the trade its expenses of laying up vessels while they are converted to container use, or pending sale. When ships are laid up for repairs or alterations for further use in the service it is reasonable that shippers should bear an expense for their benefit. Pending sale, shippers may reasonably be required to pay for the intervening lay-up expenses because the lay-up stops further expense of operation. On the other hand, ships withdrawn from service altogether are laid up for the benefit of the carrier and investors and no lay-up expense is allowable. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (282, 283).

Losses suffered by a carrier on vessels taken out of a trade and chartered to others during periods when they are not required for the trade will be excluded as expenses in fixing the carrier's rates in the trade. Id. (283).

For rate-making purposes, container rental expenses, involving large payments in the early years and smaller payments later on, should be spread evenly against operating expense over the useful life of the containers. Only in such way can there be portrayed the true picture of the carrier's operation in the future. Special expenses should be spread over that period which reasonably represents the useful life of the asset. Id. (284, 285).

Military freight and military household goods are carried for the government at special contract rates. Neither private commercial shippers nor the people of Guam should pay any part of the carrier's expense for such service or for any return on the property the carrier devoted to such carriage. Accordingly, such service will be excluded in determining the reasonableness of rates under consideration. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (425, 426).

Examiner did not err in adjusting carrier's projected voyage expenses to reflect the substitution of three C–2's for two C–3's. Elimination of charter hire on a ton-mile prorate applicable to commercial cargo and substitution of operating expenses for the three C–2 ships, after allocation, and addition of estimated increases in expenses primarily for wages and fuel, was a correct method and does not result in giving effect to increased operating expenses twice. Id. (426).

Disallowance of interest on vessel mortgages as operating expenses was proper. General Increases in Alaskan Rates and Charges, 563 (575).

Contributions to a charitable trust for use by recognized charitable organizations are for the public good, and will be recognized as eligible expenses chargeable to the shipping public and allowable for rate-making purposes. Id. (576).

Expenses for unfunded liability portions of payments into a pension fund are includable as operating expenses. Pension payments are in the nature of wages and constitute a present benefit to employees. The use of a ten-year period of amortization for computation of unfunded liability, being allowed for tax purposes, is reasonable. Id. (576).

Allowance of inactive vessel expenses, incurred because of the need to lay-up some ships during winter months, or of the need to take ships out of service for

other reasons, is proper. By chartering its vessels as charters became available during the off season, the carrier reduced the inactive vessel expense which would otherwise have accrued. To further reduce the remaining inactive vessel expense by an allocation to the charter operations would not be appropriate or in accordance with sound accounting practice. Id. (576).

Pre-inaugural expenses for newly acquired vessels required to fit them for the Alaskan service, and which were for maintenance and repair work, are properly includable in operating expenses. Id. (577).

Allowance of an expense of $20,000 to replenish the reserve for redelivery expenses which had been depleted by about $18,400 to defray redelivery expenses of a vessel chartered, is proper. Since the redelivery expense would be allowable, there is no abuse of discretion in first using reserve funds and then later restoring funds to the reserve which were used for this purpose. Id. (577).

—Operating ratio test

The operating ratio test of justness and reasonableness of rates is not applicable where the regulated carrier has a substantial investment in property used and useful in providing service. General Increases in Alaskan Rates and Charges, 563 (584).

—Operating results

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 obtainable as of the time the rate increases are proposed. Where operating results were available with regard to a 15 percent increase for the year 1957 and with regard to a further increase of 12 percent for the first six months of 1958, and extreme precision was not required, property values would be determined as of December 31, 1957, and the resulting rate bases applied to the actual operating results so far as they could be determined from the record for the year 1957, and the projected results for the year 1958. While this might have a tendency to lessen the values applicable to the year 1957 because of depreciation accrued during that year, the results would not be unreasonable. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (101).

Earnings of a carrier derived from interest on a mortgage on a terminal unrelated to earnings derived from a Puerto Rican service were to be excluded from revenues assigned to the service. Elimination of a carrier's expenses incurred during a strike required that revenues earned by an affiliate in carrying bagged raw sugar under contract terms, and profits earned by the carrier in conducting independent stevedoring operations for other carriers during the strike period, be excluded from revenues assigned to the service. Id. (112).

In rate-making proceedings, revenues of a carrier for the year preceding a further rate increase do not have to be restated so as to reflect actual operating results for that year during which an initial increase in rates was effective, where such operating results do not enter into projections for the future and thus would serve no useful purpose. Id. (112).

Consideration will be given to the future operations of a carrier in a trade, which although not a respondent in the rate-making proceeding, is an existing carrier in the trade, with rates identical to those under investigation, and has agreed to be bound by the Commission's findings. Id. (114).

In making findings as to the lawfulness of rate increases, evidence of actual results which become available during the hearings cannot be ignored. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (281, 282).

Carrier which credited to the Alaskan trade revenues equal to the normal tariff charges on items handled by it was not required to credit to the trade additional profits earned under a joint venture to provide transportation service (involving land, water, and barge services) for the Department of Defense to supply defense installations in Alaska. The profits were not a recurring item. The amount of revenue was unpredictable and inclusion of such amounts as profits or losses would distort common carrier tariff income in the revenue projections by unrelated operations in non-common carrier services. General Increases in Alaskan Rates and Charges, 563 (579).

Amounts received by the carrier from insurers representing amounts due in excess of actual expenses incurred in repairing a vessel from fire damage are properly excludable from revenue as a non-recurring item, the inclusion of which would distort results designed to project as near normal a year as possible for rate purposes. Id. (579).

—Property devoted to service

An item called claims pending in a rate base claimed by a carrier will be disallowed as not constituting a specific investment in property required in performing the sevrice. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (103).

The value of terminal facilities used but not owned by carriers should not be included in the rate base. Carriers are not devoting their capital to the public use insofar as such property is concerned. It is proper to include as expenses rentals paid and other expenses of carriers which arise by reason of the use of non-owned facilities. However, to include the value of non-owned property in the rate base and owners' expenses, instead of rentals as expenses, would result in a windfall to the carriers at the expense of the shipping public. Id. (110).

Rentals from a building located on property owned by a carrier and devoted to the trade will be credited to the carriers' service. Id. (110).

Where a carrier rents tugs from an affiliate, and it cannot be determined whether the rental is reasonable, it is proper to include in the carrier's rate base an allocated portion of the value of the tugs. 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. While the rental charge for the tugs in the rate base will be disallowed as an expense, an allocable portion of the wage and other operating expenses will be included. Increased Rates Within Hawaii, 151 (156).

In addition to ships, other items properly included in the rate base of a domestic water carrier are the values of other floating equipment devoted in whole or in part to the service, other assets and working capital. A barge which is not in condition to be used in the Guam service cannot be considered as property used or useful in providing service to shippers. A house in Guam occupied by the carrier's representative should be included in the rate base. A house in Guam owned by the carrier and leased to a shipper will be excluded. General Increases in Rates—Pacific-Atlantic/Guam Trade. 423 (428).

Only property owned by the carrier will be included in the rate base. Expenses in the form of rent or charter hire of ships are allowable charges to shippers for non-owned property but shippers should not, in addition, pay for a return on such property where no investiment is at stake. General Increases in Alaskan Rates and Charges, 563 (582).

—Prudent investment standard

The prudent investment standard for measuring the rate base, widely used in the regulation of public utilities, is equally applicable in the determination of just and reasonable rates in the domestic offshore trades. Amounts invested pru-

dently 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 determining the rate base. This method will contribute to speedier, less expensive disposition of rate cases, since data on original costs and capital improvements are readily available. Atlantic & Gulf—Puerto Rico General Increase in Rates and Charges, 87 (106, 107).

In the domestic offshore trade the prudent investment standard will be used to determine the fair value of property. The record did not warrant departing from that standard so as to permit valuation of rented tugs and certain land on the basis of fair market value. Increased Rates Within Hawaii, 151 (157).

The prudent investment standard will be used to determine the fair value of property used in domestic offshore trades. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (267).

The prudent investment standard should be used to arrive at the fair value of the property devoted to the Guam trade. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (427).

The prudent investment standard will be used to determine the fair value of property in the domestic offshore trade. Pacific Coast/Puerto Rico General Increase in Rates, 525 (533).

—Rate of return

Investors and carriers are entitled to enough revenue not only for operating expenses but also for capital costs, including service on debt and dividends. The equity owner's return should be sufficient to ensure confidence in the financial integrity of the carrier, so as to maintain its credit and attract capital. Fifteen and 12 percent increases in rates in the trade between North Atlantic and Gulf ports and Puerto Rico were found to be just and reasonable. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (166).

A reasonable rate of return is one that is sufficient to produce earnings that meet the carrier's present costs of capital, including fixed charges, such as interest on secured debt, and reasonable dividend requirements for holders of equity obligations; and adequate to attract capital in the future on favorable terms and to pay incidental costs of issuing securities. Protection of existing investors and protection of the carrier through capital attraction should provide returns commensurate with those of enterprises with comparable risks. Under these criteria and the record evidence showing that a rate of return for shipping companies must be higher than for industrial or utility companies to attract capital, rates of return of 8.32 percent for 1960 and 10.59 percent for 1961 are not excessive. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (290–292).

A rate of return of 6.4 percent on property valued on the basis of the prudent investment standard is not unreasonable. Tariffs under investigation are lawful, just and reasonable. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (429).

Just and reasonable rates should provide enough out of revenues from the regulated service to meet all allowable expenses of providing service, including the cost of acquiring or retaining the capital needed to provide service. An actual cost measure should be used as far as possible throughout the rate-fixing process, including the cost of capital. The level of earnings needed to pay interest on the carrier's notes and to pay dividends adequate to give stockholders a return comparable to other investments having a comparable risk should be allowable. One test of fairness of the rate of return is its ability to accomplish this capital attracting or retaining function. On the record, rates which produce

a return of 9.07 percent are not unjust or unreasonable. General Increases in Alaskan Rates and Charges, 563 (583, 584).

Considering, inter alia, that a carrier's increased rates were based on the added cost of all-risk cargo insurance which was unquestionably of benefit to shippers, and that the carrier's rate of return, after taxes, was 9.20 percent, the increased rates are just and reasonable. Aleutian Marine Transport Co., Inc.—Rates, Seattle and Ports in Alaska, 592 (600).

—Relationship between carrier and shipper

Although a close relationship existed between Matson, the four principal stockholders of Matson and the sugar interests in Hawaii, the carrier's sugar rates were shown to have been negotiated in good faith and at arm's length, and the rates agreed upon were reasonable and compensatory. The carrier was faced with the choice of losing the sugar business or establishing a lower rate (which was not raised when rates on most other commodities were raised). Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (273).

—Statutory reserve funds

To the extent that statutory reserve funds maintained by a carrier in connection with its subsidized foreign operations 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. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (103, 104).

In computing net earnings on its freigbt operation, the carrier properly included depreciation on funds deposited in its construction-reserve fund pursuant to section 511 of the Merchant Marine Act, 1936. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (284).

—Vessel and other property values

A market value rate base would produce erratic rates which are in the interest of neither the shipping public nor the owning companies. 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. Atlantic & Gulf—Puerto Rico General Increase in Rates and Charges, 87 (106, 107).

Reproduction cost cannot be accepted as proper for rate-making purposes. Reproduction cost assumes that a carrier bas reproduced or will reproduce its vessels. 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 vessel 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. Id. (107).

—Working capital

Working capital in an amount equal to one round voyage expense of each vessel in the service is a fair and reasonable allowance as an element of the rate basis. Working capital is required to meet the need arising from a time lag between payment by the carrier of its expenses and receipt by the carrier

of payments for service in respect of which the expenses were incurred. The conference tariff specifies prepayment of freight, thus there would be no substantial lag between payment of expenses and receipt of revenues, and the amount of working capital allowed is ample. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (109).

An amount equal to one round voyage expense of each ship in the service will be allowed as working capital. Since working capital is the fund from which voyage expenses are paid, such expenses are the most accurate measure of the employment of working capital. No allowance will be included in the rate base for "claims pending" or "other deferred charges and prepared expenses." Working capital based on average voyage expense itself provides for these items. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (428, 429).

The measure of what a regulated carrier is entitled to for working capital in the rate base is an amount equal to one round average voyage expense of each ship in the service. General Increases in Alaskan Rates and Charges, 563 (582).

RATES, FILING OF. See also Common Carriers; Jurisdiction; Practice and Procedure; Surcharge; Volume Rates.

Where a carrier applied for and received permission to establish in its tariff on less than the required thirty days' notice a new classification covering vans, which otherwise would have had to be carried at a higher "cargo, NOS" rate, and the carrier published the new classification, charged and collected freight on the basis thereof, but failed to file the tariff, the carrier violated section 2 of the Intercoastal Act by charging and collecting less compensation than provided in its schedules filed with the Board and in effect at the time of transportation. Y. Higa Enterprises, Ltd. *v.* Pacific Far East Line, Inc., 62 (63, 64).

Where under an escalation clause of a freighting agreement, any increase in the rate is contingent upon an increase in the cost to the carrier of chartering a vessel to meet the requirements of the shipper; and, since the carrier must charter vessels in advance of shipment in order to meet the shipper's requirements, the carrier will know what increased costs are involved and will be able to compute the increase in rate in advance of actual shipment, the carrier will be able to file the actual rate to be charged under the tariff as the provisions of section 2 of the Intercoastal Act require. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (281).

Where a carrier was bound by conference agreement to observe conference rates and such rates were the only rates filed and published by it or on its behalf, the rates so reported and published were its regular or established rates which it was bound to charge and shippers were bound to pay. United States Lines—Gondrand Bros.—Section 16 Violation, 464 (469).

Where the agent which performs the pickup service is certificated as a common carrier by motor vehicle by the ICC, an ocean carrier's tariff which quotes single factor rates for containerized cargo, including pickup charges at port terminal areas and delivery charges at an off dock container freight station, is not contrary to section 2 of the Intercoastal Act. ICC decisions construing section 6(1) of the Interstate Commerce Act, which is almost identical with section 2, as prohibiting joint rates between carriers subject to the Act and those not subject to the Act were based on the fact that the unregulated carrier would be free to circumvent the purpose of the Act with impunity, and are not controlling, since here the motor carrier is subject to ICC regulation. Matson Navigation Co.—Container Freight Tariffs, 480 (485–487).

It is not jurisdiction but uniformity in the treatment of shippers which requires the separate statement of rates and charges by carriers subject to the

Intercoastal Act. Prior to enactment of the Act, carriers were required to file only their maximum rates and charges and were only prohibited from charging a greater compensation for services. Prior decisions requiring disclosure of rate components dealt with rules providing for absorptions and allowances and port equalization where actual rates charged for services could not be ascertained. Section 2 was not intended to require the separate statement of each and every terminal charge which is a component of the final rate for the service offered. The purpose of the "state separately" language of the section was to make the carrier, once it had fixed its charge for the service offered, specify anything else which would effect a change in the ultimate rate to be paid by the shipper. Id. (487–489).

Where the carrier states the complete service offered and the rate charged the service under a single-factor rate including pickup and delivery service, and provision is made in the tariff for the shipper to elect to use only a portion of the entire service, in which event the tariff states in specific amounts the "allowances" made, the tariff meets the provision of section 2 of the Intercoastal Act with respect to separate statement of charges. Id. (489).

Where the carrier offers single-factor rates for containerized cargo, including pickup and delivery service, an "allowance" to shippers who elect not to use the pickup and delivery service is valid under section 2 of the Intercoastal Act. The "allowance" is not an unlawful absorption but a reduction in the rate so that each shipper pays for the service he receives, and each is able to readily ascertain not only the charges he must pay but also those of his competitor. Id. (489, 490).

Single-factor through rates of common carrier by water from inland points in Puerto Rico to Port Newark must be filed with the Commission under section 2 of the 1933 Act. Tariff Practices of Sea-Land Service, Inc., 504 (506).

Single-factor rates including pickup and delivery service are valid. The shipper may easily determine what he is paying for and which service, i.e., through service or port-to-port for which the carrier also quotes a rate, he may most economically employ. The primary purpose of section 2 of the 1933 Act is achieved when the shipper is able to determine from the tariff the exact price of the transportation to him as well as to his competitor. Aleutian Homes, 5 FMB 602, does not preclude carriers from including proper terminal charges within single-factor rates. Intercoastal Investigation, 1935, 1 USSB 400, requires the separate statement of only those terminal charges, privileges or facilities not properly identified as included within the quoted rate. Id. (508, 509).

Whether or not the Intercoastal Act is a part of the Shipping Act, 1916, the provisions of the Intercoastal Act are applicable to the rates of common carriers by water in interstate commerce, and the Intercoastal Act affords the proper recourse for inquiry into the reasonableness of the rates of carriers engaged in trade between Seattle, Washington, and Anchorage, Alaska. The 1916 Act only authorizes as to the domestic trade the prescribing of a maximum reasonable rate after a finding of unreasonableness (section 18(a)), and this is inapplicable to a proceeding involving the question of whether an agreement between carriers in the said trade for carriage by one of cargoes generated by the other at the latter's tariff rates should be approved. The protesting carrier complained not as to maximum rates that might flow from the agreement but as to minimum rates. Agreement 8492 Between T. F. Kollmar, Inc. and Wagner Tug-Boat Co., 511 (517).

The filing requirements of section 2 of the Intercoastal Act are broader and more stringent than those of section 18(a) of the Shipping Act. Consequently, if section 2 does not prohibit a carrier's substituted service rule (land haul for a portion of water haul), no other provision of the Shipping Act or the Inter-

coastal Act would do so. Puget Sound Tug & Barge Co. *v.* Alaska Freight Lines, Inc., 550 (555).

While section 2 of the Intercoastal Act assumes that the rates to be filed will be rates for the common carriage of goods by water between points on the carrier's route, it does not expressly prohibit the filing of rates which include a substituted mode of carriage over a portion of the route, and such a prohibition will not be inferred. Id. (556).

The rationale of ICC decisions requiring that where substituted service is permitted, shippers must be given the option of nonsubstituted service if they desire, is not relevant to the case of a water carrier subject to Maritime Commission jurisdiction and substituting land haul for the Oakland-Seattle portion of its Oakland-Alaska service, without giving such an option. Provisions of the Interstate Commerce Act governing bills of lading are not found in the Intercoastal or the 1916 Shipping Act. While substitution "where the shipper otherwise directs" would probably break the contract of carriage, no breach of contract is involved here since the carrier's tariff informs the shipper that substituted service may be provided and if the shipper books his cargo with the carrier the contract is necessarily subject to that condition. In any case, mere failure to offer the right to select all-water service is not a breach of contract. Id. (556, 557).

Interstate Commerce Commission cases interpreting the language "points on its own route" in section 6(1) of the Interstate Commerce Act are inapplicable to the question of whether a water carrier's substituted service rule (land haul for the Oakland-Seattle portion of its Oakland-Alaska service) is lawful under section 2 of the Intercoastal Act. The ICC cases involved attempts by a rail carrier to publish and file rates on its own line to points on the line of another carrier without the booking carrier securing the concurrence of the latter. The ICC found that, without the concurrence of the second carrier, the tariff filed could not be designated a joint tariff, and the rates were not joint rates for a through route. No problem of joint rates was presented in the instant case. To the extent ICC decisions are governed by the necessity of prescribing the proper relationship between two carriers subject to the Interstate Commerce Act they are of little value to the Maritime Commission and are not binding precedents when the Commission adjudicates rights and responsibilities of water carriers subject to the Shipping Act and the Intercoastal Act. Id. (557, 558).

The decision in Intercoastal Investigation 1935, 1 USSB 400, does not preclude the lawful filing of a carrier's substituted service rule (land haul for a portion of water haul). The portion of the Intercoastal case relied on dealt with an improper attempt by several water carriers to establish joint intercoastal rates. The instant case was not one of joint rates. Id. (558).

Carrier's rates for substituted service for the Oakland-Seattle portion of its Oakland-Alaska service are not unlawful because allegedly they "fail to afford publicity, inflexibility, or unalterability to AFL's charges (i.e., share of revenue) for the only transportation actually performed by it—the barge transportation between Seattle and Alaska". The word "charges" as used in section 2 of the Intercoastal Act can hardly be equated with the carrier's share of revenue. This would ignore the plain meaning of the remainder of the statutory language. With respect to the suggestion that the carrier partially absorbs the transportation cost, resulting in an illegal rebate, there is no evidence of any rebate to shippers, nor explanation as to how any rebate is accomplished. Shippers similarly situated receive uniform treatment under the substituted service rule. Id. (559).

Carrier's substituted service rule meets the requirements of section 2 of the Intercoastal Act with respect to uniformity and equality of treatment of shippers. However, the tariff must be amended to specify the name of the carrier or car-

riers performing the substituted portion of the service and the points between which they may be used. Id. (559).

Carrier which previously served Oakland by vessel discontinued service in 1959 because of its poor financial condition, resumed booking cargo at Oakland for Alaska in 1961, and hopes to resume direct service when cargo offerings permit, has a route between Oakland and Alaska destinations within the language "between points on its own route" in section 2 of the Intercoastal Act. The route remains essentially that of a water carrier, and the carrier's substituted service rule is lawfully on file with the Commission under the provisions of the Intercoastal and 1916 Shipping Acts. Id. (560, 561).

In view of the fact that continued suspension of a carrier's minimum charges would result in injury to a large number of shippers if the carrier discontinued its service, and the fact that only one shipper contended that it would be damaged by the minimum charges and that shipper's interest was fully protected, as it was complainant in another case against the carrier involving the lawfulness of the minimum charges, continuation of the suspension would not be in the public interest and the suspension will be vacated. Sea-Land Service, Inc.—Discontinuance of Jacksonville/Puerto Rico Service, 646 (649).

REBATES. See Devices to Defeat Applicable Rates; Rates, Filing Of.

REPARATION.

Refusal of terminal operator to refund overpayment of demurrage charge is not a violation of section 18 since that section applies only to carriers. J. M. Altieri *v.* Puerto Rico Ports Authority, 416 (418).

Every precaution will be taken to insure that discrimination does not result from the approval of Rule 6(b) applications. The requirements of the Rule must be fully complied with and Examiners should freely utilize their authority to obtain any additional information deemed necessary. Where the facts show that there will be no discrimination, and that the case is one of bona fide rate mistake or inadvertence, the Commission may exercise its discretion to remedy the situation. Martini & Rossi, S. p. A. *v.* Lykes Bros. Steamship Co., Inc., 453 (456).

Where a shipper was charged and paid the tariff rate on "film, vinyl, products" instead of the lower applicable rate on "clothing, dry goods," on shipments of baby pants from Puerto Rico to United States ports, the overcharges resulted in violation of section 2 of the Intercoastal Shipping Act. Since the carrier, after agreeing to satisfy the complaint by refunding the overcharges in installments, made only one payment, although frequent demands were made for further payments, the shipper is entitled to reparation in the amount of the balance unpaid. International Latex Corp. *v.* Bull Insular Line, Inc., 545 (547, 548).

An award of reparations, when a violation of the Shipping Act has been found, is permissive and not mandatory. Consolo *v.* Flota Mercante Grancolombiana, S.A., 635 (637).

Where the Maritime agency had twice held that a carrier's practice of contracting all of its banana space to certain shippers to the exclusion of other shippers was illegal, and the agency had also ruled that forward booking arrangements for a period not exceeding two years were reasonable if available space was prorated among all qualified banana shippers, action of another common carrier in renewing its exclusive banana contract for a three-year period could not be justified on the basis of the "unsettled nature of the law," thus making inequitable an award of reparations. While one of the former Board decisions had been appealed (and ultimately affirmed), the Board's order had not been

years after the three-year renewal contract had been negotiated. As to the carrier's claim that it might have been faced with litigation for breaching its exclusive banana contract, a provision of the contract absolved the carrier of liability in the event the contract was declared illegal. While the carrier might have had to defend the Board decisions, it was not unreasonable to think that one acting in good faith would choose such a course. One who acts in contravention of a statute, court or administrative ruling, in the belief that it will be declared invalid, assumes a risk and must face the consequences if the law is upheld. Id. (638, 639).

Reparation in connection with a shipment of household goods from Puerto Rico to New York and thence to Lincoln, Nebraska, was denied where, as to the alleged unjust and unreasonable charges of the land carrier, complainant failed to show that respondent (a forwarder) was responsible for the charges which must be deemed to be the sole responsibility of the land carrier, a person not subject to Commission jurisdiction; and as to respondent's charges up to delivery to the land carrier, they were not per se unjust and unreasonable or in violation of sections 17 or 18 and complainant failed to carry its burden of proving that the charges were unjust, unreasonable or duplicative. Birnbach *v.* La Flor De Mayo Express Co., 716 (718, 719).

The power of the Commission to award reparation is permissive and discretionary. Where respondents were acting in good faith in enforcing provisions of the Shipper's Rate Agreement, which was invalid for lack of section 15 approval, whereas complainant thought the agreement was valid at the time it attempted to evade its obligations thereunder by shipping nonconference in the name of a subsidiary, equity does not dictate that complainant be rewarded. The parties will be left where the Commission found them, and complainant's claim for reparations in the form of alleged overcharges, i.e., the difference between the contract and non-contract rates charged after respondents terminated the rate agreement, will be denied. Parsons and Whittemore, Inc. *v.* Johnson Line, 720 (731, 732).

Upon the elimination of shipments found to be time-barred, settlement of claims for reparation on cotton shipments will be approved. Such approval is not to be construed as an approval of any particular amount of interest on the claims. H. Kempner *v.* Lykes Bros. Steamship Co., Inc., 779.

—Damages

In order to sustain an award of reparations for damages resulting from a discrimination, complainant must show specific pecuniary loss. Where respondent carrier charged the same rate for the carriage of bananas from Ecuador to Galveston as to Baltimore which is 400 miles farther, and complainants (shippers—importers at Galveston) relied upon the historical differential of $10 a ton between the market price of bananas at Gulf ports and at North Atlantic ports, with the Gulf price the lower, to show pecuniary loss, evidence that the cost of operating chartered ships to New Orleans was $10 a ton less than operating chartered ships to New York or Charleston did not support a charge of discrimination against common carrier vessels operating into Galveston and Baltimore, and such evidence did not support the assertion that the $10 a ton differential in market price was due to a corresponding differential in transportation cost. West Indies Fruit Co. *v.* Flota Mercante Grancolombiana, S.A. 66 (70, 71).

Section 22 makes recoverable as reparation only damages caused by a violation of the 1916 Act. No violations were proved and thus neither carrier was entitled to recover reparations from each other. Grace Line, Inc. *v.* Skips A/S Viking

Reparations award will be adjusted downward to reflect the freight rate per ton of bananas charged to the shipper when it was one of several shippers via the carrier involved, rather than the lower rate charged its exclusive shipper by the carrier for all of the banana space during the reparation period. The higher rate charged by the carrier when allocating space to several shippers was more representative of the figure it would have charged had it allocated space to more than one shipper during the reparation period. An inadvertent error in computing stevedoring costs was also corrected. Consolo *v.* Flota Mercante Grancolombiana, S.A., 635 (643).

—Mitigation

The fact that when a carrier opened its space to several shippers of bananas they combined to act as a single shipper, refuted the carrier's argument that its ships were not adaptable for use by more than one shipper and that it "in good faith believed" that its situation was distinguishable from that of another carrier which had been found guilty of violating the law in contracting all of its banana space to a single shipper. The alleged good faith belief was not a mitigating factor in an award of reparations resulting from the carrier's refusal to provide space to a qualified shipper of bananas. Consolo *v.* Flota Mercante Grancolombiana, S.A., 635 (639).

Where an excluded banana shipper had filed a complaint against a carrier two weeks after the carrier had filed a petition for a declaratory order that it was not required to cancel its exclusive contract to carry bananas for one shipper, the Maritime agency, in exercising its discretion under section 5(d) of the Administrative Procedure Act, not only did not have to give the petition priority of consideration, it did not have to consider it at all. It could have adjudicated the matter on the basis of the complaint as being the more appropriate and effective procedure for handling the issues involved. In any event the agency did not delay in deciding the petition or the controversy so as to make it inequitable to award reparations to the excluded shipper. Consideration of the petition independently of complaints with which it was consolidated for hearing would not have expedited resolution of the dispute. The carrier itself either authorized or favored most of the postponements during the course of the proceedings. Id. (640, 641).

Where shortly after an agency decision authorizing forward booking for not to exceed two years, a carrier renewed an exclusive contract for shipment of bananas for three years, it was not possible to find that the carrier believed its forward booking contract was for a reasonable period of time so as to justify mitigation of reparations awarded thereafter. The decision had made it clear that forward booking contracts would be valid only if available space were fairly prorated among qualified banana shippers. The carrier had made no attempt to so prorate its space. It offered and contracted its space to one shipper and this was illegal, apart from the period of time which the contract covered. Id. (641, 642).

Banana shipper's failure to use all of his available space on ships of another carrier was considered by the Board in arriving at an award of reparation for refusal of another carrier to allocate space on its vessels for complainant's bananas. Id. (642).

Shipper's failure to charter vessels or to use space on another line to carry his bananas was not a mitigating factor in award of reparations in connection with refusal of common carrier to transport his bananas. It would have been a hardship on the shipper to charter vessels; and the carrier did not make clear what ships were available or that the shipper could have used them and, if he could, on what terms. As to the other line, the shipper did make efforts to use the line,

and several shipments were made, but the line terminated the arrangement. Id. (643).

Even if the Commission had been able to find any equity in a carrier's contentions, it would not be possible to equitably recognize the cumulative circumstances urged by the carrier in mitigation of an award of reparations. The Commission could not say that equity dictates that a legally and mathematically correct reparation figure be reduced by some unknown and arbitrary percentage or perhaps all. Id. (644).

—Overcharges.

Under circumstances which are the same as those set forth in Uddo & Taormina Corp. *v.* Concordia Line, 7 FMC 473, voluntary payment of reparation will be authorized to consignees who were charged a higher rate due to confusion in the filing of tariff changes by the conference. Jondi Inc. v. Hellenic Lines, Ltd., 522.

Carrier will be permitted to voluntarily pay reparation for freight overcharges which resulted from omission of a tariff rule through a stenographic error. The Commission affords a place of asylum to carriers who, because of an inadvertent misstep through the maze of tariff procedures, charged the wrong rate. No discrimination against other shippers was involved. Concurrence of complainant in the amount is deemed to be a waiver of interest, unless repayment is not promptly made. UNICEF *v.* Columbus Line, 542.

Where a carrier charged the applicable N.O.S. rate on a shipment of water fosfatefeeders from Durban, South Africa, to Houston; previously it had charged the same shipper of a similar item a rate then listed in the tariff covering the outward trade; and thereafter, on advice from the Commission to file rates for the inward trade separate from those for the outward trade, it filed inward rates but, because movements of fosfatefeeders were rare in the inward trade, the item was not listed, permission to make a partial refund on the basis of the previously charged rate was granted. Failure to file the proper rate was due solely to the error of the carrier and the burden of this should not fall on the shipper. The fact that the rate charged was not shown to be unjust, unreasonable, or otherwise unlawful is not determinative of an application under Rule 6(b). The shipper's concurrence will be accepted although filed after the Examiner's decision. Lykes Bros. Steamship Co., Inc.—Refund Application, S.S. Harry Culbreath, 602 (603, 604).

Carrier will be permitted to voluntarily pay reparation for excess freight charges arising out of its inadvertent failure to include a commodity rate in its tariff covering certain equipment transported for NATO. The shipper had the right to expect to be charged a lower rate charged on prior shipments and no discrimination against other shippers was involved. Lykes Bros. S.S. Co., Inc.—Refund Application, S.S. Charlotte Lykes, 609 (610).

Relief of a shipper from the consequences of a carrier's oversight or inadvertence in filing a rate is warranted only if the parties acting in good faith had agreed, or the shipper had been led to believe, that such rate would apply. Where the carrier gave notice to complainant, via a company handling all rate negotiations for complainant, that it was amending its tariff on the goods involved, complainant was led to believe that the rates were to be reduced prior to the shipments in question. Since other requirements warranting relief had been established, respondent was authorized to pay reparation. Barr Shipping Co. *v.* Royal Netherlands S.S. Co., 786 (787, 788).

Where the legally applicable rate was charged on a shipment of dry biscuits from Lisbon to New York, authority to refund alleged overcharges would not be granted on the basis that the rate charged was double the rate the parties agreed would apply to future shipments, or that the shipment was made by

shippers who had failed to ascertain what rates would be applicable. Businessmen engaged in the import and export trade are not innocent, but negligent, when they make no effort to determine the cost of a shipping service. There was no error or inadvertence relating to the tariff on file and no failure of the carrier to file a tariff intended to be applicable to the shipment. Nydia Foods Corp. *v.* Java Pacific Line, 808 (809, 810).

Where the legally applicable rate was charged on a shipment of valuable oil paintings from Genoa to New York, reparation would not be authorized on the basis that the rate charged was excessive because the paintings had no "commercial" value. The freight rate and the insurance coverage were based on the same valuation. There is no practical basis for a difference in proposed rates based on a claim that one class of valuable objects has no "commercial" value. There is no difference in the method of handling and shipping valuable articles of no "commercial" value and other valuable objects. It cannot be held that the paintings had no "commercial" value in relation to the purposes for which the declared value was applied. A contract of insurance and a contract of affreightment are equally commercial transactions and the application of the declared value to both contracts was not unjust or inequitable. Dayton Art Institute *v.* American Export Lines, Inc., 804 (805–807).

Where the carrier misquoted the contract rate to a shipper, not a party to a dual rate contract, afforded the shipper the opportunity to sign a contract which the shipper declined, and charged and collected the non-contract rate, the carrier's application to pay reparation to complainant consignee which had relied on the misquoted rate was denied. The parties to the contract of affreightment had not agreed in good faith that the lower rate would apply. There was no basis for a finding that the carrier, at any time, intended to apply other than the non-contract rate to non-contract shipments. The consignee relied on a misquoted rate, but ignorance or misquotation of a rate is not an excuse for paying or charging more or less than the rate filed. Aichmann & Huber *v.* Bloomfield Steamship Co., 811 (814, 815).

—Undercharges.

Where a carrier published a tariff rate for vans, which rate was determined after discussions with shippers and in light of the fact that the legal effective rate was too high to economically warrant any movement of vans, failure of the carrier to file the rate with the Board (thereby making collection of the rate unlawful), prior to transporting vans for a shipper, was an unjust and unreasonable practice. However, results of this practice should not be placed upon a seemingly innocent shipper, and, accordingly, waiver of collection of undercharges was granted. Y. Higa Enterprises, Ltd. *v.* Pacific Far East Line, Inc., 62 (64).

The power to prescribe a substitute rate for one appearing in a tariff is not a prerequisite to the granting of relief in cases of bona fide rate mistake or inadvertence under Rule 6(b). The fact that foreign commerce is involved is not significant. Where a carrier charged a rate lower than the rate legally applicable as a result of an oversight and misunderstanding as to a statutory provision (section 18(b)) that had been in force approximately one month, and the parties were acting in good faith, the question whether relief should be granted depends on whether discrimination will result. The primary purpose of the new tariff filing provisions of the 1916 Act is to prevent discrimination. Since the record disclosed that no discrimination would result, waiver of collection of undercharges was granted. Such waiver cannot, however, excuse parties from any statutory penalties to which they may be subject. Martini & Rossi, S. p. A. *v.* Lykes Bros. Steamship Co., Inc., 453 (455, 456).

Where the carrier reduced its rate on peeled tomatoes from Italy to the United States advised the Commission by cablegram of such reduction, which method of advice was unacceptable thereafter properly filed the reduced rate, and in the interim had booked tomato products in good faith on the basis of the reduced rate, voluntary reparation to those shippers who paid the applicable rate and waiver of collection of undercharges from those who paid the reduced rate was authorized. The filing requirements of section 18(b) was new at the time of the transactions, the shippers were innocent, and no discrimination would result. Uddo & Taormina Corp. *v.* Concordia Line, 473 (476).

Permission will be granted to carrier to waive collection of undercharges of freight on shipments of paper pulp machinery from New York to Santos, Brazil, where the carrier through mere oversight, failed to file the page of the tariff covering the project rate on the machinery, due to the confusion incident to filing various tariff schedules under the then new section 18(b). Since shippers to nearby ports received the benefit of project rates, granting of the relief will tend to eliminate a possible discrimination, rather than cause one. Lutcher, S.A. *v.* Columbus Line, 588 (589, 590).

Where a carrier, a one-man organization, made many inadvertent errors in filing or neglecting to file tariffs, undercharged shippers were not guilty of any impropriety, and no unjust discrimination was involved, the carrier will be given permission to waive collection of undercharges and, with respect to one shipment, will be directed to refund the amount of an overcharge. Corporacion Autonoma Regional Del Cauca *v.* Dovar S.A. International Shipping & Trading Co., 667 (669).

RETALIATION.

Provision of sugar freighting agreement enjoining the shipper from moving sugar "in vessels owned or chartered from others by the shipper" unless it has been offered first to the carrier, does not violate section 14 Third of the 1916 Act. The shipper is free to utilize any other common carrier operating in the trade, and is even free to enter into a contract with a contract carrier. The obvious purpose of section 14, when read in its entirety, is to protect the independent common carrier from discriminatory retaliation against the shipper for patronizing another common carrier. Pacific Coast/Hawaii and Atlantic—Gulf/Hawaii General Increases in Rates, 260 (280).

SECTION 19, MERCHANT MARINE ACT 1920.

No rule can issue under section 19 of the 1920 Act, with respect to the payment of brokerage or "systematically undercutting" conference rates, unless and until the Commission finds that conditions unfavorable to shipping exist in the trade. Since the trade (Venezuelan) is now relatively stable, and the carriers' prospects are improving, such conditions do not now exist. Grace Line, Inc. *v.* Skips A/S Viking Line, 432 (450, 451).

SHOW CAUSE ORDERS. See Authority of Commission; Practice and Procedure.

SINGLE FACTOR RATES. See Rates, Filing Of.

STATUTES OF LIMITATION. See Authority of Commission.

STEVEDORING. See also Agreements under Section 15.

The Commission's action in condemning and preventing an unjust and unreasonable practice setting up a stevedoring monopoly does not constitute regulation of stevedoring. Claim that Commission lacks power to strike down such a practice because of lack of power to regulate the stevedoring business is a

non sequitur. California Stevedore & Ballast Co. *v.* Stockton Port District, 75 (81).

Carrying out of arrangement and agreements between port and company operating grain elevators, which agreements give the port the exclusive right to provide stevedoring services on vessels loading or unloading bulk grain and other commodities at the elevators, constitutes an unjust and unreasonable practice. As such, it operates to the detriment of the commerce of the United States, and is contrary to the public interest. Such a practice runs counter to the anti-monopoly tradition of the United States, upsets long-established custom by which carriers pick their own stevedoring companies, deprives stevedoring companies of an opportunity to compete, and opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs. That such evils have not been proved to exist as yet is not significant. Id. (82, 83).

Practice setting up stevedoring monopoly at port is prima facie unjust and prima facie unreasonable, not only to stevedoring companies seeking work, but to carriers they might serve, and to 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. While all monopolistic stevedoring agreements are not necessarily and inevitably unjust and unreasonable practices which must be prohibited at any cost, the burden of sustaining such practices as just and reasonable is a heavy one. "Benefits" such as, that the terminal facilities would be safer in hands selected by the parties setting up the monopoly, and that elimination of the practice would be detrimental to the investment of the parties, do not justify the practice. Moreover, the fact that the port selecting the stevedoring company would secure personnel, except for the superintendent, from the same hiring hall as would be used by any other stevedoring company is not a weighty argument in view of 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. Id. (83, 84).

Argument that Commission prohibition of stevedoring monopoly as an unjust or unreasonable practice would take property of parties to monopoly without just compensation, in violation of the Fifth Amendment, is unsubstantial. The parties will not be prevented from making fair and non-discriminatory charges for the use of any of their terminal facilities. Id. (84).

STORAGE SPACE. See Discrimination.

SURCHARGES.

Where terminal costs were shown to be somewhat higher and stevedore efficiency somewhat lower at Buffalo than at some other Great Lakes ports, and terminal charges and loading time at some of the other ports were not shown to be significantly different from those at Buffalo, the record failed to support conference action in singling out Buffalo for the imposition of a surcharge on all commodities moving from Buffalo to Mediterranean ports, and the surcharge was therefore not justified. The conference presented no evidence on other elements which should be considered in determining whether a rate differential at a particular port may be upheld, such as volume of traffic, competition, distance, etc. The surcharge constitutes an unjust discrimination against the Port of Buffalo and the State of New York in violation of section 16 First. American Great Lakes—Mediterranean E/B Freight Conf.—Surcharge at Buffalo, N.Y., 458 (462).

Where the State of New York advanced money to the Port of Buffalo for the development of its terminal facilities, and for operating the port, and The Niagara Frontier Port Authority, which operates and owns the major facilities

at Buffalo is an agency of the State whose members are appointed by the Governor and whose operations are financed by State funds, it follows that a discrimination against the Port (a surcharge) constitutes a discrimination against the State as well. Id. (462).

SUSPENSION OF RATES. *See Rates, Filing Of.*

TARIFFS. See also Rates, Filing Of; Common Carriers; Demurrage.

Less than 30 days' notice of changes in terminal tariffs may be unreasonable under certain circumstances. Where such changes involve rate increases, terminal operators would be well advised to give at least 30 days' notice. Selden & Co. *v.* Board of Trustees of Galveston Wharves, 679 (683).

Carrier operating in the Florida/Puerto Rico trade is required (1) to amend its tariff to clarify rates and charges on the movement of personal effects in automobiles and on the movement of trailers when the carrier utilizes the inside cargo space, (2) to file monthly financial reports reflecting the results of operations during each month, and (3) to make available books of entry upon which the financial reports are based for the purpose of audit of the reports by the Commission's staff. Common Carrier Freight Rates and Practices in Florida/Puerto Rico Trade, 686 (696–698).

TERMINAL AREAS.

Port or terminal areas designated by a carrier for San Francisco, Los Angeles and Stockton, for pickup service incidental to and an integral part of its line haul service, were reasonable in view of their relation to industrial areas surrounding the ports, the conceneration of the carrier's shippers in the areas and the length of the line haul (2,200 miles) compares with the maximum distance within any port area (40 miles). In the cases of Stockton and Los Angeles the areas were the same as those established by the ICC, and in the case of San Francisco, smaller than the area established by the ICC and the California Public Utilities Commission. Matson Navigation Co.—Container Freight Tariffs, 480 (493, 494).

TERMINAL FACILITIES. See also Demurrage; Discrimination; Stevedoring.

An elevator which contains grains going aboard ships, and which grains flow from the elevator to ships moored at the elevator's wharf, is in and of itself a terminal facility. The owner and operator of such an elevator and of facilities which are utilized by carriers, such as dock and wharfage facilities suitable for deep-draft vessels and storage facilities for bulk commodities, is an operator of terminal facilities. California Stevedore & Ballast Co. *v.* Stockton Port District, 75 (80).

A port which leases its terminal facilities, but continues to control to a large extent the level of rates to be charged and reserves the right to order the berthing of vessels and the loading or discharging of cargo subject to the rights of the lessee, has not abandoned its function of furnishing terminal facilities. Fundamentally, the leasing of a terminal facility in connection with a common carrier by water is a function of a terminal owner or operator which cannot be separated or distinguished from the "furnishing" of "wharfage, dock, warehouse, or other terminal facilities" within the meaning of section 1 of the Shipping Act. Agreement 8905—Port of Seattle & Alaska S.S. Co., 792 (795).

To hold that the Commission has no authority over a terminal operator which leases its facilities under terms and conditions similar to those in an agreement providing for continued control over the level of rates to be charged, and reservation of the right to order berthing of vessels and loading or discharging of cargo subject to the rights of the lessee, would emasculate the powers which

Congress intended the Commission to have in order to supervise the shipping industry. Id. (796).

TRAVEL AGENTS. See also Jurisdiction.

Passenger steamship conference failure to adopt, publish, and promptly and consistently apply standards of background and qualifications in its selection of applicants for placement on the list of eligible travel agents in Metropolitan List Territories is detrimental to commerce and contrary to the public interest, within the meaning of section 15, because it detracts from the willingness of the corps of agents, or potential agents, to foster and sell steamship travel. Conference must adopt a set of uniform, objective standards in screening applicants that are sufficiently precise to give adequate notice of requirements. No other standards may be employed. All applicants meeting eligibility requirements must be approved. Action on applications must be prompt and the applicant promptly notified of the decision and the specific reasons therefor. Passenger Steamship Conferences Regarding Travel Agents, 737 (749).

Passenger steamship conference Sponsorship Rule, under which an application is deferred unless a member line shows some interest in the particular applicant must be discontinued as it has resulted in the exclusion from the Eligible Lists of qualified travel agents, to the detriment of commerce. Id. (749, 750).

Passenger steamship conference Quota System for limiting the number of applicants on the Eligible Lists must be discontinued as it has resulted in exclusion from the Eligible Lists of qualified travel agents, to the detriment of commerce. The number of agents already on an Eligible List has no bearing on the question of the qualifications of a new applicant. Id. (750).

Prohibition by passenger steamship conference of appointment of travel agencies located south of Fulton Street in Manhattan (Fulton Street Rule) must be abolished as it has resulted in arbitrary exclusion of agents to the detriment of commerce. Id. (750).

Department Store Rule of passenger steamship conference, and Automobile Club Rule, forbidding appointment of travel agents whose places of business are in department stores and automobile clubs, must be abolished as they have resulted in arbitrary exclusion of agents to the detriment of commerce. Id. (750).

Freight Forwarder Rule of passenger steamship conference, under which freight forwarders may not be appointed travel agents, must be submitted to Commission for approval in accordance with section 15 criteria. Id. (750).

Passenger steamship conference rules must provide reasonable standards in regard to the consideration of sales and transfers and changes of name, address or officers of appointed travel agencies, including adequate notice of the standards to applicants, and an opportunity for the agent to be heard. The rules must further provide for prompt action in accordance with the standards adopted and for prompt notice to the agent of the action taken together with the reasons therefor. A system of arbitration will not be required as relief from arbitrary actions or other violations by the conference will be afforded on complaint to the Commission. Id. (750, 751).

Passenger steamship conference must adopt and apply definite standards for assessment of liquidated damages, providing for adequate notice thereof and for opportunity of accused travel agents to be heard, and for prompt report to the Commission of any liquidated damages assessed. Id. (751).

Passenger steamship conference need not provide for bonding of carriers against loss of commissions caused by cancellations of voyages or line insolvency. There is no evidence that suitable bonds are available, and instances of financial failure by the lines are very rare. Id. (751).

Passenger steamship conference must adopt and apply definite objective standards for cancellation of the eligibility of travel agents. Agent against whom allegations are made should be notified of the delinquencies with which he is charged and afforded an opportunity to confront those who made the charge and adduce evidence to refute it, or in the alternative a reasonable time to correct the delinquency. Conference secretary must be informed in writing of all cancellations by member lines individually and the reasons therefor, and records must be kept for a reasonable time to permit the Commission to assure itself that multiple cancellations are not being used to circumvent restrictions on conference action. Id. (751).

Because of the public interest in the operations of passenger steamship conferences, they should be required to take and record the votes of the members, keep detailed minutes, retain records for a reasonable time and provide copies to the Commission. Id. (751, 752).

Passenger steamship conference rule requiring unanimity as it pertains to the level of commissions payable to travel agents is detrimental to the commerce of the United States. Conference attempts to solve the problem of diversion from sea to air passage have been blocked by the rule and steamship lines have been placed at a competitive disadvantage vis-a-vis the airlines. Id. (752–754).

The present level of travel agents' commissions cannot be found to be so low as to be detrimental to United States commerce. While there has been a decrease in the relative number of steamship bookings in relation to total bookings, it was not established that this was due to the level of commissions, nor was it shown that agents were being forced out of business or were losing money through the sale of sea bookings. Id. (756).

Conference Unanimity Rule as it applies to the selection of agent applicants for the Eligible Lists in the Metropolitan List Territories must be discontinued as detrimental to the commerce of the United States. Under the rule, one representative on the control committee may "black-ball" any applicant and exclude him from appointment by the rest of the lines, though all of them may favor his selection. Id. (757).

Conference Unanimity Rule as it applies to agency sales, transfers or changes of officers or locations must be discontinued. The rule has been instrumental in allowing a veto of an agency transfer and makes it possible for a member of the control committee whose line has not appointed the agency in question to block a transfer or change in personnel. These consequences are unreasonable restraints which deprive travel agents of the ability freely to dispose of property rights and interfere unduly in the conduct of their business. The rule is contrary to the public interest and may operate in some instances to the detriment of the commerce of the United States. Id. (757, 758).

Conference Tieing Rule which prohibits appointed travel agents from selling transportation on nonconference lines must be discontinued. Particularly where the rights of third parties are affected, the section 15 antitrust exemption should not be granted unless the purposes and policies of the Shipping Act are thereby furthered. Weighing the factors of rate stability and destructive outside competition, and weighing the restriction imposed by the rule against the possibilities were the rule abolished, it must be concluded that no adverse consequences would flow from abolition of the rule. The rule is admittedly not necessary to protect the conference from outside competition and there was no evidence that the conference would disintegrate without the rule. Id. (758).

Refusal of some members of passenger steamship conference to pay commissions on cancelled voyages is not unlawful. There is nothing in the record which would indicate that collective action of the respondents dictates the payment