FEDERAL MARITIME COMMISSION

No. 66–30

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION NO. 654, E & R FORWARDERS, INC., 150 BROADWAY, NEW YORK, N.Y.

Applicant for license as ocean freight forwarder found not to be an "independent ocean freight forwarder" as defined by section 1 of the Act though a holder of "grandfather" rights; found to be a "dummy" freight forwarder of the kind that Congress intended to eliminate by the enactment of P.L. 87–254. Application denied.

Philip G. Maron, attorney for Applicant.
Donald J. Brunner and *Samuel Nemirow* as Hearing Counsel.

INITIAL DECISION OF BENJAMIN A. THEEMAN, EXAMINER[1]

The order in this proceeding served March 2, 1966, by the Federal Maritime Commission on E & R Forwarders, Inc. (Applicant), stated as follows:

By letter dated March 14, 1966, E & R Forwarders, Inc., was notified of the Federal Maritime Commission's intent to deny its application for an independent ocean freight forwarder license. The ground for denial is that applicant's association with Romerovski Bros., Inc, Remor Waste Material Corp., and Romer Export Corp., shippers and sellers of merchandise to foreign countries, precludes it from qualifying as an independent ocean freight forwarder as defined in Section 1, Shipping Act, 1916 (46 U.S.C. 801). Applicant has now requested the opportunity to show at a hearing that denial of the application would be unwarranted.

The hearing was held in New York City, on June 20, 1966. The parties stipulated the facts into the record and agreed upon the exhibits placed in evidence. Applicant made an opening statement on the record, but has filed no brief although given the opportunity to do so.

From the record as a whole it is found:

1. Applicant, E & R Forwarders, Inc., a New York corporation, has been operating as an ocean freight forwarder with the permission of the Commission since 1957.

[1] This decision became the decision of the Commission on Sept. 13, 1966.

2. After the Shipping Act of 1916 (the Act) was amended on September 19, 1961, by the passage of P.L. 87–254,[2] the Applicant pursuant to section 44(b) of the amended Act (See Appendix) filed an application for a freight forwarder's license on January 17, 1962.

3. On January 27, 1962, the Application was given Application No. 654 by the Commission.

4. Applicant is presently conducting its business at 450 Westfield Avenue, Roselle Park, N.J. Its three directors are its officers: Fred Udelsman, president; Eva Romer, treasurer; and Rose Romerovski, secretary. The 20 outstanding shares of Applicant's stock are held equally by Eva and Rose; and the letters E and R in the Applicant's name stand for the first names of these two ladies.

5. Eva Romer is the wife of Harry Romer, and Rose Romerovski is the wife of Martin Romerovski. These four established the Applicant. Mr. Romer and Mr. Romerovski are brothers and the owners of all the stock of Romerovski Bros., Inc.[3] Romerovski Bros., Inc. (the Shipper), is a shipper of shipments to foreign countries in that it is a corporation engaged in the export of used clothing and rags at the Roselle Park address. Applicant's president, Udelsman, is the Traffic and Export Manager of the Shipper and is paid by the latter corporation.[4]

6. All office facilities utilized by the Applicant belong to, and are on the premises of, the Shipper. The bills of lading and other necessary shipping documents are prepared by paid employees of the Shipper at the offices of the Shipper. Applicant's files are kept by employees of, and its books by the bookkeeper of, the Shipper. Applicant pays no compensation of any kind to either the Shipper or the Shipper's employees for the work done, or for the use of the office facilities. Applicant has no capital equipment or any office facilities of its own. Applicant's only paid employee is a messenger named Daniel Fabriso.

7. There is no evidence to show that either the secretary or the treasurer perform any services for the Applicant. Applicant paid each $5,000 per year until 1965. That year each received $6,000.

8. Applicant's entire forwarding operation consists of handling from 70 to 100 shipments per month for the Shipper. Applicant bills the Shipper monthly for these services at the rate of $7.50 per shipment. Applicant also collects ocean freight compensation from the

[2] Entitled, "An Act to amend the Shipping Act, 1916 to provide for licensing independent ocean freight forwarders, and for other purposes." Pertinent provisions of the amended Act are contained in the Appendix.

[3] Romerovski Bros , Inc., came into being in 1966 as a result of a merger of three corporations wholly owned by the brothers. They were Romerovski Bros., Inc., Romer Export Corp., and Romer Waste Material Corp. See quotation from the Commission's order in the opening paragraph.

[4] Official notice is taken of (a) Udelsman's position with the Shipper; and (b) of the data in paragraphs 2 and 3.

steamship carrier. Applicant's gross receipts for the fiscal year ending June 30, 1965, were $16,334.89. Carriers paid approximately $10,000 of this sum; the Shipper paid the remainder as forwarding fees.

9. Ocean freight charges are paid directly to the carriers by the Shipper.

10. Applicant maintains a telephone-answering service and a mailing address at 150 Broadway, New York City. There is no evidence that any forwarding business is transacted at this address.

11. Applicant's board of directors has never held a meeting.

Discussion

There is no question and it is found that the Applicant doing business as shown herein is not an "independent ocean freight forwarder" within the meaning of section 1 of the Act. Applicant is subject to effective control by Romerovski Bros., a shipper of shipments to foreign countries; the Shipper has a beneficial interest in the Applicant.

The brothers Romer and Romerovski own all the stock of Romerovski Bros., the Shipper. The wives of the brothers own all the stock of the Applicant. Each corporation is a closed one-family corporation. There is no evidence that the wives in any way participate in, engage in or exercise any control over the affairs of the Applicant. Accordingly, although the Applicant and the Shipper are separate corporations it is found that the real parties at interest behind both corporations are the brothers Romer and Romerovski.

Applicant has no paid employees other than the messenger Fabriso. All the work of freight forwarding is done by employees of the Shipper under the guidance and control of an executive of the Shipper. All the operating costs of the Applicant including labor costs (except the messenger) are paid for by the Shipper. The wives, as already stated, other than receiving certain payments from the Applicant, neither engage in nor take any interest in the affairs, business or operations of the Applicant. Thus, it is clear that the only persons in charge or performing the operations of Applicant are personnel of the Shipper. Though as asserted by Applicant, there may exist a technical and legal distinction between the Applicant and the Shipper, nevertheless, under the circumstances of this case, the conclusion is inescapable that the Applicant is under the effective control of the Shipper.[5] I so find.

[5] This control is considered none the less effective because the stock of the Applicant is in the names of the wives and not in the names of the brothers. Cf. *In the Matter of Luis (Louis) A. Pereira*, etc., 5 FMB 400, 405, etc.; also *Investigation of Ocean Freight Forwarders, etc.*, 6 FMB 327, 345.

In addition to the facts stated in the above paragraph, the record shows the Shipper was instrumental in the organization of the Applicant; and the Applicant does no ocean freight forwarding for any other concern than the Shipper. The Applicant receives payments from carriers for services rendered in connection with the shipments of the Shipper. The Shipper also pays the Applicant forwarding fees. These monies are paid by the Applicant to the wives of the two stockholders of the Shipper. The record contains no evidence as to what the wives do with the money. But in view of the marital relationship between the stockholders of the Applicant and the stockholders of the Shipper, it is easily concluded that the brothers receive financial advantage from the payments received by the wives; i.e., from the Shipper's shipments. It follows, contrary to the contention of the Applicant, that the Shipper (wholly owned by the two brothers) has a beneficial interest in the Applicant.[6]

There is little question that under the circumstances of this case the Applicant is a "dummy" forwarder whose collection of compensation from carriers redounds to the benefit of the Shipper.[7] It is this type of freight forwader that P.L. 87–254 was enacted to eliminate.[8]

Conclusion

Section 44 of the Act is a licensing statute. Like other licensing statutes it should be approached with a liberal attitude to the end that licenses may be granted to qualified applicants. *Application for Freight Forwarders License—Dixie Forwarding Co., Inc.*, 7 FMC 109, 122, 167 (1965). The Commission in keeping with this policy has given applicants an opportunity to remove from their operations or organizations such aspects as may be offensive to the Act.[9] Applicant at the hearing stated that it would meet with the Bureau of Domestic Regulations "to make any changes that may be agreed upon with them as to the manner in which the operations of the [Applicant] should be continued, so that it may be in full compliance with all the rules and regulations of

[6] The Commission's Regulations Title 46 CFR 510.21 contain the following: "(1) The term 'Beneficial interest' for the purpose of these rules includes, but is not limited to * * * right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from; the whole or any part of a shipment or cargo, arising * * * by operation of law or by agreement, express or implied * * *."

[7] No finding is made concerning the possibility that the shipper may be obtaining an unlawful rebate. That aspect of this proceeding is outside the scope of this proceeding.

[8] H.R. Rept. No. 2939, 84th Cong., 2d sess., July 26, 1956, p. 53, etc.

[9] See *Application etc., Morse Shipping Co., etc.*, 8 FMC 472 (1965); *Application etc., Del Mar Shipping Corporation, etc.*, 8 FMC 493 (1965).

the Maritime Commission." As of the date of this decision, Applicant has not advised the Commission of any corrective steps taken.

The Application is denied.[10]

(Signed) BENJAMIN A. THEEMAN,
Presiding Examiner.

APPENDIX

PERTINENT PROVISIONS OF THE ACT

Sec. 1 * * * when used in this Act: * * *

An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

Section 44(a) provides that a person desiring to engage in the carrying on of the business of forwarding must first secure a license from the Commission.

Section 44(b) requires the Commission to issue the license to any qualified applicant who is found by the Commission to be "an independent ocean freight forwarder as defined in this Act and [to be] fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder * * * otherwise such application shall be denied." Also by section 44(b), the Congress granted so-called "grandfather rights" to those independent ocean freight forwarders who, on the effective date of the Act, were "carrying on the business of forwarding under a registration number issued by the Commission." Such forwarders were allowed to continue in business for a period of 120 days after September 19, 1961, without a license, and if the forwarder applied for a license within the 120 days he could "under such regulations as the Commission shall prescribe, continue such business until otherwise ordered by the Commission."

[10] Conclusions and contentions not discussed or embraced in this decision have been considered and are not justified by the record, or are considered unnecessary for the determination of the issues.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-29

AGREEMENT No. 9431, HONG KONG TONNAGE CEILING AGREEMENT

Decided September 15, 1966

The Commission has no authority to compel a carrier to participate in a section 15 type agreement against its will.

When one of the original parties to an agreement filed for approval under section 15 withdraws from such agreement prior to Commission approval thereof the document so filed no longer constitutes an agreement of all of the carriers within the meaning of section 15.

Where, in the course of considering an agreement filed for approval under section 15, it is established that the document does not constitute a true copy of the continuing agreement of the original parties thereto such document will be rejected.

If one of the parties to an agreement submitted for approval under section 15 withdraws from the agreement prior to the time Commission approval is had, the document so filed ceases to constitute a "true copy" of the agreement within the meaning of section 15 of the Shipping Act, 1916, as amended, in that it purports to include the party which has withdrawn.

Charles F. Warren and *John P. Meade* for respondents, New York Freight Bureau (Hong Kong).

George F. Galland and *J. Donald Kenny* for States Marine Lines.

Donald J. Brunner and *Samuel B. Nemirow* as Hearing Counsel.

REPORT

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

This proceeding was instituted on April 28, 1966, by our Order to Show Cause why a document designated Agreement No. 9431 as originally filed on March 4, 1965, should not be rejected as failing to constitute an agreement within the meaning of section 15 of the Shipping Act, 1916, among all of the parties which had signed it, or, in the al-

*Commissioner Hearn did not participate.

ternative, why this document should not be disapproved under section 15 for the same reason and for the additional reasons that the document no longer constitutes a "true copy" of the agreement between only the carriers party thereto and that the Commission is without statutory authority to compel a common carrier by water to participate in an agreement to which it is not a party and against its will.

BACKGROUND FACTS

The New York Freight Bureau (Hong Kong) (hereinafter called the "Bureau") is a conference which operated under approved Agreement No. 5700–4.[1] It is composed of 17 carriers and is concerned with the inbound trade between Hong Kong and United States East and Gulf Coasts.

This agreement provided in pertinent part as follows:

(1) This agreement covers the establishment and maintenance of agreed rates and charges for or in connection with the transportation of all cargo in vessels owned, controlled, chartered and/or operated by the parties hereto in the trade covered by this agreement.

The agreement's voting provisions were set forth in paragraph (10) (a) and stated:

(10) (a) Changes in tariff rates and conditions (and all other matters voted upon, with exception of changes in the arrangement) shall be effected and/or decided by the affirmative vote of not less than two-thirds of the parties hereto. Any change in this arrangement shall be made only by the unanimous vote of all the parties to the arrangement.

The members of this conference were parties to a previous cargo apportionment agreement (No. 5700–5) which placed a ceiling on the number of revenue tons of cargo which any member line could lift during any one loading at Hong Kong. This agreement expired by its own terms on January 6, 1965.

On January 14, 1965, the members of the Bureau unanimously entered into an agreement designated No. 9431, *supra*, which was a new tonnage ceiling agreement similar to No. 5700–5 which had expired 8 days earlier. Section Fifth of this agreement calls for a three-fourths majority vote to change the tonnage of cargo which may be lifted on each sailing. Section Eighth specifies that the agreement shall continue in effect for a period of 1 year beginning on the date approved by the Commission unless, by unanimous vote of the parties, it is extended further.

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[1] On May 13, 1966, Agreement No. 5700–8 was approved in part (as to noncontroversial sections). The contested portions have been made the subject of an investigation, Docket 66–32.

Agreement No. 9431 was filed with the Commission on March 4, 1965, with a letter of transmittal which stated in part, "this is a separate agreement and does not amend Agreement No. 5700." On September 28, 1965, the Commission issued its order of conditional approval. This order approved the agreement upon the condition that sections Fifth and Eighth of the agreement be modified so as to permit closer continuing surveillance over the operation of the agreement by the Commission by requiring the submission of all changes in tonnage ceilings and, in the case of decreases in such ceilings, advance approval under section 15. It also limited renewal of the agreement by unanimous vote to one additional period of 1 year.

The parties to the agreement were allowed 60 days within which to accept the changes specified in the order of conditional approval. The period was extended an additional 60 days at the request of Mr. D. Parker, Chairman-Secretary of the parties to the agreement. This would have allowed the lines involved until February 3, 1966, to comply.

On January 21, 1966, however, States Marine Lines, one of the original parties to the agreement, sent a telegram to the Commission in which it noted its opposition to the agreement and requested a hearing in the event that the Commission intended to consider the agreement further. The Commission thereupon withdrew its order of conditional approval on January 24, 1966.

On February 3, 1966, a document purporting to accept the conditions specified in the order of conditional approval on behalf of the parties was tendered to the Commission for filing.

On February 4, 1966, the matter became the subject of an order of investigation and hearing (Docket No. 66–6). On the same date, the Bureau filed a petition for reconsideration asking the Commission to vacate its order withdrawing conditional approval. This petition was denied on February 16, 1966, and the proceeding was discontinued.

THE PRESENT PROCEEDING

This proceeding arose as a result of a petition filed by the Bureau on March 25, 1966, asking for "immediate section 15 action" on Agreement No. 9431 in its original form.

In a reply filed on April 14, 1966, States Marine Lines, one of the original signatories to Agreement No. 9431, opposed the petition on the ground "that there is no such agreement before the Commission for approval."

The New York Freight Bureau (Hong Kong) filed a further pleading on April 18, 1966, in reply to States Marine's opposition to the

petition in which it contended that States Marine Lines could not legally back out of the agreement which it had signed and, in any event, that the agreement came within the scope of Agreement No. 5700–4 (the basic conference agreement of the New York Freight Bureau) and, as such, was governed by the two-thirds vote rule of that agreement thereby binding States Marine.

Since there was no issue of fact as to States Marine's opposition to Agreement No. 9431 the Commission, in an Order to Show Cause served on April 28, 1966, directed the common carriers by water involved in the purported agreement to show cause why the document designated as No. 9431 should not be:

> * * * rejected as failing to constitute an agreement between all of the said carriers within the meaning of section 15,

or, in the alternative,

> disapproved under section 15 for the same reason and for the additional reasons that the document no longer constitutes a "true copy" of the agreement between only the carriers party thereto, and that the Commission is without authority to compel a common carrier by water to participate in an agreement to which it is not a party and against its will.

In our Order to Show Cause, we invited the parties to brief the following five questions as an aid to our resolution of the issues presented:

1. May the Commission reject a document purporting to be an agreement filed for section 15 approval when it is established that a carrier signatory thereto is, at the time approval is to be granted, no longer a party thereto, or must the Commission "disapprove" such a document within the meaning of section 15?
2. What effect does the failure of a carrier originally a party to an agreement filed under section 15 to accept modifications imposed by the Commission as a condition precedent to its approval have—
   a. On the agreement itself, and
   b. On the dissenting carrier's status under the agreement?
3. Under what statutory provision, if any, may the Commission compel the participation by a common carrier by water in foreign commerce in an agreement to which it is not a party or against its will?
4. May the Commission modify Agreement 9431 so as to delete therefrom any carrier not a party to the agreement and then proceed to a determination of what action to take under section 15?
5. Is Agreement 9431 governed by any of the provisions of Agreement 5700 as amended to date?

POSITIONS OF THE PARTIES

Briefs and affidavits have been filed by the New York Freight Bureau (Hong Kong), States Marine Lines, and Hearing Counsel. The positions of each of the parties on these issues are set out below:

A. The New York Freight Bureau

1. The Bureau contends that the Commission may neither reject nor disapprove Agreement No. 9431. It argues that once a carrier signs an agreement subject to section 15 approval, it may not unilaterally repudiate its action but that it remains a party to the agreement until such time as the Commission gives its approval or, after hearing, disapproves it.

2. It is the Bureau's position that Agreement No. 9431 is a supplement to the basic Conference Agreement No. 5700–4 governed by that agreement's voting provisions. Accordingly, it argues, a two-thirds vote was sufficient for approval of the ceiling agreement as submitted originally as well as for acceptance of the modifications imposed by the Commission in its order of conditioned approval. The attempted withdrawal of States Marine Lines from the original agreement and its failure and refusal to accept the modifications imposed by the Commission has no effect on the agreement itself or States Marine's status thereunder.

3. The Bureau contends that this is not an appropriate case to test the question of whether the Commission may compel a carrier to participate in an agreement against its will because States Marine is a party to Agreement No. 9431. Moreover, the Bureau is not asking the Commission to compel participation but merely for approval under section 15 of the Shipping Act. After approval, the Bureau will take appropriate steps to force States Marine to abide by the terms of the agreement.

4. The Commission may not modify Agreement No. 9431 by deleting States Marine Lines because the adoption of this agreement was a valid Bureau action and States Marine as a member is bound thereby. Moreover, even if this were not a Bureau action, States Marine remains a party to the original agreement as unanimously adopted.

5. The Bureau contends that Agreement No. 9431 is a "supplement" of the type contemplated in Article 9 of Agreement 5700–4 and under Article (10) (a) thereof only a two-thirds vote is required for adoption.

B. States Marine Lines

1. States Marine has no preference as to whether Agreement No. 9431 is rejected or disapproved.

2. The nonacceptance by States Marine of the modification imposed by the Commission in its order of conditional approval kills the agreement or, in any event, liberates the dissenter whether the agreement is killed or not.

3. The Commission has no statutory authority to compel participation in an agreement by a common carrier by water against its will.

4. States Marine has no interest in the disposition of the cargo ceiling agreement as long as States Marine is out of it.

5. States Marine Lines contends that Agreement No. 9431 is wholly separate from Agreement 5700. But even if No. 9431 were to be governed by No. 5700, the result would be the same since Agreement 5700 requires unanimity where a "change in this arrangement" is proposed.

C. Hearing Counsel

1. Since the document bearing identification No. 9431 is no longer an "agreement" due to the withdrawal of States Marine, it does not come within the aegis of section 15 and is unapprovable as a matter of law. It must, therefore, be rejected.

2. Since a dissenting carrier must be permitted to withdraw on 30 days' notice from an approved agreement without penalty under General Order 9, it follows that it should be allowed to withdraw from an unapproved, executory agreement. This should not affect approvability provided that the dissenting carrier's name is stricken from the agreement.

3. No provision of the Shipping Act, 1916, nor any interpretation of its legislative history authorizes the Commission to compel a common carrier by water to participate in an agreement against its will.

4. The "agreement" identified as No. 9431 purports to be an arrangement among the carriers who are signatories thereto. Since a section 15 agreement is a voluntary endeavor, the Commission may not subtract carriers from the membership against their will any more than it can add carriers to it against their will.

5. The ceiling agreement (No. 9431) is a separate and distinct arrangement which must stand or fall on its own merit even though the parties are the same in each. It is not governed by any of the provisions of Agreement No. 5700 as amended to date.

Discussion and Conclusions

Section 15 of the Shipping Act, 1916, authorizes common carriers by water and other persons subject to the Act to enter into certain types of anticompetitive agreements subject to the approval of the Commission. When such an agreement is filed, the Commission must

approve it unless, after notice and hearing, it finds that it would be unjustly discriminatory or unfair, operate to the detriment of the foreign commerce of the United States, be contrary to the public interest or be in violation of the Act. Upon such a finding, the Commission may disapprove, cancel or modify the agreement.

Among the agreements which become the subject of a hearing, there are usually two broad classes of issues presented:

1. Whether the Commission has jurisdiction over the agreement; and

2. Whether the agreement ought to be approved.

The instant proceeding is concerned only with the jurisdictional question. Thus, the merits of the agreement are not reached.

In order for the Commission to have jurisdiction, there are three necessary elements. There must be:

1. an *agreement* among
2. common carriers by water or other persons subject to the Act
3. to engage in anticompetitive or cooperative activity of the types specified in section 15.

If one or more of these elements is lacking, we have no jurisdiction to consider the matter under section 15. For example, unless two or more of the parties to an agreement are common carriers by water or other persons subject to the Act, the agreement is not subject to filing under section 15 no matter how anticompetitive it may be. *Grace Line, Inc.* v. *Skips A/S Viking Line, et al.*, 7 F.M.C. 432, 447 (1962). Similarly, where there is an agreement between persons subject to the Act, but the cooperative conduct is not of the type specified in section 15, the agreement is also beyond the reach of our jurisdiction. *D. J. Roach, Inc.* v. *Albany Port District, et al.*, 5 F.M.B. 333 (1957). Finally, and most fundamental of all is the requirement that there be an actual, viable agreement to which all of the parties have given and continue to give their assent until approval is had.

The purported Agreement No. 9431 in this case fails to meet this latter criterion.

When a group of carriers files a new agreement with the Commission, it is fundamental that each member of this group must give its individual assent to the document purporting to represent the agreement of the parties. If at any time prior to approval by the Commission, one of the parties to the agreement changes its mind and withdraws from the agreement, the document previously filed becomes at that moment obsolete. It no longer constitutes a fair and accurate description of the agreement between the parties.

Accordingly, where as here, one of the parties to the agreement withdraws from the agreement as filed, that act destroys the subject matter of the Commission's jurisdiction.

We can only consider *agreements* for approval under section 15. What we have before us is manifestly a nonagreement.

The Bureau argues that a party to an agreement may not repudiate the agreement or withdraw until the Commission has acted. The major portion of the Bureau's argument is an attempt to show that States Marine is bound by Agreement No. 9431 under the principles of private contract law. The difficulty in the Bureau's premise is that we have stated that a section 15 agreement is not a private contract but "* * * a public contract impressed with the public interest and permitted to exist only as long as it serves that interest." *In Re: Pacific Coast European Conference*, 7 F.M.C. 27, 37 (1961). Thus, the rights of the parties as against each other for breach of their "contract" must be distinguished from the question of whether there is in existence an approvable agreement under section 15.

Significantly, States Marine Lines does not argue that it has an absolute, unqualified right to withdraw from a section 15 type of agreement prior to Commission approval. It argues, rather, that the passage of time and material changes in circumstances, including the inauguration of "direct service," warrant its withdrawal from an agreement which is now nearly a year and a half old, especially where the agreement, by its own terms, was limited to a year's duration following approval. The Bureau attempts to show that States Marine's increased carryings are due not to the inauguration of a "direct" service but to "rebating."

These arguments are disregarded because they are totally irrelevant to the issues raised in the order to show cause. Such "evidence" might be relevant to a determination of whether any ceiling agreement in the Hong Kong trade should be approved by the Commission, but it is not relevant or material to the determination of the current status of No. 9431.

We take no position on the question of whether States Marine Lines' withdrawal or repudiation of Agreement No. 9431 was justified or not. It is the fact of this withdrawal and not the reasons therefor which concerns us. As to this fact, there is no dispute among the parties.

The Bureau asks us to approve Agreement No. 9431 as submitted notwithstanding States Marine's withdrawal. This we cannot do.

The role of the Commission with respect to agreements requiring approval under section 15 is essentially a passive one. We neither encourage nor discourage such agreements. The function of the Com-

mission is to examine such agreements in the light of the legal criteria imposed by the Shipping Act. If the agreement meets these criteria, the agreement is approved. If there is some question as to whether the agreement should be approved, the matter is set down for hearing.

We have no general equity authority to compel specific performance on the part of a recalcitrant party. Put another way, the Commission's initial task under section 15 is to deal with *agreements* among or between carriers or other persons subject to the Act, not disagreements.

The Bureau argues that it is not asking us to compel participation by States Marine but only to approve the agreement which States Marine had signed. To approve the agreement in question in the circumstances of this case would be to do by indirection that which we could not do directly. Approval of the agreement would be tantamount to compelling participation of States Marine Lines against its will.

While it is true that Congress intended, by the Shipping Act, to allow carriers to enter into anticompetitive combinations (subject of course to approval and regulation by the Commission), it is equally true that Congress has zealously written safeguards into the law which are designed to protect the rights of a carrier to pursue an independent existence.

The Bureau objects to the conditional approval procedure, characterizing it as "disapproval by delay." The conditional approval procedure is intended as a mechanism whereby quick approval of a section 15 agreement may be had where the Commission has some objections to an agreement as filed. If the parties to a proposed agreement do not wish to avail themselves of this purely procedural short cut to approval, the Commission will, of course, set the matter down for hearing. But this is a time-consuming process, the very thing which the Bureau objects to.

What the Commission is, in effect, saying when it issues an order of conditional approval is:

> Your proposed agreement as it stands must be set down for hearing. However, if you make the following changes it will be approved without a hearing.

The Bureau seems to take the position that the Commission must, in the discharge of its statutory obligations under section 15, either approve a proposed agreement instantly or set it down immediately for a hearing.

It loses sight of the fact that many of the agreements filed for approval as, for example, No. 9431, require hours of economic study in addition to a legal review before the Commission is in a position to make the determination to approve, conditionally approve, or set down for hearing.

The Bureau alleges that the Commission went back on its word when it withdrew its order of conditional approval prior to the expiration of time for acceptance of the conditions.

If the Bureau had, subsequent to the Commission's withdrawal of its order of conditional approval, submitted its acceptance of the conditions specified, and if this acceptance clearly represented the position of all of the parties to the agreement, then there is little doubt that the order of withdrawal would have been vacated and the agreement permitted to become effective in accordance with the terms of the original order of conditional approval. However, the events which followed the withdrawal of the order of conditional approval demonstrate amply that our withdrawal was fully warranted. At most, it could be argued that the withdrawal was a few days premature. But this error, if error it was, was clearly harmless since the Bureau admittedly was, and is, unable to secure the requisite unanimous approval of its members.

The basic conference agreement of the New York Freight Bureau (Honk Kong) in effect at all times pertinent herein is Agreement No. 5700–4. This agreement is limited by its own terms to ratemaking. Nevertheless, the Bureau argues at some length that Agreement No. 9431 is tied to Agreement No. 5700–4.

For reasons which are best known to the Bureau members, the instant agreement was carefully insulated from conference activity (unlike the earlier tonnage ceiling agreement which had been filed as a supplement). Agreement No. 9431 by its own terms does not purport to be a modification to or an amendment of No. 5700–4. Moreover, the letter of transmittal accompanying Agreement No. 9431 specifically stated that it was separate from No. 5700. Since this letter of transmittal is a required document under the Commission's regulations, Title 46, C.F.R. § 522.1, any representation made therein is entitled to be given some weight in construing or explaining the agreement which it accompanies particularly if there is ambiguity in the contract itself. Moreover, since the tonnage ceiling agreement is a temporary expedient, it is not the type of agreement which is usually incorporated in a permanent conference agreement. We hold, therefore, that Agreement No. 9431 is separate and distinct from Agreement No. 5700–4.

However, even if No. 9431 were considered to be a part of No. 5700–4 (whether characterized as supplemental, ancillary or any other terminology), the voting rules of No. 5700–4 clearly require a unanimous vote whenever a change in the arrangement is contemplated. Since this unanimous vote was lacking, the result is the same.

The Bureau, however, argues that unanimity is not required because Agreement No. 9431 is ancillary or supplementary to the conference Agreement No. 5700–4 and that conference voting rules require only a two-thirds vote. The only matters under Agreement No. 5700–4 which could be done by two-thirds vote were changes in rates and ordinary internal housekeeping functions. Whenever an anticompetitive scheme other than ordinary ratemaking was contemplated, a change in the arrangement was called for and this required unanimity by the clear and unequivocal terms of the agreement.

Of course, if Agreement No. 9431 had been submitted as a supplement (i.e., a change in the arrangement) to Agreement No. 5700–4, and if the voting rules under No. 5700–4 permitted a change in the arrangement by something less than a unanimous vote, then a situation similar to that presented in Docket 1095 might be before us. *Agreement No. 150–21, Trans-Pacific Freight Conference of Japan and Agreement No. 3103–17, Japan-Atlantic and Gulf Freight Conference*, decided March 24, 1966, 9 F.M.C. 355.

In our view, it is immaterial whether No. 9431 is considered to be separate and distinct from No. 5700–4 or an amendment (or supplement) thereto. If it is separate, then clearly, it requires continuing agreement on the part of all whom it purports to bind. This must be so or it simply is not an agreement; it is a disagreement.

If, on the other hand, it is considered to be a part of No. 5700–4, it is, nevertheless, governed by that agreement's unanimous vote provision since it involves a basic change in the scope of the agreement.

In either event, unanimity is lacking. If one fact is utterly beyond dispute, it is that States Marine Lines is now opposed to the tonnage ceiling agreement. There is, therefore, no "agreement" before the Commission at this time upon which any action may be taken.

Upon consideration of the briefs and affidavits of the parties and for the reasons set forth in this report, it is ordered that this proceeding be, and the same hereby is, discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65-1

MATSON NAVIGATION COMPANY, REDUCED RATES ON FLOUR FROM PACIFIC COAST PORTS TO HAWAII

Decided September 15, 1966

Respondent, in the carriage of flour from Pacific Coast port to Hawaii as a common carrier, found to be in competition with an unregulated barge line carrying wheat in the same trade.

Respondent's reduced rate on flour found to be compensatory, and justified as a means of meeting barge line competition.

Norman E. Sutherland, *Alan F. Wohlstetter* and *Martin Sterenbuch* for petitioner Hawaiian Flour Mills, Inc., intervener Hawaiian Manufacturer's Association.

A. R. Allen for intervener Portland Freight Traffic Association.

Arthur S. K. Fong for intervener State of Hawaii.

David F. Anderson for respondent Matson Navigation Co.

Robert N. Lowry for interveners General Mills, Inc., and Fisher Flouring Mills Co.

Paul Stepner for the Pillsbury Co.

H. E. Franklin, Jr., for Seattle Traffic Association, Port of Seattle and Seattle Chamber of Commerce.

James R. Cunningham for Washington Utilities and Transportation Commission.

R. Stanley Harsh and *Donald J. Brunner*, Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* James V. Day, George H. Hearn and John S. Patterson, *Commissioners*) :*

This proceeding was instituted by us as a result of petitions filed by Hawaiian Flour Mills, Inc., petitioner) and Hawaiian Grain Corp.[1]

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*Vice Chairman Ashton C. Barrett did not participate.

[1] Hawaiian Grain advised the Commission by letter dated Mar. 24, 1965, that it would not further participate in the proceeding.

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protesting a reduction in rates on flour carried from Pacific Coast ports to Hawaii by Matson Navigation Co. (Matson). Petitioner also sought a suspension of the rate reduction.

By order of January 7, 1965, we instituted an investigation to determine whether the reduced rates were unjust, unreasonable or otherwise unlawful as alleged by petitioner. Matson was named as respondent in this proceeding. We did not grant the requested suspension.

Intervening on behalf of petitioner were Hawaiian Manufacturers Association, Fred L. Waldron, Ltd.,[2] Portland Freight Traffic Association and the State of Hawaii. Intervening for respondent were the (State of) Washington Utilities and Transportation Commission, Port of Seattle, Seattle Traffic Association, Seattle Chamber of Commerce, and he following mainland flour mills: General Mills, Inc., Fisher Flouring Mills Co. (Fisher) and The Pillsbury Co. (Pillsbury). Hearing Counsel also participated.

All interested parties have been heard and the proceeding is now before us upon exceptions to the Initial Decision of Chief Examiner Gus O. Basham.

FACTS

Historically, mainland millers such as General Mills, Fisher, and Pillsbury have been the sole suppliers of flour to the islands of Hawaii. These millers have for years shipped their finished flour product to Hawaii via respondent Matson Navigation Co. (Matson).

Recently, a new source of flour for the island has been created by the establishment of petitioner in Honolulu. Petitioner receives wheat transported in unregulated barges from Portland, Oreg., to Honolulu and mills it into flour (and mill feed) for the Hawaiian market where it competes with mainland millers.

Petitioner, organized in 1963, operates in close connection with various other related corporate entities. Pursuant to a 10-year contract, petitioner purchases whatever wheat it needs for milling from Hawaiian Grain in Honolulu. Hawaiian Grain previously acquired the wheat from Kerr Grain in Portland, Oreg., and has it shipped to Honolulu via Hawaiian Tug & Barge, an unregulated carrier.[3] Hawaiian Grain stows the wheat in its elevators in Honolulu which are located adjacent to the mill which petitioner uses in its flour milling operation. The mill is not owned by petitioner but is leased to it by Oahu Railway & Terminal Warehousing Co.[4] pursuant to

[2] Waldron did not appear at the hearing.

[3] Petitioner and Kerr Grain are both owned by Thomas Kerr.

[4] Dillingham Corp. is the owner of Hawaiian Tug & Barge, Oahu Railway, and 40 percent of Hawaiian Grain. Carnation Co. owns 60 percent of Hawaiian Grain.

a 20-year lease. The total cost of construction of the mill together with the waterfront land on which it is located was $1,500,000.

Petitioner Hawaiian Mills commenced operation on August 27, 1964, of this new modern mill which has the capacity for supplying all of the Hawaiian flour market. It has a favored location by virtue of being in close proximity to deep water, to its grain supply, and to its purchaser of mill-feed. It has a specially designed trailer equipped to load and discharge flour pneumatically which it uses to transport flour to bakeries. It produces only bakery flour now, but has not ruled out the possibility of producing family flour. Its customers enjoy the advantages of having deliveries on a 24-hour basis, without having to carry large inventories. Petitioner employs 16 people with an annual payroll of $87,000.

Petitioner's competitors from the mainland, Fisher, Pillsbury, and General Mills, have served Hawaii since the early 1900's. These mainland millers have seen their business in Hawaii decrease since the institution of petitioner's business there. Because of this loss of business and fear of further loss, the mainland millers sought to have Matson decrease its rates on flour to Hawaii. Matson's rate prior to the reduction was $516 per container or $22.43 per ton of flour.

The first request for a rate reduction was made by General Mills in September 1963, when it first learned of the proposed establishment of petitioner's business. General Mills had concluded that petitioner would have a cost advantage ranging from 45 cents to 91 cents a hundred pounds of flour. This was based on an estimated rate on wheat of $10.69 per long ton, which in turn was the equivalent of the going common carrier rate on barley in bulk. Therefore, General Mills requested a container rate of $15 per ton, which was denied by respondent as based upon speculative competition.

Upon the opening of petitioner's business (August 1964), General Mills learned that petitioner was quoting prices 40 to 50 cents per 100 pounds less than General Mills' prices to the retail bakery trade. Fisher encountered similar price competition in its sales to local Hawaiian bakeries. In August and September 1964, Fisher booked only 25 per cent of the volume it normally expected. Fisher's customers stated that Fisher's prices were too high. As a result, both mainland mills, in October 1964, renewed their request to Matson for a rate of $15 per ton. They presented to Matson, in early November 1964, a study showing the estimated cost of wheat transportation to be $10.62 per ton, consisting of a barge rate of $8 per ton and accessorial charges of $2.62 per ton.

Matson then decided to reduce the rate per container from $516 to $398, resulting in an equivalent rate of $17.31 per ton, or a reduction of 26 cents per 100 pounds. The flour shippers were not satisfied with that rate but stated that they could "live" with it. Matson emphasizes that it reduced the flour rate to give its flour shippers rates which would preclude them from being forced completely out of the Hawaiian market solely because of the differential then existing between the unregulated barge charges for carrying wheat and respondent's flour rates. Matson disavowed any intention to put the new mill out of business, or to equalize other competitive factors such as a possible difference in the cost of producing flour in Honolulu and on the mainland, economic factors unrelated to transportation, or geographical disadvantage.

Matson transported 19,898 short tons of flour from Pacific Coast ports to Hawaii in 1964, 17,337 tons from the Pacific Northwest. It estimated that in 1965 it will have retained only about 61 per cent 12,300 short tons) of its total 1964 movement.

Discussion

The Examiner recommended that the Commission find the reduced rate to be lawful. He found it would not be unduly preferential or prejudicial to any shipper and that it was not an unreasonable rate. He found the rate to be reasonable though not recovering fully distributed costs inasmuch as the reduction was necessitated by carrier competition. The Examiner also found the reduced rate to be compensatory and not contrary to the public interest.

Before reaching a discussion of the issues raised on exceptions, we wish to comment on certain aspects of the Examiner's decision to which no exception was taken.

The Examiner found no undue preference or prejudice in violation of section 16, First of the Act. Since we agree with this conclusion no discussion is here necessary.

There has been much discussion throughout this proceeding concerning what cost amounts need be recovered to enable the rate to be classified as reasonable. There was also much discussion about the reliability of the cost studies submitted by the two principal parties and whether either cost study would support their desired conclusion of reasonableness or unreasonableness of the rate.

We endorse the Examiner's findings concerning these problems. The Examiner first recognized that rates need not in every case recover fully distributed costs to be reasonable. This Commission has previously held that a carrier may establish rates below fully distributed

costs if special circumstances exist to justify them. *Investigation of Increased Rates on Sugar/Gulf Puerto Rico Trade*, 7 F.M.C. 404, 414 (1962); *Aleutian Marine Transport Co.—Rates Between Seattle and Ports in Alaska*, 7 F.M.C. 592, 596 (1963). Matson admitted its rates did not recover full costs but argued that special circumstances (carrier competition) justified the lower rates.

The Examiner then concluded that Matson's cost studies were based on proper considerations and that they were acceptable. Matson's studies showed that in 1964, its reduced rate on flour returned a "net-to-vessel" [5] contribution of $78.59 per container and that estimates for 1965 predicted an even higher return for that year. On the basis of this return, the Examiner determined the rates to be compensatory. Since no exception has been taken to any of these conclusions, it is not necessary to discuss them in any further detail.

Exceptions to the Examiner's decision filed by petitioner, the State of Hawaii, and Hearing Counsel raise the following issues for our consideration.

1. Whether the Examiner erred in finding the rate reduction to be necessitated by carrier competition.
2. Whether the Examiner properly treated the question of whether the rate reduction was necessary to enable the mainland mills to compete with petitioner in Hawaii.
3. Whether Matson's rate reduction unfairly distorts the existing rate structures, thereby resulting in unfair discrimination among shippers.
4. Whether the Examiner gave proper consideration to the public interest aspects involved.

We first consider whether the Examiner erred in finding the rate reduction to be necessitated by carrier competition.

Matson sought to establish justification for its rates which it admitted recovered less than fully distributed costs. Matson argued that Hawaiian Tug & Barge, the unregulated carrier employed by petitioner for the transportation of wheat, supplied meaningful competition so as to furnish justification for a reduced rate. The Examiner found such competition existed and that it was sufficient justification for rates recovering less than full costs.

Petitioner and Hawaii both except to the finding that Matson is in competition with the unregulated carrier. The substance of their position is that as a matter of law Matson, in the carriage of flour, cannot be competitive with Hawaiian Barge carrying wheat, because

[5] A "net-to-vessel" rate of return recovers for the carrier all costs of handling the specific traffic and in addition contributes toward vessel and overhead expense.

they are not competing for the carriage of the same traffic of the same shipper. Petitioner cites *Board of Trade of Chattanooga* v. *East Tenn. Va. & Ga. R.C.*, 5 I.C.C 546 (1892) to support its theory that there can be no actual competition between carriers unless one line could and would perform the service alone if the other did not undertake it. This case, however, is not at all in point. It involved a proceeding under section 4 of the Interstate Commerce Act which prohibits railroads from assessing greater charges for transportation for a shorter than for a longer distance over the same line or route. Relief from this provision may be granted if the lower rate on the longer route is justified to meet water competition. The ICC merely held that in the proceeding before it, no water competition in fact existed to justify a lower rate. The Commission determined no water competition existed because none of the goods involved would reach the destination by water if the railroad withdrew from the business, and no competition can be said to exist unless one line would perform the service alone if the other did not do it. The case involved no question of different carriers transporting different types of commodities.

Petitioner further argues that because rates on raw materials are not comparable with the usually higher rates on the finished products manufactured therefrom, there can be no competitive relationship between them. We recognize that such a differential in rates exists between raw materials and the finished product, but we see no reason why this means the two commodities cannot be competitive. The Examiner cited two cases in which the ICC recognized such a competitive relationship; between wheat and flour,[6] and between coal and fuel oil.[7] This Commission has recognized a competitive relationship between logs and products therefrom.[8]

We agree with the Examiner that a competitive relationship can exist other than between carriers competing for carriage of the same product. Such a situation exists here. As Hearing Counsel suggested, what we have here are two competing systems involving supply of grain, milling, transportation, and the sale of flour; that flour and grain are competing products in this scheme; and that transportation rates and charges on one, by whatever type of ocean carrier, directly and vitally affect the other.

The fact that the competitive relationship between Matson and Hawaiian Barge is the outgrowth of a more direct competitive relationship between the local Hawaiian mill and the mainland mills for

[6] *Grain and Grain Products*, 205 I.C.C. 301, 345 (1934).
[7] *Fine Coal to Plymouth*, 280 I.C.C. 745 (1951).
[8] *Nickey Bros. Inc.* v. *Associated Steamship Lines*, 5 F.M.B. 467 (1958).

the sale of flour does not, as petitioner suggests, detract from the fact that Matson is competing with Hawaiian Barge.

We conclude that the existence of carrier competition is convincingly established and its existence serves as sufficient justification for Matson's reduced rates which return less than fully distributed costs.

We turn then to a consideration of the Examiner's treatment of the question of whether Matson's rate reduction was necessary to enable the mainland mills to compete with petitioner for the sale of flour in Hawaii.

Petitioner suggests that since Matson's rate reduction was allegedly instituted to enable its shippers (mainland mills) to compete in Hawaii with petitioner, Matson is required to show that the reduction was necessary to achieve that goal. Petitioner maintains that Matson has failed to make this showing; that the Examiner erred in concluding that it had been shown; and that the Examiner improperly curtailed petitioner's attempt to show the opposite.

The record is clear that the mainland mills were losing their business in Hawaii to petitioner, and that a reduction in their price of flour was necessary to enable them to compete there.

The Examiner found:

> Prior to seeking a rate reduction the second time, General Mills became aware of substantially lower price quotations by complainant [petitioner] than its own. Fisher had the same experience, losing 75 percent of its contract business during the first 2 months of complainant's [petitioner's] operation. It appears that Fisher has lost practically all of its Hawaiian trade. General Mills stands to lose only about 25 percent of its 1964–65 volume, due to the fact that complainant [petitioner] has not entered the family flour market or the Neighbor Islands market. At the time of hearing in May–June 1965, complainant [petitioner] had captured 48 percent of the market. Respondent expects to lose about 40 percent of its 1964 movement.

So it is clear that if the mainland mills are to retain a meaningful market in Hawaii it is necessary for them to lower their price of flour there.

The substance of petitioner's argument, however, is that the mainland mills should have met their competition in Hawaii by decreasing their own profit on the sale of flour instead of by asking Matson to lower its transportation rates applicable to the carriage of flour and, had they done this, Matson's reduction would not be necessary to enable the mills to compete with petitioner.

Petitioner says that it was precluded by the Examiner from developing facts in the record which would show that the mainland mills could have met the competition by lowering its profit margin. The Examiner

barred inquiry by counsel for the petitioner into the production costs and the profit and loss position of the mainland millers. The Examiner's decision in this respect was based partly upon the practical difficulties and delays inherent in taking a cost accounting excursion through the books, but was based primarily on the Examiner's conclusion that there is no requirement that cost of production or profit margin of shippers must be revealed to show a compelling necessity for a carrier's rate reduction below fully distributed costs.

We do not feel that the Examiner improperly barred the abovementioned line of inquiry, since we agree with the Examiner that the important criteria to be considered here are the transportation considerations and not whether the mainland mills could compete by reducing their own profits.

The ICC in *State of Alabama* v. *New York Central*, 235 I.C.C. 255, 320, 321 (1939), quoted from an earlier case, *Cotton, Woolen, and Knitting Factory Products*, 211 I.C.C. 692, 786 (1935), as follows:

> But the relation of such conditions [costs of production], whatever they may be, to transportation rates is remote * * *. *These factors are part of the industrial problems as distinguished from the strictly transportation problem with which we deal,* and their value in the consideration of the lawfulness of competitive rates is doubtful * * *. When left for determination by this Commission, *the decision must be governed by the circumstances and conditions directly or indirectly having to do with the transportation of the commodity.* (Emphasis supplied.)

This Commission has consistently refused to permit the "profitability" of a shipper's business to determine the reasonableness of a carrier's rates.[9] The reason given for this rule is that ocean rates are but a single factor affecting "profitability," which is also affected by a narrowing market, increased cost of production, over production, and many other considerations.[10]

The true measure of petitioner's advantage then lies in its lower cost of transportation of flour in the form of wheat compared with the mainland mills' cost of transporting flour in finished form under Matson's rates. Prior to the rate reduction, petitioner enjoyed a favorable transportation cost advantage of $14.48 per ton, and after the reduction it still retained an advantage of $9.36 per ton.[11]

In view of these differentials and in view of the fact that the evidence shows that mainland mills cannot compete with petitioner at this

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[9] *Intercoastal Cancellations and Restrictions,* 2 U.S.M.C. 397, 400 (1940) ; *Wool Rates to Atlantic Ports,* 2 U.S.M.C. 337, 341 (1940) ; *Eastbound Intercoastal Lumber,* 1 U.S.M.C. 608, 623 (1936) ; *Alaskan Rate Investigation,* 1 U.S.S.B. 1, 7 (1919).

[10] *Eastbound Intercoastal Lumber, supra.*

[11] Petitioner paid a rate of $7.95 per ton on wheat compared to Matson's rate of $22.43 and $17.31 per ton of flour before and after the reduction.

higher differential, and that they will have trouble continuing even their present level of flour shipments at the reduced differential, we cannot find that Matson's rate reduction was unnecessary.

We conclude that Matson's rate reduction was necessary to enable the mainland millers to compete in Hawaii with petitioner and that such necessity was created by the transportation cost advantage which petitioner held by virtue of the low rates of the unregulated carrier at which petitioner was able to transport wheat to Hawaii.

The third issue raised by exceptions is whether Matson's rate reduction unfairly distorts the existing rate structures, thereby resulting in unfair discrimination among shippers.

This issue is raised by exception of the State of Hawaii and the essence of their argument is that by allowing large shippers, such as the mainland mills, selective rate reductions which return less than full costs, without affording similar reductions to smaller shippers of other commodities, Matson places an undue burden on the shippers of the other commodities to cover costs of carriage. Such lack of precision in ratemaking and allocation of costs to specific classifications results in undue discrimination among shippers, according to the argument of the State of Hawaii.

This argument, however, is not valid in view of our conclusion that Matson's reduced rate does in fact return a net-to-vessel contribution of $78.59 per container. This means that, although the shipments of flour did not return fully distributed costs, they do return a sufficient amount to cover the extra expenses incurred as a result of the particular flour shipment and they also contribute an additional $78.59 per container toward administrative and vessel expense. In other words, if Matson did not carry these flour shipments (a likely result if no rate reduction is effected), the shippers of other commodities would have to bear an even larger burden in enabling Matson to meet its administrative and vessel expenses.

In view of this it cannot be said that the rate reductions distort the rate structure in such a way as to result in discrimination among shippers.

Finally, we will determine whether the Examiner gave proper consideration to the public interest aspects of the rate reduction.

The State of Hawaii and petitioner both state that the Examiner failed to properly consider whether the rate reduction was contrary to the public interest.

There can be no question that the Examiner did consider the public interest. The only question is whether he gave proper consideration to the proper aspects of the public interest.

The Examiner, in determining whether the reduction is contrary to public interest, would restrict himself to a consideration of transportation conditions and the effect the reduction might have thereon. Hearing Counsel endorses this position and we accept it as sound.

Each of the parties to this proceeding advanced its theory as to what a consideration of the public interest should entail, and as to why this reduction is not compatible with such considerations.

In the final analysis, each of the public interest factors urged by the parties (except one urged by the State of Hawaii discussed *infra*) involves transportation considerations and need be considered herein to determine if the rate reduction is reasonable.

Petitioner and the State of Hawaii fear that, if Matson prevails in the ratemaking theory here advanced, Matson will be able to prevent the entry of any new water carrier in the trade. This conclusion is based on the assumption that approval of the rate reduction involved here would amount to a condonation by this Commission of arbitrary rate reductions below compensatory levels, and that Matson could in the future employ such reductions to keep new carriers from competing in the trade. In view of our earlier determinations that the reduction here is compelled by competition and that it returns an amount in excess of out-of-pocket costs, such an assumption is unwarranted and the fears expressed by Hawaii and petitioner in this regard are unfounded.

Petitioner and the State of Hawaii also feel that this rate reduction will result in an unreasonable rate structure in Hawaii in which one commodity will be subsidized by another.

The effect of a rate reduction on other commodities and the over-all rate structure is important to a consideration of the public interest. However, we demonstrated earlier how this reduction, since it returns a net-to-vessel contribution, does not distort the rate structure in such a way as to place an undue burden on one commodity or one shipper.

We do not deny that Matson's rate reduction on flour affects its rates on other commodities. Every change in one rate causes a change in relationships or differentials with other commodity rates. At times, the public interest may require a change in rates because of their adverse effect on other rates on essential commodities. This Commission in fact has determined in a particular case that the public interest required that rates on a certain commodity be increased to return more than full costs in order that such rates might subsidize rates on basic foodstuff commodities which were sorely needed in Puerto Rico.[12]

[12] See *Reduced Rates on Automobiles—North Atlantic Ports to Puerto Rico*, FMC Docket No. 1145 and 1167, dated Feb. 4, 1965; *Reduced Rates on Machinery and Tractors—Atlantic Ports to Puerto Rico*, FMC Docket No. 1187 and 1187(1), 9 F.M.C. 465.

A third public interest factor urged by petitioner and the State of Hawaii is that, if Matson prevails in allowing a specific commodity rate reduction at the request of a large shipper, large influential shippers will always be able to gain similar concessions at the expense of smaller shippers.

We cannot assume that Matson will make indiscriminate rate reductions to please large shippers in view of Matson's treatment of the shipper's request here. Matson's traffic department would not even discuss rate reductions with the mainland mills until the new mill and barge were in operation, and then Matson gave the shippers only a rate of $17.30 per ton, instead of the requested $15 per ton rate, and then only when it was apparent they would lose cargo.

This argument also overlooks the fact that the reduced rate is justified because it returns an amount in excess of out-of-pocket costs, and because, as the Examiner found, if the reduction was not effected it is probable that Matson would lose most of its flour traffic.

We now turn to the final public interest consideration urged by the State of Hawaii; one that does not involve a transportation consideration.

Hawaii contends that the rate reduction will effectively deter the establishment of new industry in the State of Hawaii. This conclusion is based on the testimony of the Executive Vice President of the Hawaiian Manufacturers Association who feels that, if the spot rate reduction made here by Matson is approved, Matson will be able to control industry expansion in Hawaii in the future by making similar spot rate reductions on whatever commodities a new industry is seeking to market there. This witness related an instance where a manufacturer refused to locate a new industry in Hawaii because of Matson's rate policy as to flour.

We need only say that this manufacturer's fears cannot be based on petitioner's experience in Hawaii with Matson since petitioner, in spite of Matson's reduction, has not lost its competitive position in Hawaii. In fact, the President of the petitioner testified that his company will continue to make inroads into the market of the mainland mills even at the reduced flour rate.

In view of our determination that the record will not support a conclusion that Matson's reduced rate will prevent the entrance of new industry in the State of Hawaii, petitioner and Hawaii are in no way prejudiced by limiting the public interest consideration to transportation factors.

CONCLUSION

It is found and concluded that Matson's reduced rate on flour does not result in undue preference or prejudice to any shipper; that it is necessitated by unregulated carrier competition, is compensatory, does not disturb the existing rate structure, is not contrary to the public interest, and therefore is not an unreasonable rate within the meaning of the provisions of the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933.

This proceeding is hereby discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 399

JAVA PACIFIC RATE AGREEMENT

v.

NUMEROUS SHIPPERS IN THE TRADE FROM INDONESIA

Decided September 20, 1966

Application for leave to waive collection of undercharges denied.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*, Ashton C. Barrett, *Vice Chairman;* George H. Hearn, *Commissioner*):

Java Pacific Rate Agreement (the Conference), an inbound conference with office and principal place of business at Djakarta, Indonesia, applied on behalf of its members for permission, pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure (46 CFR 502.92) to waive collection of undercharges representing the difference between rates on file with the Commission and lesser rates charged uniformly to all shippers during certain periods in 1964. The "numerous shippers" are the persons from whom undercharges would otherwise be collected and are nominal respondents in this proceeding. The application was verified before a United States Vice Consul in Djakarta.

An initial decision was issued by Examiner Walter T. Southworth denying the application for leave to waive collection of undercharges as inappropriate, but finding that undercharges were properly collectible. No exceptions or replies to exceptions to this decision were filed, and no oral argument was heard.

FACTS

1. On November 2, 1963, the Conference published from its Djakarta office and transmitted to the Commission a one-page "circular to shippers No. 13", announcing a general increase of 10 percent to become

effective February 1, 1964. The circular stated that in due course amendments to the freight tariff showing the new rates would be issued to tariff holders, and exporters not possessing a tariff might obtain further details from "the Secretariate".

2. On November 14, 1963, a copy of this circular was received and placed on file by the Commission.

3. On December 20, 1963, the Commission originally received and placed on file Conference Addendum No. 89 to Freight Tariff No. 10, issued as of December 1, 1963, and effective February 1, 1964, setting forth in detail the rate increase.[1]

4. On February 1, 1964, the increased rates were put into effect pursuant to the circular to shippers.

5. On March 10, 1964, the Director of the Bureau of Foreign Regulation addressed a letter to the Conference as follows:

Gentlemen:

Reference is made to circular to Shippers No. 13, dated November 2, 1963, relating to a 10% general increase in tariff rates and to the filing of revised pages reflecting the increased rates effective February 1, 1964 in your currently effective Freight Tariff No. 10.

In view of the fact that this tariff provides both contract and non-contract rates in accordance with Agreement No. 191, it is thought advisable to inform you of the position adopted by the Commission with respect to changes in rates involving a dual rate contract system as reflected in your tariff so that such changes may be made in accordance with the provisions of Section 14(b)(2) and the tariff filing requirements of Section 18(b), Shipping Act, 1916.

Section 14(b)(2) reads as follows:

> "provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days;"

In accordance with the cited Section of the Act, none of the contract rates subjected to the increase effective as of February 1, 1964, may be further increased prior to the expiration of the 90 day period, or prior to May 1, 1964.

Since the spread between contract and non-contract rates may not exceed 15% of the non-contract rates nor be altered without the approval of this Commission as required by Section 14(b), any change in contract rates must also be reflected in the corresponding non-contract rates. However, an increase in contract and non-contract rates may become effective if the previously effective lower rate has been in effect for the required 90 days, and providing an appropriate revision to the tariff is received by the Commission at least 30 days in advance of the effective date of the increase in rates in accordance with the requirements of Section 18(b). Section 14(b) does not preclude reductions in contract and non-contract rates at any time, providing an appropriate

[1] Final filing of the addendum was accomplished February 13, 1964.

amendment to the tariff is received by the Commission on or prior to the effective date of such reduction in accordance with the requirements of Section 18(b).

It is noted that on occasion your conference files certain emergency contract rates which are reductions from the rates contained in the tariff, but these emergency rates are filed for a limited period of time, generally less than the required period of ninety days. Upon expiration of such emergency rates, the rates would then revert to the higher tariff rate. In such instances these emergency rates must remain in effect for the minimum period of 90 days, otherwise they would contravene the requirements of Section 14(b)(2). In other words, temporary, special, or emergency rates, which are lower than the standard tariff rates, are considered to be the rates lawfully in effect and applicable to shippers and such rates must remain in effect for a period of least 90 days before they may be increased. Further reductions of such emergency contract and non-contract rates may become effective upon the proper filing of a tariff revision as pointed out above.

We trust that the foregoing information will assist your conference in submitting tariff matter in accordance with the statutory requirements.

6. The Conference construed the foregoing letter to mean that 90 days' prior notice to the Commission was required before its rate increase could become effective, and that its circular and Addendum No. 89 had been rejected as not submitted in accordance with statutory requirements. The Conference therefore published and transmitted to the Commission for filing:

(1) "Circular to Shippers No. 16" dated April 15, 1964, which referred to Circular No. 13 and stated that the general increase contained therein would become effective as per August 1, 1964, instead of February 1, 1964;

(2) "Agents Circular No. 173" which was to the same effect; and

(3) Addendum No. 93 to the tariff which stated that it was "issued in lieu of Addendum No. 89 rejected by the Commission".

Addendum No. 93 showed the issue date of May 1, 1964, and effective date of August 1, 1964.

7. On April 23, 1964, the aforementioned three documents were received by and placed on file with the Commission.

8. On June 8, 1964, the Director, Bureau of Foreign Regulation returned Addendum No. 93, and addressed a letter to the Conference stating that the rates reflected in Circular No. 13 and Addendum No. 89 were the lawful rates effective February 1, 1964, "and are the only rates which could thereafter be assessed . . ., except as may have been altered by subsequent revisions to the tariff consistent with . . . Section 18(b), Shipping Act, 1916". The letter further stated that the Bureau's former letter was "intended merely as a means of informing you of the position of this Commission with respect to the requirements of Section 14(b)(2), Shipping Act, 1916, as it appeared to relate to

the general increase . . ." and should not have been construed as a rejection of the rates involved in Circular No. 89. Full particulars were requested with respect to the rates assessed by the member lines since February 1, 1964.

9. In the meantime, the Conference had reverted to the rates in effect prior to February 1, 1964, which it maintained through July 31, 1964.[2] The member lines had made adjustments in rates applied to shipments made between February 1, 1964, and April 15, 1964, so that all relevant shipments made during that period were made under rates which had been in effect prior to February 1, 1964.

10. On July 21, 1964, the Conference refiled Addendum No. 93. The Commission did not return this addendum, but notified the Conference that it could not accept it and that the rates effective February 1, 1964, were still in effect.

11. On July 29, 1964, the Conference wrote the Commission requesting a "dispensation" to apply the increased rates effective August 1, 1964.

12. On September 3, 1964, the Commission notified the Conference that the increased rates were in effect and had been in effect since February 1, 1964, and notified the Conference of the procedure for application for waiver of collection of undercharges.

13. On September 9, 1964, such application was filed with the Commission.

The Initial Decision

The Examiner treated the question of what rates were on file with the Commission and duly published and in effect between February 1, 1964, and July 31, 1964, as the sole issue in this proceeding. Hence, he treated *Mueller* v. *Peralta Shipping Corp.*, 8 F.M.C. 361 (1965) and other cases dealing with circumstances under which collection of undercharges on rates in effect at the time might be waived as inapplicable. The Examiner concluded that the publication and filing of the new rates contained in Circular No. 13 was treated by the Commission as a sufficient filing of a "new tariff" in compliance with section 18(b)(2), and that Circular No. 16 and Addendum No. 93 were sufficient, as evidenced by the Bureau's conduct, to constitute an amendment to the Conference tariff in conformity with section 18(b)(2), insofar as it effected a reduction in existing rates from the date of filing to August 1. The adjustments against the rates paid or charged for shipments made between February 1 and April 15, the Examiner concluded, were made pursuant to tariffs published and filed when the adjustments were

[2] This reversion was made pursuant to Circular No. 16 and Agents Circular No. 173.

made. These tariffs were unlawful insofar as their retroactive dates were concerned and the adjustments, therefore, constituted unlawful rebates under section 18(b)(3). The rates contained in them were nevertheless, he concluded, the applicable rates because they were the only filed rates, citing *Chicago, M. St. P. & P. R. Co.* v. *Alouette Peat Products*, 253 F. 2d 449 (1957). Moreover, he asserted, a shipper cannot be required to pay a rate higher than the filed rate even though the filed rate is unlawful because improperly filed. Therefore, the Examiner concluded that no sums could be collected on account of freight shipments made during the period February 1, 1964, through July 31, 1964, in excess of amounts based upon the rates in effect immediately prior to February 1 and denied the application for leave to waive collection of undercharges as inappropriate.

Discussion and Conclusions

The original filing of the increased rates was accomplished either on November 14, 1963, the date of receipt of Circular No. 13 by the Commission, or December 20, 1963, the original date of receipt by the Commission of Addendum No. 89 to Freight Tariff No. 10. It is unnecessary for us to determine which of the above dates to consider for this purpose. Either of them fulfills the requirements of 18(b) that rate increases in the foreign commerce of the United States not be effective until the passage of 30 days from the dates of publication and filing. In addition, both documents plainly indicated the changes proposed to be made in the tariff then in force and the time when the rate increases were to become effective.[3]

The rates filed through Circular No. 13 and Addendum No. 89 thus were the rates specified in the tariff on file with the Commission and duly published and in effect as of February 1, 1964.[4] They were, ac-

[3] Section 18(b)(2) provides:

"No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: *Provided, however,* That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission The term 'tariff' as used in this paragraph shall include any amendment, supplement or reissue."

[4] It is unnecessary for us to determine whether or not the rate filings involved in this proceeding would have complied with our regulations published pursuant to section 18(b)(4) governing filing of tariffs by common carriers in our foreign commerce (46 CFR 536), as such regulations did not become effective until July 1, 1965.

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cordingly, the rates which were required by the statute to be charged and collected by the Conference as of that date.[5]

Similarly, the same rate increases when contained in Circular No. 16 and 173 and Addendum No. 93, which were received by the Commission on April 23, 1964, became the lawful rates as of August 1, 1964, the effective date named in these publications, having been published and on file with the Commission for more than 30 days prior to that date.

The problem arises with respect to the effect of the filings of April 23, 1964, upon the rates then in effect. The attempted result of these documents was to cancel the earlier filings, reinstate the rates on file and in effect prior to February 1, 1964, and postpone the rate increase until August 1, 1964.

The filings never legally accomplished this result. They were effective insofar as they attempted to become the filed rates as of April 23, 1964, the date of their receipt by the Commission. They were without effect insofar as they altered the rate to be charged and collected with respect to the period from February 1, 1964, to April 23, 1964. Although the Examiner correctly cites *Chicago, M. St. P. & P. R. Co.* v. *Alouette Peat Products*, 253 F. 2d 449 as supporting the proposition that illegally filed rates are nevertheless the applicable rates simply because they are the filed rates, we are aware of no case in which retroactive rates were held to be the "applicable" rates. The *Alouette* case involved increased rates which were published on 5 days' notice rather than the 30 days' notice required by the Interstate Commerce Act.[6] That Act, like the Shipping Act, 1916, allows carriers to obtain permission to effectuate rate increases upon less than 30 days' notice if certain statutory requirements are met. No provision is made, however, in either the Interstate Commerce Act or our own statute for the effectiveness of

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[5] Section 18(b)(3) provides:

"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."

[6] Section 6 of the Interstate Commerce Act provides in pertinent part:

"(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid . . . *Provided*, That the commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified . . ."

retroactive rates. In fact, section 18(b)(2) clearly nullifies the retroactive application of rates by requiring that increased rates "shall become effective not earlier than thirty days *after* the date of publication and filing thereof with the Commission . . . [and] any change in the rates . . . which results in a decreased cost to the shipper may be effective *upon* the publication and filing with the Commission". (Emphasis supplied.) We will not extend the proposition of the *Alouette* case, *supra*, to cover retroactive changes in rates for in our view such an extension would circumvent the clear meaning of section 18(b). Therefore, the increased rates remained in effect until April 23, 1964.

The refunds made to shippers for the period between February 1, 1964, and April 23, 1964, were thus refunds of a portion of the rates duly published and in effect during this period within the meaning of, and contrary to, section 18(b). However, because the illegal manner of filing was the result, at least in part, of the actions of the Commission as reasonably (if not accurately) interpreted by the Conference, the Commission will not seek penalties from respondent for the "refunds" made under the erroneous filing.

The application for leave to waive collection of undercharges is denied.

COMMISSIONER JAMES V. DAY CONCURRING:

In this case the Conference refunded part of its charges to shippers in reliance upon the validity of a change in its tariff which it had filed with the Commission. Then the Government, whose prior position regarding the Conference's tariff was misleading to the Conference, declared the tariff change invalid. Thus faced with the impractical task of having to persuade its shippers that they should pay a higher rate after all and that they must return the refunds, the Conference has sought our permission to waive recapture of the refunds.

The majority deny the relief the Conference has sought. They affirm that the tariff change was invalid and the original higher rates should have been charged.

However, they also state that they will not seek penalties from the Conference for the refunds made.

Administrative discretion may be exercised to achieve an equitable result. Cf. *Mueller* v. *Peralta*, 8 F.M.C. 361, dissent; *Tank Car Corp.* v. *Terminal Co.*, 308 U.S. 422, 432. The majority decision would accomplish this. No further determination on my part is necessary. I thus concur in denying the application.

COMMISSIONER JOHN S. PATTERSON, DISSENTING:

In the absence of exceptions, the decision of the Examiner should become the decision of the Commission, and his findings that no undercharges are collectible on the facts shown should be sustained.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–52

IN THE MATTER OF THE PETITION OF NEW YORK FREIGHT BUREAU (HONG KONG) FOR A DECLARATORY ORDER

Decided October 3, 1966

Where conference voting rules require unanimity whenever a change in the basic conference agreement is contemplated and where one of the original parties to such an amended conference agreement filed for approval under section 15 of the Shipping Act, 1916, withdraws from such agreement prior to the Commission's approval thereof, the effect of such withdrawal is to remove the document so filed from the Commission's consideration.

Approval accorded by the Commission to an amended conference agreement filed pursuant to section 15 is void *ab initio* where one of the parties thereto had withdrawn from such agreement prior to approval.

Charles F. Warren and *John P. Meade* for New York Freight Bureau (Hong Kong).

George F. Galland and *Amy Scupi* for States Marine Lines.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman;* James V. Day, George H. Hearn, *Commissioners*).

This matter comes before us on petition of the New York Freight Bureau (Hong Kong) for a declaratory order pursuant to section 5(d) of the Administrative Procedure Act [5 U.S.C. section 1004(d)] and rule 5(h) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.69).

THE CONTROVERSY INVOLVED

The New York Freight Bureau (Hong Kong) (hereafter called the Bureau) serves the inbound trade between Hong Kong and U.S. Atlantic and Gulf ports. It has been in existence since 1924 and since

1937 has operated under approved Agreement 5700. Until 1964 this agreement remained substantially unchanged (such changes as were made dealt with the rotation of the Chairmanship and minor changes in the geographic scope of the agreement, etc.). The modification approved on July 29, 1960, was designated Agreement No. 5700–4.

As a result of the 1961 amendments to section 15 of the Shipping Act (Act of October 3, 1961, Public Law 87–346, section 2, 75 Stat. 763) and our General Orders 7 and 9, conference agreements were required to contain reasonable provisions for the admission, withdrawal and expulsion of members and an adequate system of self-policing. The Bureau submitted two agreements to accomplish this purpose. Agreement No. 5700–6 filed on February 10, 1964, provided for a system of self-policing which generally complied with the requirements of section 15 and General Order 7. Agreement No. 5700–7 filed on June 17, 1964, contained amendments designed to bring their agreement within the requirements of General Order 9.

These agreements were never approved because after analysis of them, the staff suggested to counsel for the Bureau that certain clarifying and conforming changes be made and that the two agreements be consolidated in one. In response to these suggestions, counsel for the Bureau withdrew Agreements 5700–6 and 5700–7 and filed a third agreement designated 5700–8 which contained the changes suggested by the staff and repeated the remaining provisions of 5700–6 and 5700–7. We issued an order of conditional approval of this latter agreement in which the Bureau members were given 60 days within which to accept the modifications. Additional time for acceptance was sought by the Bureau and granted by us. The Order of Conditional Approval as extended was due to expire on May 2, 1966. However, on March 1, 1966, States Marine Lines sent a telegram to the Commission which stated in pertinent part: "* * * States Marine opposes the agreement and hereby withdraws same from Commission's consideration as far as States Marine is concerned. * * *" On May 2, 1966, the Order of Conditional Approval expired by its own terms since no notification had been received by the Commission of the acceptance by the Bureau membership. On May 13, 1966, at the Bureau's request we approved Agreement 5700–8 in part, i.e. as to those portions which were deemed noncontroversial because they had not been objected to by States Marine, and issued an order of investigation (Docket 66–32) with respect to the controversial portions. The original order of investigation set down three issues for determination: (1) the expansion of the conference trade area to include the Great Lakes; (2) the voting provisions; and (3) modification of the self-policing provisions to

include provision for reference of certain arbitration matters to the Federal Maritime Commission. On June 13, 1966, States Marine filed a petition to reconsider our order of May 13, *supra* and, after considering this petition and the Bureau's reply dated June 20, 1966, we issued an amended order in Docket 66–32 in which the issues raised in States Marine's petition for reconsideration were also set down for investigation. These amendments broadened the original order of investigation to include the following issues: (1) whether Agreement 5700–8 was properly before the Commission for its approval under section 15; (2) if Agreement 5700–8 was properly before the Commission for approval, should the approval granted in our order of May 13, 1966, be continued; (3) if Agreement 5700–8 was not properly before the Commission for approval and the approval thereto was without force and effect, were Agreements 5700–6 and 5700–7 properly withdrawn, and if not, what is their present status as representing true and complete agreement of the parties; and (4) whether there is in existence a presently approved agreement to which all the parties signatory thereto now agree and should approval thereto be continued or should the agreement be modified, disapproved, or canceled.

Hearings are now scheduled in Docket 66–32 to commence on October 13, 1966, and it appears that at least one witness is coming from as far away as Hong Kong. The Bureau, feeling that several of the issues specified in the amended order of investigation are pure questions of law involving no genuine issues of material fact, filed its petition for declaratory order for the "summary resolution of legal issues." This petition was filed on September 9, 1966, and a reply filed by States Marine Lines was received September 26, 1966. States Marine Lines joined the Bureau in requesting a declaratory order on one of the questions raised in the petition. Neither party requested oral argument and both urged a speedy resolution of the issues.

The question both parties agree is: "Did States Marine Lines' telegram protest of March 1, 1966 filed prior to approval operate to withdraw Agreement No. 5700–8 from the Commission's consideration?"

In its reply, States Marine Lines relies entirely upon the Commission's report in *Hong Kong Tonnage Ceiling Agreement*, Docket 66–29 (involving the same parties) decided September 19, 1966, after the Bureau's petition for a declaratory order but before States Marine's reply. We there held substantially that where one of the parties to an agreement which has been filed for approval with the Commission under section 15 withdraws from said agreement prior to the time approval is given, the agreement ceases to exist.

DISCUSSION

States Marine Lines argues that it withdrew from Agreement 5700–8 by its telegram dated March 1, 1966, and that this was complete and unqualified opposition to the entire agreement. We agree. While the telegram in question goes on to "oppose particularly" certain specific provisions in the agreement a fair reading of the telegram supports States Marine's contention that its opposition to the whole agreement was unqualified and that its withdrawal was complete. It appears therefore that States Marine's position with respect to applicability of our report in Docket 66–29, *supra*, is well taken.

While it is true that in Docket 66–29 the agreement in question was found to be a new agreement and not a modification of an existing agreement, as is the case here, we feel that this is a distinction without a difference, particularly in view of the fact that the voting provisions of Agreement 5700–4 require unanimity whenever a change in the arrangement is contemplated.

It appears that Agreements 5700–6 and 5700–7 were withdrawn by counsel for the Bureau at the same time as Agreement 5700–8 was offered for approval. In any event States Marine's reply to the instant petition states on page 8, "we do not understand that either 5700–6 or 5700–7 is presently before the Commission for approval. If they are before the Commission, States Marine Line now withdraws them." Thus, if these two earlier agreements had any residual sparks of life, the above-quoted statement would effectively extinguish them.

It follows that Agreement 5700–4 as approved on January 20, 1960, is presently in full force and effect and constitutes the basic agreement under which the New York Freight Bureau (Hong Kong) is permitted to operate.[1]

The other issues raised in the petition for declaratory order are moot as a result of our holding with respect to the effect of States Marine's telegram protest of March 1, 1966. Our holding also is entirely dispositive of the issues now pending in Docket 66–32 and that proceeding will therefore be discontinued.

The entire relationship between the Bureau and States Marine Lines has presented and does present a continuing problem to the Commission. The 1961 amendments to section 15, *supra*, clearly require us to disapprove any agreement in which no proper provisions for self-policing or admission or withdrawal have been made. Similarly General Orders 7 and 9 require appropriate amendments to existing agree-

[1] Agreement 5700–5 was a temporary ceiling tonnage agreement which expired by its own terms in January 1965.

ments in order to effect these changes if continued approval is to be had.

Agreement 5700–4 does not meet the criteria imposed by amended section 15 and General Orders 7 and 9.

We can only conclude from past history in this matter that the Bureau and States Marine Lines are either incapable or unwilling to resolve their differences. On the other hand, the Bureau has been in operation for over 40 years. We, therefore, will issue an order to show cause why Agreement No. 5700–4 should not be modified by us so as to include amendments providing for an adequate system of self-policing and acceptable standards for admission, withdrawal, and expulsion. The language of such amendments will be taken from the relevant portions of Agreement 5700–8 since all of the members of the Bureau, including States Marine Lines, agreed to it up to March 1 of this year.

Conclusions

In summary, we conclude that:

1. States Marine Lines' telegram protest of March 1, 1966, filed prior to approval of Agreement 5700–8 operated to withdraw Agreement No. 5700–8 from the Commission's consideration.

2. Our order of May 13, 1966, which approved Agreement 5700–8 in part was void *ab initio* since said agreement was not properly before the Commission for approval.

3. Agreements 5700–6 and 5700–7 had been withdrawn prior to approval.

4. That Agreement 5700–4 as approved on July 29, 1960, is presently in full force and effect and constitutes the basic agreement under which the New York Freight Bureau (Hong Kong) is permitted to operate.

5. Agreement 5700–4 does not satisfy the requirements of section 15 and General Orders 7 and 9 promulgated thereunder in that it does not contain a satisfactory system of self-policing and does not meet the required criteria for admission, withdrawal, and expulsion of members.

6. Proceedings in Docket No. 66–32 should be discontinued.

7. That the members of the New York Freight Bureau (Hong Kong) should be required to show cause why Agreement No. 5700–4 should not be modified by us or, in the alternative, why continued approval of said agreement should not be withdrawn.

An appropriate order will be entered.

By the Commission.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–52

IN THE MATTER OF THE PETITION OF NEW YORK FREIGHT BUREAU (HONG KONG) FOR A DECLARATORY ORDER

ORDER

Upon consideration of the petition of the New York Freight Bureau (Hong Kong) for a declaratory order and the reply of States Marine Lines (a member of said conference), there having been no request for oral argument, and the Commission on this day having made and entered of record a report stating its findings, conclusions, and decisions thereon, which report is hereby referred to and made a part hereof;

Therefore, it is ordered and declared, That:

1. States Marine Lines' telegram protest of March 1, 1966, filed prior to approval of Agreement No. 5700–8, operated to withdraw Agreement No. 5700–8 from the Commission's consideration;

2. The order of May 13, 1966, which approved Agreement No. 5700–8 in part was void *ab initio*, since said agreement was not properly before the Commission for approval;

3. Agreement Nos. 5700–6 and 5700–7 were withdrawn prior to approval;

4. Agreement No. 5700–4, as approved on July 29, 1960, is presently in full force and effect and constitutes the basic agreement under which the New York Freight Bureau (Hong Kong) is permitted to operate.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

NOTICE OF INTENT TO MODIFY AGREEMENT NO. 5700–4 AND ORDER TO SHOW CAUSE WHY SUCH MODIFICATIONS SHOULD NOT BE INCOPORATED INTO SAID AGREEMENT

Decided October 3, 1966

By declaratory order served this date,[1] we decided that:

1. States Marine Lines' telegram protest of March 1, 1966, filed prior to approval of Agreement 5700–8 operated to withdraw Agreement 5700–8 from the Commission's consideration.
2. Our order of May 13, 1966, which approved Agreement 5700–8 in part, was void *ab initio* since said agreement was not properly before the Commission for approval.
3. Agreements 5700–6 and 5700–7 have been withdrawn prior to approval.
4. That Agreement 5700–4 as approved on July 29, 1960, is presently in full force and effect and constitutes the basic agreement under which the New York Freight Bureau (Hong Kong) is permitted to operate.
5. Agreement 5700–4 does not satisfy the requirements of section 15 and General Orders 7 and 9 promulgated thereunder, in that it does not contain a system of self-policing and does not meet the required criteria for admission, withdrawal, and expulsion of members.

The members of the New York Freight Bureau (Hong Kong) were able to agree upon amendments to this conference agreement which would satisfy the requirements of General Orders 7 and 9. Agreements 5700–6 and 5700–7 received the unanimous support of all the Bureau members. Similarly, Agreement 5700–8 was approved unanimously by the Bureau. Nevertheless, States Marine Lines has chosen to withdraw from these amended agreements prior to approval, thereby removing them from the Commission's consideration.

There are only two courses of action now open to the Commission. The first would be to withdraw approval of Agreement 5700–4. Unless satisfactory self-policing and membership provisions are added to the agreement, this course is clearly necessary under section 15.

The second would be to modify Agreement 5700–4 by adding amendments which would give the conference an adequate system of self-policing and proper provisions for the admission, withdrawal, and expulsion.

[1] In the Matter of the Petition of New York Freight Bureau (Hong Kong) for a Declaratory Order.

Under section 15, we are empowered "by order, after notice and hearing," to modify or disapprove any agreement found to be in violation of the act.

Accordingly, the members of the New York Freight Bureau (Hong Kong) are hereby notified, pursuant to our authority under section 15 of the Shipping Act, 1916, that we intend to modify Agreement 5700–4 by deleting subparagraphs 10(b), 10(c), 10(d), and 10(e) and by adding new paragraphs 12 through 16, as set forth in the Appendix A hereto.

We see no need for the taking of evidence in this proceeding since no genuine issues of material fact are presented. The modifications to Agreement No. 5700–4, which the Commission proposes to make as specified in his notice, have twice been considered and "approved" by the Commission as satisfying the requirements of section 15 and General Orders 7 and 9. Should any of the parties to this proceeding consider that there are disputed issues of fact which are relevant to this proceeding, such facts shall be specified with particularity by means of affidavits setting forth such facts, together with a statement of their relevance to the issue in question. Should any other parties dispute these facts by a similar affidavit, the disputed issues of fact, if relevant, will be set down for an evidentiary hearing.

Now therefore, pursuant to sections 15 and 22 of the Shipping Act, 1916, as amended,

It is ordered, That the common carriers by water designated in Appendix B hereto show cause why Agreement No. 5700–4 should not be amended in the manner proposed in this notice or, in the alternative, why approval of Agreement No. 5700–4 should not be withdrawn on the grounds that:

1. It fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal, as required by section 15 of the act and General Order 9; and

2. Fails to contain provisions for adequate policing of the obligations under it, as required by section 15 of the Shipping Act, 1916, and General Order 7 of the Federal Maritime Commission promulgated thereunder.

It is further ordered. That this proceeding shall be limited to the submission of affidavits and memoranda and oral argument. The affidavits of fact and memoranda of law shall be filed by respondents no later than close of business October 18, 1966, replies thereto shall be

filed by Hearing Counsel and interveners, if any, no later than close of business October 28, 1966. An original and 15 copies of affidavits of fact, memoranda of law, and replies are to be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Copies of any papers filed with the Secretary should also be served upon all parties hereto. Oral argument, if granted, will be heard at a date and time to be announced later.

It is further ordered, That the carriers indicated in Appendix B are hereby made respondents in this proceeding,

It is further ordered, That this order be published in the FEDERAL REGISTER and a copy of such order be served upon each respondent.

Persons other than respondents and Hearing Counsel who desire to become a party to this proceeding shall file a petition for leave to intervene in accordance with Rule 5(1) (46 CFR 502.72) of the Commission's Rules of Practice and Procedure no later than the close of business October 11, 1966, with a copy to respondents.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX A

12. Copies of the minutes of all meetings, including meetings of the committees authorized to take final action as well as those of the conference shall be promptly furnished to the Federal Maritime Commission. These minutes shall be authenticated by the Chairman/Secretary or other duly authorized New York Freight Bureau (Hong Kong) official.

13. *Faithful Performance: Bond.*—As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or of any award or judgment which may be rendered against them hereunder, the parties hereto agree to deposit with the New York Freight Bureau Chairman/Secretary the sum of US$30,000 (thirty thousand) or its equivalent in Hong Kong currency or a confirmed irrevocable letter of credit, in such form as may be approved by the New York Freight Bureau, in the aforesaid sum of US $30,000 (thirty thousand) or its equivalent in Hong Kong currency established by a bank being a member of the Hong Kong Exchange Banks Association and which is acceptable to the New York Freight Bureau, providing that it may be drawn upon by draft signed in the name of the New York Freight Bureau by the Chairman/Secretary and by the authorized representatives of any two member lines and payable to the New York Freight Bureau to which there shall be attached a certificate signed by the Chairman/Secretary to the effect that there has been assessed or adjudged against the party who shall have deposited the said letter of credit a penalty or penalties in the amount of the said draft. Such depositing party undertakes and agrees in the event of the payment of the said draft to cause a new letter of credit in the sum of US$30,000 (thirty thousand) or its equivalent in Hong Kong currency, similar in its terms, to be issued immediately in replacement for that upon which the draft has been made. Among other such provisions as the New York Freight Bureau may require, the New York Freight Bureau may insist upon provisions in such letter of credit which will render it most certain that payment must be made by the bank immediately upon the compliance by the Chairman/Secretary with the aforesaid conditions.

14. *Self-Policing System.*—It is thereby agreed and declared by and between the parties hereto that:

(a) A report shall immediately be made in writing to the Chairman/Secretary in respect of any information which appears to such party hereto to be reasonably reliable of the commission by any other party hereto of a violation of this agreement.

(b) A report shall immediately be made in writing to the Chairman/Secretary in respect of any information which such party hereto shall have received from any shipper or from any other source considered to be reliable that any party hereto has committed a violation of this agreement.

(c) It shall be the duty of the Chairman/Secretary to investigate immediately all such reports submitted by parties hereto in addition to any such reports in writing he may receive direct from shippers or from any other source considered to be reliable, for which purpose the Chairman/Secretary shall hereby be authorized to engage the services of such qualified persons as he may consider necessary for a thorough and complete investigation to be made.

(d) It shall also be the duty of the Chairman/Secretary to ascertain, on his own initiative, whether or not the parties hereto have strictly complied with the terms of this Agreement, the provisions incorporated in the

New York Freight Bureau tariff and all other decisions regularly and properly made by the parties hereto and, in the event that there is any reason to believe that there has been a violation of any of the aforesaid obligations, he shall file a complaint with respect thereto as above provided.

(e) The Chairman/Secretary shall be furnished such pertinent records of the parties hereto, their agents, sub-agents, affiliates, subsidiaries, freight brokers, compradores and/or Chinese Freight Agents, wherever located, as may be required in the enforcement of this Agreement and the decisions of the New York Freight Bureau, and the failure of any party hereto either on their own behalf or the aforementioned additional parties shall constitute a violation of this agreement.

(f) Upon the completion of such investigations, the Chairman/Secretary shall lay before the membership his written report thereon, and such report shall include all relevant particulars thereto other than the identity of the party hereto or other person from whom the report originated.

(g) Such written reports shall constitute and are hereafter referred to as complaints. A copy thereof shall be furnished to the accused party not less than 20 days prior to the time that the matter is submitted to a vote of the parties as provided in subparagraph (h), of the paragraph.

(h) All such complaints shall be submitted to a vote of the parties hereto other than the party charged with the violation, after giving the party charged in the respective complaint an opportunity to adduce evidence in its defense. If the parties hereto, other than the party so charged shall, by a three-fourths affirmative vote of all parties entitled to vote, determine that the violation or violations alleged in the complaint have been proved, the party charged with the violation or violations shall be subject to liquidated damages as hereinafter provided in respect of each and every violation so proved; but if the party accused is dissatisfied with the decision reached as aforesaid, such party shall have the right to appeal, it being incumbent upon the accused party to make any such appeal within 10 days following the aforementioned determination. In which event the question of violation shall be left to the determination of a majority of three arbitrators, one arbitrator to be nominated by the accused, the second by a three-fourth affirmative vote of the remaining parties, and the third arbitrator to be nominated by the arbitrators so chosen, it being incumbent upon the parties concerned to nominate the first and second arbitrators within 30 days of the appeal being made by the accused party. In the event the accused party does not appoint an arbitrator within the said 30 days, the accused party will thereby forfeit its right to appeal. Such arbitrations shall take place in Hong Kong and any decision so arrived at shall be binding and final, and the parties hereto agree that such decision shall be equivalent to a legal judgment given by the highest court of law, and the parties to this agreement hereby waive and abandon every right to take any legal action to obtain a review or reversal of the decision so made.

However, it shall not be a breach of this agreement for any line to refer any matter arbitrated to the Federal Maritime Commission for a decision as to whether or not the matter arbitrated was within the jurisdiction of the arbitrators in the terms of this agreement; or, as to whether or not any decision rendered constitutes a modification of this agreement.

(i) Inasmuch as it will be impossible to ascertain or measure the amount of damages which the parties hereto will suffer by reason of the breach of this

Agreement, the parties hereto expressly agree that the damages suffered thereby by each party hereto shall be assessed on the basis of a three-fourths majority vote as above provided but that, in any event, such damages shall be subject to the undernoted maxima, exclusive of any arbitration costs which may accrue to the accused party:

(i) First offence—up to a maximum of US$10,000.00 or its equivalent in H.K. currency.

(ii) Second offence—up to a maximum of US$15,000.00 or its equivalent in H.K. currency.

(iii) Third offence—up to a maximum of US$20,000.00 or its equivalent in H.K. currency.

(iv) Fourth and any subsequent offences—up to a maximum of US$30,000.00 or its equivalent in H.K. currency.

(j) The Chairman/Secretary shall notify in writing the party against whom a violation shall have been found of the decision against it and the amount of liquidated damages which shall have been assessed against it. In the absence of any appeal by such notified party in accordance with the provisions of Article 14(h) hereof, the party thus notified shall pay the amount of such liquidated damages within a period of ten (10) days. In the event that it shall fail or refuse to make such payment within said period, the other parties may have resort to the performance bond which such party shall have deposited in accordance with the provisions contained in Article 13 of this Agreement; and each party hereto hereby authorizes the Chairman/Secretary, in case that a decision shall be made against it, to the effect that it has violated this Agreement, and in case liquidated damages are assessed against it and it shall fail to pay said damages within the period of ten (10) days after such notice has been given to it by the Chairman/Secretary, to pay the amount of said liquidated damages to the other parties hereto from the cash which it shall have deposited or, if its performance bond shall be by way of a confirmed irrevocable letter of credit, to draw upon the letter of credit and pay the amount of such liquidated damages to the other parties from the proceeds thereof, such payments to the other parties being on a pro-rata basis. The costs incurred in arbitration proceedings shall be dealt with in the award.

(k) It is hereby agreed and declared by and between the parties hereto that each party hereto shall be fully responsible for the acts and omissions of its parent companies, agents, sub-agents, affiliates, subsidiaries, freight brokers, compradores and/or Chinese Freight Agents, and an act done or omitted to be done by an agent, sub-agent, affiliate, subsidiary, freight broker, compradore and/or Chinese Freight Agent, which would constitute a violation of this Agreement, if done or omitted to be done by the party itself, shall for all purposes hereof, constitute a violation of this Agreement by such party, for which such party shall be liable for damages in the same amount as if it had done or omitted the said act.

(l) In the event of the termination of this Agreement or the expulsion or voluntary withdrawal of any of the parties hereto, the performance bond deposited by the parties concerned shall be returned to them, together with accrued interest, but only after any complaints which may be pending against the parties concerned at the time of its expulsion or withdrawal or at the time of the termination of this Agreement, as the case may be, have been satisfied.

15. *Admission to Membership.*—(a) Any common carrier by water which has been regularly engaged as a common carrier in the trade covered by this Agreement, or who furnishes evidence of ability and intention in good faith to institute and maintain such a common carrier service between ports within the scope of this Agreement, and who evidences an ability and intention in good faith to abide by all the terms and conditions of this Agreement, may hereafter become a party to the New York Freight Bureau, promptly following written application to the New York Freight Bureau for membership, such application to set forth evidence demonstrating compliance with the foregoing requirements, by affixing its signature hereto, or to a counterpart hereof, and by payment to the New York Freight Bureau of any outstanding financial obligation arising from prior membership of the New York Freight Bureau, and by posting with the New York Freight Bureau security for faithful performance of its obligations as provided in Article 13 hereof.

(b) Every application for membership shall be acted upon promptly.

(c) No carrier which has complied with the conditions set forth in paragraph (a) of this Article, shall be denied admission or readmission to membership.

(d) Prompt notice of admission to membership shall be furnished to the Federal Maritime Commission and no admission shall be effective prior to the postmark date of such notice.

(e) Advice of any denial of admission to membership, together with a statement of the reasons therefor, shall be furnished promptly to the Federal Maritime Commission.

16. *Withdrawal and Expulsion of Membership.*—(a) Any party may withdraw from the Conference without penalty by giving at least sixty (60) days' written notice of intention to withdraw to the Conference; *Provided, however*, That action taken by the Conference to compel the payment of outstanding financial obligations by the resigning Member shall not be construed as a penalty for withdrawal.

(b) Notice of withdrawal of any party shall be furnished promptly to the Federal Maritime Commission.

(c) No party may be expelled against its will from this Conference except for failure to maintain a common carrier service between the ports within the scope of this Agreement, or for failure to abide by all the terms and conditions of this Agreement.

(d) No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished to the expelled Member and a copy of such notification submitted to the Federal Maritime Commission.

299-843 O-68—13

APPENDIX B

New York Freight Bureau, Hong Kong
D. Parker, Chairman/Secretary
P & O Building
Des Voeux Road Central
Hong Kong, B.C.C.
American President Lines, Ltd.
29 Broadway
New York, New York 10006
Barber-Wilhelmsen Line—Joint Service
c/o Barber Steamship Line, Inc.
17 Battery Place
New York, New York 10004
Blue Sea Line
c/o Funch, Edye & Co.
25 Broadway
New York, New York 10004
Central Gulf Steamship Corporation
One Whitehall Street
New York, New York 10004
Japan Line, Ltd.
c/o A. L. Burbank & Co., Ltd.
120 Wall Street
New York, New York 10005
Kawasaki Kisen Kaisha, Ltd.
c/o Kerr Steamship Company
51 Broad Street
New York, New York 10004
Lykes Bros. Steamship Co., Inc.
17 Battery Place
New York, New York 10004
Marchessini Lines
c/o P. D. Marchessini & Co., Inc.
26 Broadway
New York, New York 10004
Maritime Company of the Philippines, Inc.
c/o Furness, Withy & Co., Ltd.
34 Whitehall Street
New York, New York 10004
Mitsui O.S.K. Lines, Ltd.
17 Battery Place
New York, New York 10004
Moller-Maersk Lines, A.P.
c/o Moller Steamship Company, Inc.
67 Broad Street
New York, New York 10004
Nedlloyd Lines, Inc.
25 Broadway
New York, New York 10004
Nippon Yusen Kaisha, Ltd.
25 Broadway
New York, New York 10004
States Marine Lines—Joint Service
c/o States Marine-Isthmian Agency, Inc.
90 Broad Street
New York, New York 10004
United Philippine Lines, Inc.
c/o Stockard Shipping Co., Inc.
17 Battery Place
New York, New York 10004
United States Lines Company (American Pioneer Line)
One Broadway
New York, New York 10004
Yamashita-Shinnihon Steamship Co., Ltd.
c/o Texas Transport & Terminal Co., Inc.
52 Broadway
New York, New York 10004

IN THE MATTER OF THE MODIFICATION OF AGREEMENT 5700–4

A conference self-policing system must provide specific and realistic guarantees against arbitrary and injurious action.

Where a self-policing system allows the conference itself to sit in judgment upon the accused member both the question of violation of the conference agreement as well as the penalty to be imposed must be subject to review upon arbitration.

Charles F. Warren and *John P. Meade* for New York Freight Bureau (Hong Kong).

George F. Galland and *Amy Scupi* for States Marine Lines.

Donald J. Brunner and *Samuel B. Nemirow*, Hearing Counsel.

SUPPLEMENTAL REPORT

Decided August 11, 1967

BY THE COMMISSION: (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, *Commissioners.*)*

In our order served May 19, 1967, we reopened this proceeding for the limited purpose of reconsideration of the amendments to Agreement 5700–4 contained in our report served February 1, 1967, in the light of the guidelines set down by the U.S. Court of Appeals for the District of Columbia Circuit in *States Marine Lines and Global Bulk Corp.* v. *F.M.C. et al.*, 376 F. 2d 230, Dec'd. March 8, 1967.

The parties were invited to file memoranda and (if appropriate) affidavits of fact.

In response to this invitation, memoranda were filed by Hearing Counsel, the New York Freight Bureau (Hong Kong) and States Marine Lines. No affidavits purporting to raise factual issues were filed.

Hearing Counsel's position is that the self-policing provisions contained in our report served February 1, 1967, conform fully with the standards prescribed by the Court of Appeals. Therefore, they recommend no further modifications.

States Marine Lines [1] agrees with Hearing Counsel with one exception, and that is the "apparent lack of authority of the arbitrators to consider the equity of the fine imposed". This deficiency could be

*Commissioner Fanseen did not participate.

[1] In so doing, States Marine Lines does not abandon or waive its earlier position that the Commission may not directly modify the terms of an agreement.

remedied, according to States Marine, by adding appropriate language to Article 13(h) of the modified agreement.

The New York Freight Bureau (Hong Kong) filed a memorandum containing a number of suggested modifications. These changes had previously been submitted to the conference membership as a proposed amendment to the basic conference agreement. Two members (States Marine Lines being one of them) voted against the proposal and it was therefore defeated.[2] These amendments form the basis of the Bureau's suggested changes to bring Agreement 5700–4 in conformity with the court's guidelines.

Unlike the single change suggested by States Marine Lines, the Bureau's proposals would go far beyond merely bringing Agreement 5700–4 into compliance with the guidelines of the court. Among other things they would completely change the arbitration procedure, severely limiting the scope of review by the arbitrator to a determination of whether the membership "could have reasonably reached the result set forth in its decision applying the standard . . . (of) common sense". The arbitrator would be forbidden "to make any decision on the level of assessment" (of penalties). In addition, the Bureau proposes a great number of so-called "clarifying, housekeeping changes".

In our order served May 19, 1967, we reopened this proceeding for the limited purpose of considering whether the amendments to Agreement 5700–4 prescribed in our report of February 1, 1967, comply with the guidelines of the U.S. Court of Appeals in the *States Marine Lines and Global Bulk Transport* case, *supra*. The memoranda of the parties were to be limited to that question. The Bureau's memorandum goes far beyond the limited scope of this issue.

It seems that the major concern of the Court of Appeals in the *Global Bulk* case, *supra*, was that "this kind of self-regulatory process must provide specific, realistic guarantees against arbitrary and injurious action", 376 F. 2d at 236.

Arbitrary and injurious action can flow equally from an unsupported finding of guilt or an unconscionably large penalty. We believe that both the finding of violation as well as the level of the penalty should be included in the arbitrator's scope of review. While there is language in the court's opinion which tends to support the view that "an independent check of the disclosed evidence" is sufficient, it is our conclusion that a fair reading of the court's opinion as a whole requires the result we have reached.

[2] The New York Freight Bureau (Hong Kong) requires unanimity under its voting procedure in Agreement 5700–4 whenever a change in the basic conference agreement is contemplated.

There are important differences between the self-policing systems in the *Global Bulk* case, *supra*, and the instant case. In *Global Bulk*, the tribunal in the first instance is a "neutral body", while in the system under consideration here the conference itself sits in judgment upon the accused member. Since the conference members are clearly interested parties, it is essential to provide a safeguard against arbitrary action both as to a finding that a member has violated the conference agreement as well as the penalty to be imposed.

Conclusion

We conclude upon reconsideration that the modifications to the self-policing system prescribed in our report and order served on February 1, 1967, should be further modified by adding the words "and the amount of the fine, subject to the maxima set forth in Article 13(i)" after the word "violation" contained in the third sentence of Article 13(h).

An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–52

IN THE MATTER OF THE MODIFICATION OF AGREEMENT 5700–4

ORDER UPON RECONSIDERATION

This proceeding having been reopened by the Commission on its own motion, the Commission having received memoranda of law and having pursuant thereto issued on this date a supplemental report in this proceeding which, in addition to the report and order served on February 1, 1967, is hereby referred to and incorporated herein by reference,

Therefore, it is ordered, That Agreement No. 5700–4 be and the same hereby is further modified by adding the words "and the amount of the fine, subject to the maxima set forth in Article 13(i)" after the word "violation" contained in the third sentence of Article 13(h) as set forth in the Appendix A of the report served February 1, 1967.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65-17

TRANSSHIPMENT AND APPORTIONMENT AGREEMENTS FROM INDONESIAN PORTS TO U.S. ATLANTIC AND GULF PORTS

Decided October 13, 1966

The entire movement of cargo on a through bill of lading transported from an Indonesian outport by originating carriers (First Carriers) and transshipped at an Indonesian base port or at Singapore/Penang and on-carried to a U.S. port by JNYRA members (Second Carriers) found to constitute the transportation by water of property between the United States and a foreign country in the import trade within the intent and meaning of the Shipping Act, sec. 1.

First Carriers which engage in the movement of through cargo from Indonesian outports to base ports whether in Indonesia or at Singapore/Penang held to be common carriers by water in foreign commerce within the intent and meaning of sec. 1 of the Shipping Act where such movement forms a part of a continuous line over which through traffic flows from a foreign country to the United States.

An exclusive transshipment agreement between originating or First Carriers and Second Carriers whereby a continuous line for the movement of through cargo from a foreign country to the United States is formed held to constitute an agreement which must be filed under sec. 15 of the Shipping Act.

Exclusive dealing provisions in a transshipment agreement found to be contrary to the public interest where the effect of such provisions is or may be to eliminate the possibility of competition by carriers not a party to the agreement in the trade involved.

Provisions of section 15 agreements relating to transshipment of Indonesian cargo at Singapore/Penang where such transshipment has ceased due to strained political relations held not to be contrary to the public interest where there is a reasonable probability of resumption of normal relations and where the cessation was due to a sovereign act.

The proposed transshipment agreement, No. 9222, if modified, found not to violate any of the standards of section 15 and it is therefore approved.

Agreements among Second Carriers to enter into a transshipment agreement found not to be subject to section 15 of the act.

The proposed agreement, No. 9202, providing for the apportionment of cargo originating at Indonesian outports and transshipped at Singapore/Penang found not to violate the standards of section 15 and it is therefore approved.

Elkan Turk, Jr. for respondents designated as "Second Carriers".

Leonard G. James and *F. Conger Fawcett* for intervenor, Holland-America Line.

Donald J. Brunner and *Roger A. McShea III*, Hearing Counsel.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman;* James V. Day, George H. Hearn, *Commissioners*)

This proceeding involves two agreements which have been filed for approval under section 15 of the Shipping Act, 1916.

Agreement No. 9222 calls for an exclusive transshipment arrangement between four carriers which served the coastwise and interisland trade in Indonesia (First Carriers) and the members of the Java/New York Rate Agreement [1] (Second Carriers).

Agreement No. 9202 provides for the apportionment among the Second Carriers of some of the transshipment cargo carried under above arrangement.

DESCRIPTION OF THE INDONESIAN TRANSSHIPMENT TRADE

Indonesia is a vast island nation stretching from New Guinea on the East beyond the Malay peninsula on the West. It is composed of hundreds of islands including Sumatra, Java and the Celebes. Indonesia was formerly a part of the Netherlands until it gained its independence in 1949. Among Indonesia's major export commodities are: rubber, coffee, tea, spices and tin.

Because of its geography, Indonesia relies heavily upon transportation by water, both in its foreign and interisland/coastwise trades. Many of the commodities which Indonesia exports originate in places which are remote from good harbor facilities. As a result, a large portion of the goods which move into Indonesia's export trade can be transported initially only by shallow draft vessels which can be ac-

[1] Agreement No. 90.

commodated at the small ports serving the areas where the cargo originates. Such ports are called "outports". The harbor or river depth is insufficient for the draft of ocean-going vessels and in most cases dock and warehouse facilities are also inadequate. Up-river outports usually have no harbor facilities and cargo is lightered directly to the vessel. These shallow draft ships which originally lift cargo at the Indonesian outports are referred to in Agreement No. 9222 as "First Carriers".

The First Carriers transport the cargo from the outport to a transshipment port or "base port". These ports have harbors sufficient to accommodate ocean-going vessels as well as good storage and terminal facilities. Among the base ports located in Indonesia are Surabaja, Tanjang Priok and Belawan. A great volume of transshipment was formerly done at ports of Singapore and Penang.

Upon arrival at the base port, the cargo is normally lightered from the First Carrier vessel directly onto the slings of an ocean freighter which, in turn, completes the transportation of the cargo to a port located in the United States. The lines operating these ocean freighters are the members of the Java/New York Rate Agreement and are referred to in Agreement No. 9222 as "Second Carriers".

Because of their geographic convenience and excellent harbor facilities, the ports of Singapore and Penang have traditionally been the base ports for much of the Indonesian export cargo destined for the United States. However, in September 1963, Indonesia severed all trade relations with the Federation of Malaysia, which then contained the ports of Singapore and Penang. Since that time, there have been no transshipments of Indonesian cargo at either Singapore or Penang. Instead, Indonesian through cargo has been transshipped exclusively at base ports located in Indonesia. In the latter part of 1965, Singapore broke away from Malaysia and became independent.

Since the date of the initial decision on August 11, 1966, Indonesia and Malaysia entered into an agreement, of which we take official notice, formally ending the period of "confrontation" between the two nations. Moreover, we are advised that Singapore is now permitting Indonesian vessels to use some of its harbor facilities.

Transshipment cargo is shipped on a through bill of lading issued by the First Carrier and covers the transportation from the outport beyond the transshipment port to the ultimate destination in the United States. Through cargo is considered by all the nations involved, the carriers, the purchasers and the sellers as a direct export to the United States. Indonesian regulations governing export li-

censes, exchange control and customs require that the foreign exchange and letter of credit covering the shipment emanate from the United States. The same requirements existed when Singapore or Penang were the transshipment ports. At Singapore, through cargo from Indonesia entered under a transshipment permit requiring no entry declaration or export formalities. Under the foregoing system, the merchandise is considered to move directly to the United States and is never deemed to have entered into a third country.

Local cargo differs from transshipped or through cargo in that it originates in an outport of Indonesia and is destined either for another outport or a base port. At the base port, local cargo is usually processed or warehoused instead of being transferred to a Second Carrier. If it is shipped to a foreign destination, a new bill of lading is issued with the base port as the port of origin. When shipped to Singapore, local Indonesian cargo also required an export permit from the Indonesian Government. The exporter was required to obtain foreign exchange from Singapore and to export on a Singapore local bill of lading. If this cargo was shipped from Singapore, it had to be exported as local merchandise and foreign exchange was required to pay for it.

Up until 1960, the transshipment arrangements between the First Carriers and Second Carriers were handled on an individual letter of intent basis. Each member of the Java/New York Rate Agreement actively solicited the various First Carriers for transshipment cargo. This system was utilized prior to World War II and resumed after the war. By 1960, the members of JNYRA felt that it would be more orderly to enter into a formal agreement with the First Carriers as a group rather than continue on an individual letter of intent basis. After negotiations, a preliminary agreement was executed and filed with the Commission in March 1962, as FMC Agreement No. 8916.

In August 1963, Agreement No. 9222 was filed with the Commission for approval under section 15 of the Act replacing No. 8916, *supra.*[2] This agreement provides that the First Carriers will present all the cargoes, which they lift at Indonesian outports for transshipment to U.S. Atlantic and Gulf ports exclusively to members of JNYRA. The members of JNYRA in turn agree to use the services of the First Carriers exclusively. The individual First Carriers which executed Agreement No. 9222 were P. N. "Pelajaran Nasional Indonesia" (Pelni), Straits Steamship Co., Ltd., Kie Hock Shipping Co., Ltd., and Guan Guan, Ltd. Pelni is owned by Indonesia and maintains a fleet of about 90 vessels. At the time of the execution of the agreement,

[2] Action on Agreement No. 8916 was closed before approval in July 1963.

these carriers transported all of the transshipment cargo from the Indonesian outports.

After September 1963, when Indonesia proclaimed its "confrontation" policy with regard to Malaysia, the transshipment of Indonesian through cargo at Singapore and Penang ceased. Trade between the United States and Indonesia continued but through cargo was transshipped at Indonesian base ports only. As a direct result of this change, First Carriers, Straits Steamship, Kie Hock and Guan Guan left the Indonesia trade. They either sold their ships or employed them in other trades. By the time of the hearing, Pelni remained as the only First Carrier serving the Indonesia trade.

Second Carriers also decided to enter into Agreement No. 9202 as a means of distributing the through cargo equitably among the JNYRA members. This agreement deals with trade between the U.S. Atlantic ports and Indonesia, excluding U.S. Gulf ports; and affects only through cargo which is transshipped at Singapore and Penang. The apportionment is made among the Second Carriers based on their respective sailing frequencies.

ISSUES INVOLVED

In our order of investigation dated May 17, 1965, we specified the following eight issues for determination:

1. Whether First Carriers, parties to Agreement No. 9222, are common carriers by water in the foreign commerce of the United States as defined in section 1 of the Shipping Act, 1916.
2. Whether Agreement No. 9222 is subject to the requirements of section 15 of the Shipping Act, 1916.
3. Whether Agreement No. 9222, if subject to section 15, should be approved, disapproved, or modified pursuant to section 15.
4. Whether the arrangement between Second Carriers to enter into Agreement No. 9222 is an agreement subject to the requirements of section 15.
5. Whether the arrangement between Second Carriers to enter into Agreement No. 9222, if subject to section 15 should be approved, disapproved, or modified pursuant to section 15.
6. Whether Agreement No. 9202 should be approved, disapproved, or modified pursuant to section 15.
7. Whether Agreements No. 9222 and 9202 represent the complete understanding between the parties.
8. Whether Agreement No. 9222, Agreement No. 9202, or the arrangement between the Second Carriers to enter into Agreement No.

9222 have been carried out in whole or part without approval of the Commission as required by section 15.

THE INITIAL DECISION

The Hearing Examiner, Benjamin A. Theeman, did not pass on whether or not the First Carriers are common carriers by water in the foreign commerce of the United States within the meaning of section 1 of the Shipping Act on the grounds that such a decision was neither "essential nor necessary" but held that Agreement No. 9222 was subject to the requirements of section 15 for other reasons.[3]

The Examiner reasoned that since Agreement No. 9222 is an agreement signed by each of the Second Carriers individually (all of whom are clearly subject to the act), it is subject to the requirements of section 15 of the Shipping Act, 1916. The fact that other persons (who may or may not be subject to the act) also signed is of no consequence.

In considering whether Agreement No. 9222 should be approved or not, the Examiner pointed out that the only protest was filed by Orient Overseas Line which is not engaged in the Indonesian trade. This protest was rejected and the Examiner approved the agreement except as to those portions dealing with transshipment at Singapore and Penang. These were disapproved as being contrary to the public interest, since transshipment of Indonesian cargo at these ports had ceased.

The Examiner rejected the proposition advanced by Hearing Counsel that the "arrangement" entered into by the Second Carriers to conclude a transshipment agreement with the First Carriers was subject to section 15 on the grounds that the effects of such an arrangement were only potential and that further negotiations with the First Carriers were necessary before an agreement came into being.

The Examiner decided that Agreement No. 9202 should be disapproved *in toto* since it deals only with transshipment at Singapore and Penang and no Indonesian cargo is transshipped at these ports at the present time. However, he found that the agreement was otherwise approvable.

Finally, he concluded that Agreements No. 9222 and 9202 represented the complete understanding of the parties and that there was insufficient evidence to support a finding that either agreement was carried out in whole or in part without Commission approval.

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[3] In a "discussion" found in the initial decision, however, the Examiner indicates that he would hold that the First Carriers are common carriers by water within the meaning of section 1 if a decision on this issue were found to be necessary.

EXCEPTIONS OF THE PARTIES

The exceptions of the parties to the initial decision may be summarized as follows:

Intervenor: Intervenor, Holland-America Line, excepts to the Examiner's failure and refusal to rule on the issue of whether the First Carriers are common carriers by water in the foreign commerce of the United States within the intent and meaning of section 1. Its position is that the Commission has no jurisdiction over the First Carriers because they do not come within the meaning of section 1 of the act.

Intervenor also contends that the Examiner erred as a matter of law in concluding that Agreement No. 9222 is subject to section 15.

Second Carriers: Respondents, Second Carriers except only to the Examiner's disapproval of Agreement No. 9202 and those portions of Agreement No. 9222 which deal with transshipment at Singapore and Penang. They contend that there is nothing to indicate that these agreements are not in the public interest and, moreover, that there is a likelihood that the transshipment of Indonesian cargo at Singapore and Penang will resume in the near future.

Hearing Counsel: Hearing Counsel except to the Examiner's failure and refusal to make an affirmative ruling on the question of whether First Carriers come within section 1 of the act and argue that this ruling should be in the affirmative on the basis of *Restrictions on Transshipments at Canal Zone*, 2 U.S.M.C. 675 (1943) which holds that the Commission has jurisdiction over the entire through movement. However, Hearing Counsel oppose "actual assertion" of this jurisdiction.

It is urged rather that the Commission should assert its jurisdiction over the "arrangement" and not the agreement itself, relying on *Anglo-Canadian Shipping Co.* v. *U.S.*, 264 F. 2d 405 (9th Cir. 1959) and *Isbrandtsen* v. *U.S.*, 211 F. 2d 51 (D.C. Cir., 1954) in support of this position.

Hearing Counsel oppose the Examiner's approval of Agreement No. 9222 (under any theory of jurisdiction) on the grounds that it effectively precludes independent competition with the parties to the agreement. They reach the same conclusion with respect to Agreement No. 9202 because of its predatory effect on independents.

Finally, Hearing Counsel urge that since Agreement No. 9222 is a mere formalization of a practice that has long existed through the device of letters of intent between individual parties to the agreements, the record shows that parties have implemented a section 15-type arrangement without prior Commission approval.

DISCUSSION

1. *First Carriers Are Common Carriers by Water in the Foreign Commerce of the United States.*

We believe that it is both essential and necessary in this case to determine whether the First Carriers satisfy the definition of "common carrier by water in the foreign commerce of the United States". In this respect, we differ somewhat with the Examiner. However, we agree with the conclusion contained in his "discussion" of this question that these:

> . . . activities may be interpreted to make Pelni a common carrier within the meaning of the language in section 1 reading "engaged in transportation by water of . . . property between the United States . . . and a foreign country in the import or export trade". This finding is supported by long standing Commission decisions.

In *Restrictions on Transshipment at Canal Zone*, 2 U.S.M.C. 675 (1943), the United States Maritime Commission held that:

> Section 15 applies to every "common carrier by water". This term as defined in section 1 of the Shipping Act, 1916, includes a "common carrier by water in foreign commerce," which is defined as "a common carrier . . . engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade . . ." The transportation in question does not end at Cristobal. It is through transportation from Colombia and Ecuador to United States ports on the Atlantic or Gulf. When the lines operating up to the Canal enter into the carriage of commerce of the United States by agreeing to receive the goods by virtue of through bills of lading, and to participate in through rates and charges, they thereby become part of a continuous line, not made by consolidation with the on-carrying lines, but made by an arrangement for the continuous carriage or shipment from a foreign country to the United States. *Cincinnati, N.O. & T.P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S. 184, 192. Clearly, therefore, the former, being part of the continuous line over which the through traffic moves, are "engaged in the transportation by water of . . . property between the United States . . . and a foreign country." *Norfolk & Western R.R. Co.* v. *Pennsylvania*, 136 U.S. 114, 119. Indeed, they are no less a factor in such transportation than the on-carrying lines.

We do not rely upon any language contained in the Interstate Commerce Act to support our view that the First Carriers come within the definition of a common carrier by water in the foreign commerce of the United States. The reason for the inclusion of the language concerning continuous carriage in the Interstate Commerce Act is, as intervenor correctly points out:

> . . . to deprive the individual states of jurisdiction over . . . transportation wholly intrastate wherever intrastate carriers participate in transportation between the states under an "arrangement for continuous carriage".

Absent this language, there might have been a question of dual jurisdiction by the states and the Federal Government.

Since the Shipping Act deals with the foreign commerce of the United States, this problem does not arise since the Constitution has always vested the plenary power over foreign commerce in the Federal Government.[4]

Under the plain language of the act and the decisions cited, there is no doubt that the First Carriers are "engaged in the transportation . . . of property between the United States and a foreign country". Where there exists a unitary contract of affreightment such as a through bill of lading by which two or more carriers or conferences of carriers hold themselves out to transport cargo from a specified foreign point to a point in the United States with transshipment at one or more intermediate points from one carrier to another, each of the carriers so involved is "engaged in" transporting cargo by water from a foreign country to the United States.

Intervenor contends that the First Carriers cannot be subject to the act because they are foreign and that it would be impossible to obtain *in personam* jurisdiction over them since they do not actually bring cargo to ports in the United States. But there is no need for us to do so in order to carry out our regulatory obligations under section 15 of the act. It is enough that the First Carriers satisfy the definition formulated by Congress, i.e. being engaged in the transportation by water of property between a foreign country and the United States, in order for such carriers to be subject to the act at least to the extent that they are so engaged.

Of critical importance is the fact that we are able to discharge our regulatory duties over those activities of legitimate interest to us without attempting to exercise personal jurisdiction upon a foreign entity. The only activities of the First Carriers with which we are concerned are their contracts, agreements or understandings of the type specified in section 15 with other carriers or persons subject to the act over whom we do have *in personam* jurisdiction.

2. Agreement No. 9222 is Subject to the Requirements of Section 15.

Having determined that the First Carriers come within the definition of common carrier by water in the foreign commerce of the United States, we turn to Agreement No. 9222 to see if it is the kind of agreement which must be filed for approval under section 15 of

[4] See *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 565 (1870) cited with approval in *Norfolk & Western R.R. Co.* v. *Pennsylvania, supra.*

the Shipping Act. We hold that it is subject to the requirements of section 15 for three reasons.

a. Agreement No. 9222 is an agreement between First Carriers and Second Carriers. Since both of these groups are subject to the act, any agreement among them meets the criteria of section 15 as to parties to the agreement;

b. Agreement No. 9222 is an agreement ". . . fixing or regulating transportation rates or fares . . . preventing or destroying competition . . . allotting ports . . . (and) providing for an exclusive, preferential, or cooperative working arrangement". It is manifestly the type of agreement which is contemplated by section 15; and

c. Since the Second Carriers actually serve ports located in the United States under Agreement No. 9222, effective, practical regulation of the agreement can be achieved without *in personam* jurisdiction over the First Carriers.

The Commission, in the exercise of its regulatory duties under section 15 of the Shipping Act, directs its attention more to the agreement—*a res*—and not so much to the parties to that agreement. As long as the parties satisfy the definition of common carriers by water engaged in the transportation of goods from a foreign country to the United States, we have jurisdiction over the agreement.

The Examiner was correct in concluding that we have jurisdiction over Agreement No. 9222. We have gone somewhat further than the Examiner in defining our reasons why this jurisdiction exists. We do this in order to prevent any misunderstanding on the part of the shipping industry and to insure that transshipment agreements concluded between individual carriers are also filed for approval under section 15.

Actually, there is nothing new about requiring the filing of transshipment agreements. In *Intercoastal Rates From Berkeley*, 1 U.S.S.B.B. 365, 367 (1935), the Board held that transshipment agreements must be filed under section 15. See also *Commonwealth of Massachusetts et al.* v. *Colombian SS Co. et al.*, 1 U.S.M.C. 711 (1938) and the *Canal Zone* case, *supra*. In *Common Carriers by Water*, 6 F.M.B. 245 (1961), the Federal Maritime Board noted that, if respondents were held to be common carriers, a through transportation agreement would require section 15 approval.[5]

Under long established policy and consistent practice, the Commission and its predecessors have always required approval of trans-

[5] The case of *B. M. Arthur Lumber Co., Inc.* v. *American-Hawaiian SS Co.*, 2 U.S.M.C. 6 (1939) cited by Intervenor as contrary to *Canal Zone* is inapposite. The Shipping Act and the Intercoastal Shipping Act were not mutually exclusive. The shipment in question in that case was foreign commerce and, at the same time, intercoastal.

shipment agreements under section 15. The fact that in many instances the carrier or carriers on one side of the agreement do not touch United States territory is immaterial. There are more transshipment agreements on file and presently in operation, under section 15, than any other type of agreement and many of them involve arrangements where the carriers on one side never call at ports in the United States. This consistent administrative construction of the act is entitled to great weight. *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391 (1959).[6]

3. Agreement No. 9222, if Modified, is Approved.

In his initial decision, the Examiner found that Agreement No. 9222 was approvable under the criteria of section 15 except for those portions dealing with transshipment at Singapore and Penang. We reject these conclusions for the following reasons.

As we have noted above, there has been a decided relaxation of the tensions between Indonesia and Malaysia since the date of the initial decision and there is every reason to believe that normal trade relations will be resumed in the very near future. The same holds true for Singapore which is now independent. It would serve no useful purpose to disapprove those portions of the agreement dealing with transshipment at Singapore and Penang in these circumstances and would, on the contrary, place an unreasonable burden on the carriers involved to require them to wait until transshipment at these ports has again become an accomplished fact. This same reasoning applies to Agreement No. 9202 which the Examiner also disapproved for the same reasons (although finding it otherwise approvable).

Moreover, in Docket No. 66–14—Agreements No. 4188, No. 4189, No. 5080, No. 7550, No. 7650 and No. 7997, served August 17, 1966, we held that where a cessation of a trade is brought about by a sovereign act, this fact will not constitute grounds for modification or disapproval of an otherwise acceptable agreement involving that trade. We believe that this rationale is equally applicable here.

However, we do have a grave difficulty with another portion of Agreement No. 9222. These are the exclusive dealing requirements found in paragraphs 2a and 2b of the agreement which read as follows:

2a. Second carriers undertake not to accept cargo from nor close contracts with other Shipping Companies for the conveyance of through cargo to ports

[6] Intervenor argues that the inclusion of the phrase ". . . on its own route or any through route which has been established" in section 18(b) added in 1961 shows Congress' intent to exclude jurisdiction over such "through routes" in the original act. Such an inference is unwarranted. See *Federal Maritime Commission* v. *Ludlow Corporation,* (2nd Cir., decided August 29, 1966, slip opinion, p. 16).

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within the Java/New York Rate Agreement sphere without the written consent of First Carriers.

b. First Carrier undertakes not to close contracts for the conveyance of through cargo to ports within the Java/New York Rate Agreement sphere from ports in Indonesia with other Shipping Companies not members of the Rate Agreement, nor to deliver such through cargo to other Shipping Companies not members of the Rate Agreement, without the written consent of Second Carriers.

The limitation on Second Carriers expressed in paragraph 2a, *supra*, is meaningless. Pelni is a state-owned monopoly and no transshipment cargo is now available from any other First Carrier. There is nothing in the record to indicate that any other First Carriers will be permitted in the trade in the foreseeable future. Indeed, there were four First Carriers when Agreement No. 9222 was executed. Now there is only one.

Since Pelni is the only First Carrier in the trade, if it agrees to patronize the JNYRA Second Carriers exclusively, the possibility of any independent Second Carrier's entering the trade is utterly precluded. We believe that this provision goes far beyond the permissible limits of section 15, unduly prevents competition, and is therefore contrary to the public interest.

If we are to discharge our regulatory obligations under section 15, we must be especially wary of any agreement which places restraints upon third parties. The Supreme Court in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 491, 493 (1958) stated:

Freedom allowed conference members to agree upon terms of competition subject to Board approval is limited to freedom to agree upon terms regulating competition among themselves.

In the particular factual circumstances of this case, the exclusive dealing paragraph would achieve for the Second Carriers an absolute monopoly of an important segment of the foreign commerce of the United States. We would be derelict in our duties if we were to sanction such an arrangement by approving it under section 15.

As we said recently in our Report in Docket No. 873, "Investigation of Passenger Steamship Conferences Regarding Travel Agents," served July 20, 1966 (offset report pp. 9–10):

In determining whether to approve initially or to allow continued approval of an agreement under section 15 we are called upon to reconcile, as best we can, two statutory schemes embodying somewhat incompatible policies of our country—the antitrust laws, designed to foster free and open competition and the Shipping Act which permits concerted anticompetitive activity which in virtually every instance, if not unlawful under the antitrust laws, is repugnant to the basic philosophy behind them.

* * * * * * *

Thus, before we legalize conduct under section 15 which might otherwise be unlawful under the antitrust laws, our duty to protect the public interest requires that we ". . . 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." *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 57 (C.A.D.C. 1954) ; cert. denied *sub nom. Japan-Atlantic & Gulf Conf.* v. *U.S.*, 347 U.S. 990.

In a companion case also decided this date, *Transshipment and Through Billing Arrangement Between East Coast Ports of South Thailand and U.S. Ports*, Docket No. 65–19, we approved a similar exclusive dealing provision between the First and Second Carriers. The critical difference between the two cases lies in the fact that in the *Thailand* case *supra*, there are a number of other First Carriers serving the trade which may be utilized by any independent Second Carrier which seeks to compete with the New York Lines Agency members. In the instant case, there are no other First Carriers.

Even though we approved the exclusive dealing provisions in the *Thailand* case, the language of the Examiner (whose initial decision we have adopted) is extremely guarded:

The exclusive arrangement goes far beyond the elimination of intraconference competition, usually accomplished by section 15 agreements, and attempts to restrict the competition of independent carriers. Without surveillance under section 15, such predatory devices are obviously capable of being discriminatory, of detriment to our foreign commerce, and contrary to the public interest.

The fact that no independent competitors of JNYRA members appeared to protest the approval of Agreement No. 9222 is not controlling. Indeed, if JNYRA now enjoys a *de facto* monopoly of the transshipment cargo originating in Indonesia, there is no need for an exclusive arrangement clause in their contract with Pelni. But the inclusion of such a clause leads inescapably to the conclusion that the JNYRA members are concerned that some independent competition may be inaugurated. We find, therefore, that there is no present need for this provision in Agreement No. 9222 and that its only purpose is to foreclose completely the possibility of any independent competitor's ever entering this trade. To approve such a provision would be clearly contrary to the public interest. At best, the provision is meaningless; at worst it would constitute our sanction of an absolute monopoly in an important segment of a trade in the foreign commerce of the United States.

We recognized that conditions may change and that other First Carriers may one day again compete with Pelni for the transportation of transshipment cargo destined for the United States from Indonesian outports to transshipment ports. In that case, if JNYRA should

desire to enter into an exclusive arrangement with one or the other of such competing First Carriers, we would be willing to reexamine our position. The principle which must control is that we will not permit any greater invasion of the antitrust laws than is necessary to serve the public interest with due recognition of the fact the shipping industry world wide is regulated by means of conference arrangements.

4. The Arrangement Among Second Carriers to Enter Into Agreement No. 9222 is Not Subject to the Requirements of Section 15.

In this case as well as in Docket 65–19, *supra*, we specified in our order of investigation the question of whether the "arrangement between Second Carriers to enter into Agreement No. 9222 is an agreement subject to the requirements of section 15" and if so, whether it should be approved.

Both Examiners concluded, and we agree, that the "arrangement" is in the nature of an agreement to agree, a mere preliminary step which may lead to a section 15 agreement but which, in and of itself, does not constitute such an agreement. It is only when a final agreement has been concluded with the First Carriers that the requirements of section 15 come into play. The question of approving such arrangements under section 15, of course, becomes moot.

5. The Apportionment Agreement, No. 9202 is Approved.

We agree with the Examiner that the apportionment agreement, No. 9202 does not violate the standards of section 15 and should be approved. The Examiner disapproved the agreement solely because of the non-existence of transshipment of Indonesian cargo at Singapore and Penang. As we pointed out above, there is a strong probability that this trade will resume in the immediate future and that, in any event, we will not disapprove an agreement which cannot be implemented where the reason for this impediment is a sovereign act.[7]

We reject Hearing Counsel's contention that the agreement should be disapproved because of its predatory effects on independent competitors. This agreement is of a type which, by its very nature, operates almost entirely upon the agreeing parties. It can have little or no effect upon an independent competitor. This is in sharp contrast to the exclusivity portions of Agreement No. 9222 discussed above where the very reason for these provisions is to keep independent competitors out of the trade.

There has been an adequate showing on the record that Agreement

[7] Our Report in Docket No. 66–14 was served on August 17, 1966, and the treaty ending "confrontation" between Indonesia and Malaysia was dated August 11, 1966. Both events occurred long after the date of the Initial Decision.

No. 9202 will tend to eliminate wasteful practices and promote orderly continuity in the flow of cargo in this trade. It is therefore approved.

6. Other Issues.

None of the parties contends that the agreements filed for approval do not represent the complete understanding among the parties. There is no evidence in the record that it does not. We therefore conclude, as did the Examiner, that the agreements in question represent the complete understanding of the parties.

Similarly, there is insufficient evidence of record to warrant a conclusion that either of the agreements have been implemented in whole or in part prior to approval. The individual letters of intent by which transshipment arrangements were handled by the parties in the past were never introduced in evidence. Whether they might have constituted agreements requiring filing under section 15 is beyond the scope of this inquiry. It is clear that they did not call for concerted activity among the Second Carriers as do Agreements No. 9222 and 9202.

CONCLUSIONS

1. First Carriers, parties to Agreement No. 9222, are common carriers by water as defined in section 1 of the Shipping Act, 1916, because they are engaged in the transportation by water of property between the United States and a foreign country in the import trade;
2. Agreement No. 9222 is subject to the requirements of section 15 of the Shipping Act, 1916;
3. Agreement No. 9222, if modified as required herein, is approved pursuant to section 15;
4. The arrangement among Second Carriers to enter into Agreement No. 9222 is not subject to the requirements of section 15;
5. Agreement No. 9202 is approved pursuant to section 15;
6. Agreements No. 9222 and 9202 represent the complete understanding of the parties and neither agreement has been carried out in whole or in part prior to Commission approval as required by section 15.

An appropriate order will be entered.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65–17

TRANSSHIPMENT AND APPORTIONMENT AGREEMENTS FROM INDONESIAN PORTS TO U.S. ATLANTIC AND GULF PORTS

ORDER

The Federal Maritime Commission instituted the proceeding to determine whether Agreements No. 9222 and No. 9202 should be approved 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:

Therefore, it is ordered, That (1) Agreement No. 9222 be and the same hereby is approved pursuant to section 15 of the Shipping Act, 1916, on condition that it be modified by deleting in its entirety paragraph 2b; and (2) Agreement No. 9202 be and the same hereby is approved.

It is further ordered, That the approval herein ordered with respect to Agreement No. 9222 shall become effective at such time as the Federal Maritime Commission receives written notice that the parties have agreed to the foregoing modification except that such approval shall become null and void unless the agreement so modified is filed with the Commission not later than sixty (60) days from the date of service of this order.

By the Commission.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65-19

TRANSSHIPMENT AND THROUGH BILLING ARRANGEMENT BETWEEN EAST COAST PORTS OF SOUTH THAILAND AND UNITED STATES ATLANTIC AND GULF PORTS

Decided October 13, 1966

Elkan Turk, Jr., for respondent carriers designated "Second Carriers."

Leonard G. James and *F. Conger Fawcett* for Intervener Holland-America Line.

Donald J. Brunner and *Roger A. McShea III*, Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman;* James V. Day, George H. Hearn, *Commissioners*):

This is an investigation on our own motion to determine whether or not an exclusive transshipment arrangement between a group of originating or First Carriers, which operate exclusively between ports on the east coast of south Thailand and Singapore, and a group of Second or oncarriers, which operate from Singapore to United States Atlantic and Gulf ports, is subject to the filing requirements of section 15 of the Shipping Act, 1916, and if so, whether the agreement should be approved.

In his initial decision, Examiner E. Robert Seaver concluded (1) that the First Carriers are common carriers by water in the foreign commerce of the United States as defined in section 1 of the Shipping Act, 1916; (2) that a transshipment agreement between First and Second Carriers is subject to the requirements of section 15 of the Shipping Act, 1916; (3) that the agreement in question is not contrary to the public interest and will promote a more efficient and orderly shipment of rubber to the United States; (4) that the arrangement

among the Second Carriers to enter into a transshipment agreement is not subject to the requirements of section 15; (5) that Agreement No. 9311 represents the complete understanding of the parties; and (6) that Agreement No. 9311 has not been implemented in whole or in part without approval by the Commission.

We have considered the exceptions of the parties and find that they are essentially a reargument of issues which were fully briefed and treated by the Examiner in his initial decision. Upon careful examination of the record, we conclude that the Examiner's disposition of these issues was well founded and proper. See also Docket 65–17 FMC Reports 10 FMC 183 decided October 13, 1966.

Accordingly, we adopt the Examiner's initial decision as our own and make it a part hereof, and for the reasons stated therein, Agreement No. 9311 is hereby approved pursuant to our authority under section 15 of the Shipping Act, 1916, as amended.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65–19

TRANSSHIPMENT AND THROUGH BILLING ARRANGEMENT BETWEEN EAST COAST PORTS OF SOUTH THAILAND AND UNITED STATES ATLANTIC AND GULF PORTS

Agreement No. 9311 between two groups of carriers providing for transshipment of rubber at Singapore found to be subject to the requirements of section 15 of the Shipping Act, 1916.

The proposed transshipment agreement not found to violate any of the standards of section 15 and it is therefore approved.

Elkan Turk, Jr., for respondent carriers designated "Second Carriers."

Leonard G. James and *F. Conger Fawcett* for Intervener Holland-America Line (filed briefs but did not appear at hearing).

Donald J. Brunner and *Roger A. McShea III*, Hearing Counsel.

INITIAL DECISION OF E. ROBERT SEAVER, PRESIDING EXAMINER [1]

1. THE INVESTIGATION

Agreement No. 9311 was filed for Commission approval under section 15 [2] of the Shipping Act, 1916 (the Act). The agreement creates an exclusive arrangement between two groups of carriers for the carriage of cargo (rubber) on through bills of lading from ports on the east coast of south Thailand to ports on the Atlantic and gulf coasts of the United States with transshipment at the port of Singapore. The two parties to the agreement are described therein as (1) the "First Carriers," [3] the steamship lines that bring the rubber to the roadstead at Singapore, and (2) the "Second Carriers," [4] those that transport the rubber on to the United States.

[1] This decision was adopted by the Commission Oct. 13, 1966.

[2] Sec. 15 is set out in appendix A, attached.

[3] These are Straits Steamship Co., Ltd. (Straits), N. V. Koninklijke Patketvaart-Maatschappij (N. V. K.), and Heap Eng Moh Steamship Co., Ltd.

[4] These are the 9 member steamship lines of New York Lines Agency, discussed later.

The Commission instituted this proceeding under the authority of sections 15 and 22 of the Act to determine whether the proposed agreement should be approved, disapproved, or modified under section 15. In its Order of Investigation the Commission also required investigation of the questions as to whether First Carriers, the agreement itself, or the arrangement among Second Carriers to enter into it are subject to section 15. The questions to be investigated are set forth in the following language quoted from the Order:

1. Whether First Carriers, parties to Agreement No. 9311, are common carriers by water in the foreign commerce of the United States as defined in section 1 of the Shipping Act, 1916;
2. Whether Agreement No. 9311 is subject to the requirements of section 15 of the Shipping Act, 1916;
3. Whether Agreement No. 9311, if subject to section 15, should be approved, disapproved, or modified pursuant to section 15;
4. Whether the arrangement between Second Carriers to enter into Agreement No. 9311 is an agreement subject to the requirements of section 15;
5. Whether the arrangement between Second Carriers to enter into Agreement No. 9311, if subject to section 15, should be approved, disapproved, or modified pursuant to section 15;
6. Whether Agreement No. 9311 represents the complete understanding between the parties; and
7. Whether Agreement No. 9311 or the arrangement between the Second Carriers to enter into Agreement No. 9311 have been carried out in whole or part without approval of the Commission as required by section 15.

Second Carriers appeared at the hearing, represented collectively by counsel, presented evidence, and filed a brief in support of approval of the proposed agreement.[5] Hearing Counsel participated in the proceeding and urge, in their brief, that while First Carriers are not necessarily subject to section 15, section 15 approval is required. They take the position that the standards of section 15 will not be violated and that approval should therefore be granted. Intervener Holland-America Line came into the proceeding because they participate in transshipment arrangements in various trades and state that they have an interest in the outcome. They did not appear at the hearing, but counsel filed briefs urging that section 15 approval is not required.

The disposition of these issues calls for a somewhat detailed con-

[5] Second Carriers take the position that the agreement is not subject to sec. 15 but state that if the Commission determines that sec. 15 approval is required the agreement must be approved because it has not been shown that the agreement would violate the standards of sec. 15.

sideration of the facts surrounding the cargo, the shippers, and the carriers involved in the trade that is the subject of Agreement No. 9311. In order to provide the necessary background of the proposed agreement, the following findings have been extended beyond those facts that would be considered essential under a strict application of the rules of evidence.

2. The Facts

During the season of the northeast monsoon, which extends from November through March, considerable difficulty is experienced in attempting to load cargo on large vessels at the ports on the east coast of south Thailand (Songkla, Patani, and Narahdivas). At all times the loading of large vessels at these ports is somewhat inefficient because there are no docks with berths for loading. Large ships stand off the shore several miles, at anchor, where they are loaded from lighters. Rubber moves from these ports in about the same volume the year around.

Crude rubber is exported from these ports to Japan, Europe, and the United States. Today, substantially all of the rubber destined for the United States moves on the respective vessels of both groups of respondents. The lines which will make up the First Carrier group (under Agreement 9311) transport the rubber to Singapore.[6] There it is discharged into lighters and reloaded onto vessels of one of the Second Carriers for carriage to Atlantic and gulf ports. The cargo is not landed at Singapore. It is intended to and it does move from south Thailand to the United States in continuous carriage in a direct, through movement. The carriers who make up the First Carrier group, as well as the Second Carriers, are common carriers by water.

Several nonconference lines operate vessels inbound to the United States from Singapore who are ready and willing to serve the rubber exporters. The three originating carriers are faced with even greater potential competition because there are many other carriers serving routes that include both Singapore and the ports on the east coast of south Thailand. Still others ply between Bangkok and Singapore. Any of these could easily serve the ports on the east coast of south Thailand because these ports are on nearly a direct line between Bangkok and Singapore. The success of the three First Carrier lines over their competition in the rubber trade to the United States apparently results from the fact that they actively solicit the cargo from shippers and also because the conference carriers presently patronize only these three lines for the first leg of the journey. The

[6] Singapore, today, is an independent, sovereign nation.

American purchaser bids on the rubber on a cost-and-freight basis, but he pays the freight charges on delivery. The letter of credit is therefore made out for the f.o.b. price. The shipper in Thailand does not always nominate the carriers. While the record is not entirely clear on this point, it would seem from this that the American cost-and-freight purchaser would sometimes select the carrier, as is usually the case on cost-and-freight shipments.

A conference presently made up of nine steamship lines serving this trade (who will make up the Second Carriers) was formed in 1951 under Agreement No. 8100, duly approved under section 15. In 1954 some of the lines resigned from the conference and reduced their rates. The resulting instability of rates led the conference lines in 1955 into Agreement No. 8061 providing for the apportionment of rubber cargo among the members. Under the terms of that agreement, the members (each of whom must be a member of the conference) discontinued the use of their respective local agents in south Thailand. A joint agency was set up to serve all the members, collectively, with its main office at Haadyai, south Thailand, which is near the port of Songkla, on the east coast, and a branch at Singapore. This agency is referred to as New York Lines Agency (NYLA). The group of carriers that are members of the apportionment agreement is also referred to by that name. The rubber shipments are apportioned among the members by the Agency in accordance with fixed percentage shares stated in the agreement, but the earnings are not pooled.

At the time NYLA was formed, a much greater quantity of rubber was imported from Siam through Atlantic and gulf ports than is imported today. In 1956, the first year of operation under the NYLA arrangement, 106,147 long tons moved. This dropped to 50,720 in 1960; 14,166 in 1963; 5,867 in 1964; and only 1,288 tons moved from January to September 1965. The conference witness testified that this decrease occurred because of higher prices paid for rubber in Japan and Europe. There is no evidence in the record that the formation or operation of NYLA led to this decrease in traffic. The conference carriers expect our imports of rubber from Thailand to increase in the near future. They say the traffic has "bottomed out."

Rubber in Thailand is produced by small holders, as distinguished from the large plantations found in some places in Southeast Asia. The shippers of rubber are, normally, consolidators who buy rubber from the growers, for export. There are many of these shippers in Thailand, so that the ship of one of the First Carriers does not load only the rubber of one shipper on one voyage, nor even the rubber available at one of the three ports. The ships sail north from Singapore light and

normally load at all three ports in order to obtain sufficient cargo to make the voyage worthwhile. On each voyage, then, the rubber of many shippers, destined for many ports and consignees, and covered by separate shipping documents will be on board.

The shipper usually books the cargo with one of the First Carriers and notifies the NYLA office at Haadyai. In some instances the cargo is booked directly with NYLA. The first carrier issues a "mate's receipt" or "boat note," as a receipt for the cargo, rather than a bill of lading. This serves the same purpose as a dock receipt. The NYLA office at Haadyai notifies their Singapore office of the movement and it is then allocated to one of the Second Carriers under the apportionment agreement. NYLA issues to the shipper a transshipment bill of lading of the designated Second Carrier in exchange for the mate's receipt and the shipper then draws down from the bank about 70 percent of the purchase price covered by the letter of credit. Under Agreement 9311, the bill of lading will be issued by one of the Second Carriers to cover the entire trip from south Thailand to the United States. Thus it is issued on behalf of the originating carrier as well as the oncarrier.

When the rubber has been loaded aboard one of the oncarrier's ships at Singapore, that carrier cables NYLA at Haadyai so advising them and reporting any exceptions. NYLA Haadyai then places the onboard endorsement on the bill of lading, and notes any exceptions. The bank, upon receipt of the onboard bill, pays the balance to the shipper under the letter of credit and sends the bill of lading "on to New York." The shipment is made on a "freight collect" basis.

The freight rate for the entire service from south Thailand to the United States port is that shown in the tariff of the conference. The rate at present is $50.25 for 2,500 pounds of sheet rubber or 2,240 pounds of crepe. The rate is the same when the conference line calls direct at the south Thailand port during the open season. The conference member presently pays freight charges of approximately US$10 per ton to the line that brings the rubber to Singapore as well as the cost of lighterage at Singapore. The conference line charters the lighters at present. The apportionment of freight under Agreement 9311 will continue in this same proportion.

Under Agreement 9311 the First Carrier will arrange and pay for the lighterage at Singapore. Second Carriers will reimburse First Carriers at the rate of 5 Malayan dollars per ton for this service. This is US$1.67. First Carriers are also required by Agreement No. 9311 to sort the rubber by marks, bills of lading lots, and destinations, before delivery to Second Carriers. This is an important feature of the

agreement and reflects one of the main reasons why the conference members see a need for it.

On occasion, in the past, rubber cargo of various shippers that was transshipped at Singapore was hopelessly mixed. In one instance a vessel came into Singapore with 18,000 bales of rubber on board, 10,000 of which were for transshipment to various American ports via NYLA and 8,000 destined for ports in Europe and Latin America. The NYLA carrier could not distinguish most of the marks and the cargo was inextricably mixed, so most of it was left behind. This resulted in the payment of large claims to the importers. Under Agreement 9311 the sorting responsibility is that of the First Carrier, on whose vessel the cargo is loaded.

Second Carriers testified that the arrangement will promote more orderly and efficient transshipment. The agreement provides that the Second Carriers shall receive rubber for transshipment in this trade only from First Carriers and First Carriers agree to transship only via Second Carriers. Second Carriers are allowed to load direct at the south Thailand ports during the open season and each of them may transship rubber at Singapore on its own vessels during the open season.

The three lines that make up the First Carriers were selected by the Second Carriers because they are the most experienced and dependable carriers in this service. Second Carriers are similarly the most experienced carriers in the transportation of rubber in the second leg of the route. Experience in the transport of rubber enables the carrier to provide better service because it calls for special skill and experience. The arrangement will tend to provide shippers with efficient and stable service. By dealing exclusively with First Carriers, rather than dealing with all carriers in the trade indiscriminately, Second Carriers believe that they and the shippers will be assured of stability of service "through thick and thin." That is, if the rubber trade diminishes, or more attractive cargoes are offered elsewhere, these three carriers will have a motive to stay in the trade. There is no evidence to the contrary, and since this prediction accords with history in the field of ocean transport, it is accepted as valid.

Speed of transshipment service is important to shippers because it permits them to receive payment under letters of credit earlier and avoid their working capital being tied up. This cooperative working arrangement between the two groups of carriers will expedite the transshipment service. As noted above, it will eliminate the problem of resorting the cargo at Singapore. It will also promote stability of rates, which is equally important to shippers. There is no dual rate system in effect in this trade. NYLA vessels make 15 calls a month

in this service. No question was raised as to the adequacy of the conference service. Due to their know-how, their length of service, and frequency of service they carry all the rubber in this trade. It can be concluded from this that they have found no need for a dual rate system.

The freight rate on rubber from south Thailand to Japanese and European ports is roughly half of that to United States ports. The price of a ton of rubber is about $500 on a cost-and-freight basis. It seems unlikely that a $25 rate disparity would be the cause of the decrease in the exports of rubber to the United States. There is no evidence in the record, one way or the other, as to whether the difference is justified. The relative distance would tend to justify it, of course. The question of rate levels is not directly in issue here, in any event. It is not expected that Agreement 9311 will result in a change in the conference rate either upward or downward. Orient Overseas Line (O.O.L.), one of the independent carriers in this trade, has a rate on rubber from Singapore of $42 per 50 cu. ft. plus an arbitrary of $1.25. The conference rate is $45.50. They would come out better on shipments from Singapore under this rate than they will under the transshipment arrangement contemplated by Agreement 9311.

The shippers who expressed themselves on the subject do not oppose the approval of the agreement. Central Gulf Steamship Co., an independent carrier in the trade, stated that it did not oppose the agreement. However, this carrier also said it soon may join the conference, so this position cannot necessarily be taken as typical of the independent carriers. O.O.L. opposes the agreement on the ground that its exclusive provisions would prevent O.O.L. participation in the rubber cargoes transported by First Carriers. No other independents have expressed a view in this proceeding. The government of south Thailand has not indicated an interest in the agreement either in communications with the carriers or in the course of this proceeding.

3. Discussion and Conclusions

The first and second issues to be resolved, as stated in the Order of Investigation, can be treated together:

> Question No. 1: Whether First Carriers, parties to Agreement No. 9311, are common carriers by water in the foreign commerce of the United States as defined in section 1 of the Shipping Act, 1916.

Question No. 2: Whether Agreement No. 9311 is subject to the requirements of section 15 of the Shipping Act, 1916.

Section 15 requires "every common carrier by water, or other person subject to this Act" to file with the Commission for approval all agreements of the type described in that section with another such carrier or person. Section 1 defines "common carrier by water" to mean, for our purpose in this proceeding, a "common carrier by water in foreign commerce" which, in turn, is defined in section 1 to mean:

> A common carrier engaged in the transportation by water of passengers or property between the United States . . . and a foreign country.

First carriers are common carriers. The record clearly establishes this fact. The Holland-American brief contains an innuendo that there is no such thing as a common carrier outside common law countries. For whatever relevancy this factor has, every country recognizes the common carrier concept. See "Report of United Nations Conference on Trade and Development," January 28, 1964. On page 14 the report states—

> Whereas the tramp owner is only bound to carry a cargo from one place to another after he has engaged himself by charter party to do so, the liner is legally defined as a 'common carrier' in all countries.

The point here, in any event, is that the First Carriers are acting as common carriers within the meaning of section 1, so that part of the definition is satisfied.

The question, then, is whether these carriers are engaged in the transportation of property between the United States and a foreign country, either by virtue of their actual carryings or because of their joint activity with Second Carriers covering the whole route from south Thailand to the United States. The answer is that they are so engaged, on both counts.

In *Restrictions on Transshipment at Canal Zone*, 2 U.S.M.C. 675 (1943), the U.S. Maritime Commission held unequivocally that carriers transporting cargo destined for the United States between two foreign ports, the cargo being transshipped to other carriers at the second port, were engaged in the transportation of property between the United States and a foreign country, within the meaning of section 1, and that the agreement covering the transshipment was subject to section 15.

For rather widely varying reasons, the parties herein argue that First Carriers are not so engaged. In order to sustain these arguments, the *Canal Zone* case and a continuous line of other precedents going back to the beginning would have to be overturned, even though there has been no change in the statutes or the circumstances. Intervener

Holland-America Line acknowledges that the *Canal Zone* case is in point but urges that the Commission should reverse its predecessor. Respondent attempts to distinguish the case on the ground that some of the carriers involved in *Canal Zone* made direct calls at U.S. ports on other routes and that the first carriers in the instant case do not do so. This is by no means a distinguishing feature. The sole operation of the carriers involved in the *Canal Zone* ruling was the transshipment service. Other activities of the carriers have no bearing on the legal status of the transshipment agreement. Likewise, the fact that here the Second Carriers issue the through bill of lading, rather than the originating carriers, does not distinguish the cases, as contended by counsel. In most, if not all transshipment agreements either the originating carrier or the oncarrier issues a through bill for the whole trip, but this has never been held to prevent the agreement being subject to section 15.

After speaking of earlier decisions that such a transshipment agreement was subject to section 15, the Commission stated on page 678:

> . . . These administrative determinations, which have stood for years without challenge, rest upon sound reason.
>
> Section 15 applies to every "common carrier by water." This term as defined in section 1 of the Shipping Act, 1916, includes a "common carrier by water in foreign commerce," which is defined as "a common carrier . . . engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade . . ." The transportation in question does not end at Cristobal. It is through transportation from Colombia and Ecuador to United States ports on the Atlantic or Gulf. When the lines operating up to the Canal enter into the carriage of commerce of the United States by agreeing to receive the goods by virtue of through bills of lading, and to participate in through rates and charges, they thereby become part of a continuous line, not made by consolidation with the on-carrying lines, but made by an arrangement for the continuous carriage or shipment from a foreign country to the United States. *Cincinnati, N.O. & T.P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S. 184, 192. Clearly, therefore, the former, being part of the continuous line over which the through traffic moves, are "engaged in the transportation by water of . . . property between the United States . . . and a foreign country." *Norfolk & Western R.R. Co.* v. *Pennsylvania*, 136 U.S. 114, 119. Indeed, they are no less a factor in such transportation than the on-carrying lines.

The lawyers for Holland-America argue, in effect, that the decision was erroneous because the two Supreme Court cases cited in the above quoted portion of the decision were decided under the Interstate Commerce Act and that therefore the Commission decision was based on the Interstate Commerce Act rather than the Shipping Act. This argument is unacceptable because it is evident that the Commission cited the Supreme Court cases as involving generally analogous situations where the Supreme Court reiterated the well established prin-

ciple that any local carrier becomes a part of the continuous line of carriage when he enters into a through route arrangement. It is quite evident that the Commission was aware of the applicable language of the Shipping Act for they quoted the relevant portion of it in the same passage. The other cases decided by the Commission (and its predecessors and successors) on this point do not even mention those Supreme Court cases.

Hearing Counsel urge that the arrangement between the Second Carriers to enter into Agreement 9311 is a section 15 agreement. They say that "the effect is practically the same [as the result in *Canal Zone*]" and that they "are really doing through the back door what the Commission in that case [*Canal Zone*] did, so to speak, through the front door; . . ." page 181 of transcript. They state that *Canal* Zone "settled" the proposition that First Carriers fall within the definition of section 1 of the Act, yet they say in their opening brief that when that case is looked at with a "degree of penetration" it can be distinguished from the case at hand.[7]

They say the following factors distinguish the cases: 1. In *Canal Zone* the transshipment points were in territory leased and administered by the United States. 2. The *Canal Zone* agreement did not involve exclusive dealings between the two groups and it included through movements by single member carriers as well as transshipment.

None of these points distinguish the instant case from the *Canal Zone* case. The two cases are on all fours. The Commission treated the *Canal Zone* case as a situation where the originating carriers did not touch a port of the United States. Commerce between the U.S. ports and the Canal Zone has always been treated as foreign commerce. *Sigfried Olsen* v. *W. S. A. and Grace Line, Inc.*, 3 F.M.B. 254, 259 (1950). First carriers in the *Canal Zone* case plied between foreign ports just as they do in the instant case.

The fact that the carriers who were parties to the agreement involved in *Canal Zone* were permitted to carry cargo over the entire route, if they chose, is not a distinguishing factor. Under Agreement 9311, any of the Second Carriers can make direct calls at south Thailand ports during the open season. The *Canal Zone* agreement had exclusive features, too.

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[7] In their answering brief, Hearing Counsel have apparently sensed the weakness of this position because they urge the Commission not to make a decision that would disclaim jurisdiction over the originating carriers in a through movement. In Docket No. 65–17, "Transshipment and Apportionment Agreements From Indonesian Ports to United States Atlantic and Gulf Ports" decided by Examiner Benjamin A. Theeman on Mar. 24, 1966, Hearing Counsel take the position that First Carriers are subject to sec. 15.

Other, even less pertinent distinctions are attempted to be made, but these need not be discussed further because the preoccupation of counsel with attempts to distinguish this case from the *Canal Zone* case has caused them to miss or to obscure the point. The briefs treat the *Canal Zone* case as an isolated and unique incident and treat the whole area of transshipment agreements as rather novel, innocuous arrangements that really haven't received much, if any, serious consideration until this proceeding came along. The transportation of property to and from the United States by means of transshipment arrangements is, in fact, a major element in the foreign commerce of the United States. To remove it from regulatory control would obviously have a profound impact on our foreign commerce. Holland-America even seems to argue that no transshipment agreement is a section 15 agreement.

The point is that under frequent rulings and decisions, long established policy, and consistent practice, the Commission and its predecessors have always required approval of transshipment agreements under section 15. The fact that in many instances the carrier or carriers on one side of the agreement do not touch U.S. territory has not been deemed and is not now deemed to make a distinction in this policy or these decisions. The briefs of counsel (except intervener Holland-America) give the impression that their authors are unaware that the regulatory supervision and processing of such agreements has been and is today one of the largest areas of concern of this Agency. More transshipment agreements are on file and presently in operation, under section 15, than any other type of agreement. They constitute more than half of the section 15 agreements presently on file and many, probably most of them, involve arrangements where the carrier or carriers on one side never call at ports in the United States. The Examiner takes official notice of the facts stated in this paragraph.

Like Agreement 9311, some transshipment agreements contain exclusive features which prohibit either side dealing with other carriers in through shipments in the particular trade. Others do not contain the exclusive feature. Contrary to the contention of Holland-America, all such agreements have been held to fall within section 15. See *Intercoastal Rates From Berkeley*, 1 U.S.S.B.B. 365, 367 (1935) and the cases cited later herein. Such agreements are invariably "cooperative working arrangements" under section 15 and, like Agreement 9311, frequently cover aspects of rate fixing and/or provide for exclusive dealing among the parties. Agreement 9311 is patently subject to the statute. To treat it as an innocuous, incidental facet of the overall activities of these carriers would overlook the spirit as well as the

letter of the Act. The exclusive arrangement goes far beyond the elimination of intraconference competition, usually accomplished by section 15 agreements, and attempts to restrict the competition of independent carriers. Without surveillance under section 15, such predatory devices are obviously capable of being discriminatory, of detriment to our foreign commerce, and contrary to the public interest.

The first time the matter was mentioned in a formal decision was in 1935 in *Intercoastal Rates From Berkeley*, 1 U.S.S.B.B. 365, 367. This decision recognizes that transshipment agreements must be filed under section 15. Next came *Commonwealth of Massachusetts et al.* v. *Colombian SS Co. et al.*, 1 U.S.M.C. 711, in 1938, and the *Canal Zone* case in 1943. If the case of *B. M. Arthur Lumber Co., Inc.* v. *American-Hawaiian SS Co.*, 2 U.S.M.C. 6 (1939) cited by Holland-America as contrary to *Canal Zone* has any bearing on this proceeding it is the fact that the through route transshipment arrangement involved there was filed and approved under section 15, as Agreement No. 4970. The Examiner finds nothing in that decision that is at odds with the other precedents cited here.

The converse of the instant situation was present in *Boston Wool Trade Assn.* v. *Oceanic, et al.*, 1 U.S.S.B. 86 (1925), where wool from Australia destined for Boston was transshipped at San Francisco to an oncarrier who carried the wool through the Panama Canal to Boston. The Shipping Board held that the San Francisco to Boston leg of the through transportation was foreign commerce rather than interstate. They looked at the whole through route as a unit. This must be done here, as well, with the result that the entire through transportation is part of "the transportation of property" between the United States and a foreign country. As said in the *Boston Wool* case, page 87, the stop at the transshipment point is only incidentally a part of the movement and does not change its character. In *Common Carriers by Water*, 6 F.M.B. 245 (1961), the Federal Maritime Board noted that, if respondents were held to be common carriers, a through transportation agreement would require section 15 approval. The proposition was apparently deemed to be so well established that neither the Board nor any of the parties raised any question on that score.

Recent actions of the Commission have confirmed this unvarying policy and decision. On July 15, 1964 the Commission mailed to all affected carriers a notice of the delegation of authority to the Bureau of Foreign Regulation to approve under section 15 the more routine transshipment agreements filed for approval. A copy is attached, marked "Appendix B." This notice was given pursuant to Commission Order No. 1 which was amended at about that time to provide for this

delegation of authority to approve transshipment agreements. This recognizes, of course, that such agreements require section 15 approval. No distinction is made as to those involving only carriers that call at U.S. ports. Obviously, by their very nature such through shipment arrangements normally involve transshipment at a foreign port with one carrier or group of carriers plying between that port and other foreign ports.

Even more recently, in *Pacific Seafarers, Inc.* v. *AGAFBO*, 8 FMC 461, the Commission recognized that section 15 jurisdiction would lie if the carriers involved there, who traded between ports in Thailand and Taiwan, had been transporting cargo transshipped from the United States. The decision states, "Further, the record is bereft of any evidence that the cement involved was cement transshipped from the United States," so the Commission determined that it did not have jurisdiction.

Section 18(b), added to the Act in 1961, requires common carriers in foreign commerce and conferences of such carriers to file their rates with the Commission "for transportation to and from United States ports and foreign ports between all points on its own route *and on any through rate that has been established*," and it gives the Commission jurisdiction over the rates so filed. Congress cannot be charged with the futile action of assigning this responsibility to the Commission to regulate rates on a through route if the Commission had no authority over intercarrier agreements under the terms of which such rates are established and applicable. The Holland-America argument that the inclusion of the italicized words somehow shows a congressional intention to omit them from sections 1 or 15 is unacceptable. In the first place, we are considering the enactments of two different Congresses. Beyond this, the 87th Congress can be deemed to have been aware of the long and unvarying Agency policy, decision, and practice requiring the filing of through transportation arrangements. The 1961 amendments did nothing to bring this decision and practice into question, they confirm it. In any event, the intention of a 1916 Congress can hardly be ascertained by looking at a statute enacted in 1961.

The effect of a contrary holding must be considered. If Agreement 9311 were not subject to the Act the parties thereto would be at liberty to engage in any discriminatory, monopolistic, predatory practice they wish [8] (at least in the Singapore/Thailand leg of this continuous journey), to the detriment of shippers and the destruction of competing carriers in our foreign commerce who call or may wish to call at these

[8] To the extent that the antitrust laws might not be applicable. If they are considered to be applicable, this does not solve the problem since Congress intended the sec. 15 standards to apply to situations falling within its coverage, rather than the antitrust laws.

Thailand ports direct. This would be true in all trades where through transportation is practiced. It is not conceivable to the Examiner that Congress intended such a result.

First carriers are literally "engaged in" (participating in) "the transportation—of property—between the United States and a foreign country" within the meaning of section 1 when they carry the rubber on the initial leg of the through route. Equally important, they are also constructively "engaged" in the whole trip from Thailand to New York by entering into Agreement 9311 because the carriage on the entire trip then becomes a joint and common undertaking between the two groups of carriers. It is not open to question, at this late date, that the transport of cargo between the United States and Thailand is part of the foreign commerce of the United States. Switching the cargo to a different vessel in the roads at Singapore does not change this.

Counsel mistakenly look at the problem strictly as one of jurisdiction over the person, where the First Carriers are concerned, and they worry about theoretical aspects of enforcement. What we are primarily concerned with is jurisdiction over the agreement between these two groups. Enforcement poses no problem for if the requirements of the Commission are not met by the parties and the section 15 standards are violated the agreement will be disapproved.

For the foregoing reasons, the first two issues are answered in the affirmative.

> Question No. 3: Whether Agreement No. 9311, if subject to section 15 should be approved, disapproved, or modified pursuant to section 15.

The parties agree that there has been no showing that the agreement will be unjustly discriminatory or unfair, that it will operate to the detriment of the commerce of the United States, be contrary to the public interest or in violation of the Act. On the positive side, the evidence shows that the agreement will promote a more efficient and orderly transshipment of rubber in this trade. It will tend to provide service to shippers in lean times because the three First Carriers, being assured of the exclusive transshipment of through cargo with the conference lines, will develop an interest in the trade and will be motivated to stay there and serve the trade even though greener fields elsewhere might otherwise lure them away. The arrangement for sorting the cargo by First Carriers will speed the transshipment process. This will be of benefit to shippers as it will allow them to recoup their investment sooner.

There was no evidence that the agreement will result in increased rates. Importers of rubber did not oppose approval of the agreement.

One of the independent carriers in the trade between Singapore and the United States, O.O.L., testified that the agreement is discriminatory as to it because it will be prevented from transporting through cargo under transshipment arrangements with any of the First Carriers. There is no question that the agreement will place some restrictions on competition, but this factor alone does not prevent approval under section 15. The First Carriers are not transshipping cargo at present with O.O.L., so that carrier will be no worse off under the agreement except insofar as it eliminates the prospect of their doing so in the future. There is nothing to prevent O.O.L. working out transshipment arrangements with other first carriers, or calling direct at Thailand at least in the open season.

Since the agreement will not violate any of the standards of section 15, and it will serve valid transportation purposes, it should be approved.

Question 4: Whether the arrangement between Second Carriers to enter into Agreement No. 9311 is an agreement subject to the requirements of section 15.

Question 5: Whether the arrangement of Second Carriers to enter into Agreement No. 9311, if subject to section 15, should be approved, disapproved, or modified pursuant to section 15.

Question No. 4 requires a decision as to whether a preliminary agreement, presumably entered into by the members of the conference, an "agreement to agree," has to be submitted for approval under section 15. The answer is in the negative. Respondents argue with some fervor, and the Examiner agrees, that a requirement that every preliminary "agreement to negotiate" be submitted for approval is not contemplated by the statutes and would lead to the hopeless congestion of the Commission's docket. Under a contrary rule, every time a section 15 agreement between two groups were filed, the separate agreement between the members of each group also would have to be filed. In addition, each separate agreement among the members of each group would have to have section 15 approval as negotiations progressed and as each side altered its position on various points. Such an absurd result was surely not contemplated.

The short answer is that a mere agreement to negotiate, among the members of just one side of the ultimate bargain, cannot, standing alone, accomplish those things covered by section 15 and therefore such an "agreement" does not come within the section. It cannot fix or regulate rates, give special rates, control competition, pool earnings, allot ports, et cetera. The colloquial expression, "It Takes Two to Tango," is so entirely appropriate that its use here hopefully will be

excused. For these reasons, among others, section 15 approval is not required for the agreement (if any) between Second Carriers.

However, Hearing Counsel attempt to place some different interpretation on Question No. 4 and, comparing transshipment arrangements to dual rate arrangements, say that the decision, among themselves, of Second Carriers to enter into Agreement 9311 requires section 15 approval. They cite *Anglo Canadian Shipping Co.* v. *United States*, 264 Fed. (2d) 405 (C.A. 9, 1959), and *Isbrandtsen* v. *United States*, 211 Fed. (2d) 51 (C.A.D.C., 1954), as authority for this point. Insofar as they may have any relationship with the situation here, those two cases hold that the action of a group of carriers (members of a conference) in initiating a "scheme" of dual rates in a particular trade requires Commission approval under section 15 before it can be carried out because the basic conference agreement does not provide a "cover of authority" (as decided by the Board) to adopt such a "scheme."

By means of an alleged analogy with these cases, Hearing Counsel seek to bring Agreement 9311 under section 15 through the "back door," as they say. The foregoing decision on Question No. 1 that the agreement between the two groups of carriers is subject to section 15 makes it unnecessary to decide the "back door" question, of course. However, the Examiner is constrained to take it up since the question was included in the Commission's Order of Investigation, or something like it.

Hearing Counsel find themselves in a dilemma as a result of (1) their conviction that transshipment agreements must be regulated, and (2) their assertion (which has been shown above to be erroneous) that First Carriers are not subject to section 15. Their attempt to solve this dilemma has led them into further difficulty. They seize upon the *Isbrandtsen* and *Anglo Canadian* cases as authority for the proposition that an "arrangement" can be one subject to section 15 even though there may be a party to it who is not subject to the Act. This, they apparently feel, will get them off the first horn of their dilemma. This nonsubject party, in the case of the dual rate contract, is the shipper, they say. The corresponding party in the 9311 Agreement would be the First Carriers (assuming, for the sole purpose of this discussion, that they are not subject to section 15). The analogy might be tenable if the shippers were party to the "arrangement" the courts were considering in the *Isbrandtsen* and *Anglo Canadian* cases. However, they were not parties. Section 15 requires that common carriers by water and other persons subject to the Act file for approval agreements "with another such carrier . . ." or person. The courts in those two cases would have had to repeal the statute to reach the result urged by Hearing Counsel.

The alleged analogy breaks down when the nature of a dual rate system is compared with that of a transshipment arrangement. Under the *Isbrandtsen* and *Anglo Canadian* decisions, the Commission approves the "scheme" of the carriers, entered into among themselves, to institute a dual rate system. Thereafter, the conference enters into uniform dual rate contracts with the individual shippers—thousands of them—under which each shipper is given a reduced freight rate in exchange for his promise of exclusive patronage of the conference members. The act of entering into these individual shipper contracts does not require approval. That act is nothing more than a ministerial function, once the "scheme" is settled. Approval of the "scheme" gives blanket authorization for the execution of the individual contracts.

Now, it is certain that the Commission could not and would not give such blanket authorization to a conference or any other group of carriers to enter into any and all transshipment agreements thereafter. On the contrary, unlike the individual shipper dual rate contracts, the Commission must, of necessity, scrutinize each and every proposed transshipment agreement in order to see if the special terms of the particular agreement, in the special circumstances of the trade involved, are compatible with the standards of section 15. The distinction lies in the fundamental difference between these two categories of section 15 undertakings.

The heart of the dual rate situation lies in the arrangement between the conference members to adopt the system itself. Even the form of uniform contract with shippers is approved as a part of this arrangement. When this arrangement comes to the Commission, all of the ramifications of the plan are available for study and approval, disapproval or modification under section 15. The actual signing up of the shippers thereafter is actually only incidental. On the other hand, the mutual decision among a group of carriers to enter into a transshipment arrangement in a particular trade tells only a minor part of the story. At the heart of this transaction is the identity of the other carrier or group of carriers that will sign, the exclusivity of the particular arrangement, the form of the contract, and other unique incidents of the arrangement that must be subjected to the test of section 15 for ad hoc determination. If blanket consent were given, none of these things would receive regulatory attention.

Counsel for Holland-America call this approach of Hearing Counsel the "half-agreement" approach and correctly point out a result which alone would render it unworkable and in violation of the spirit of the 1916 Act as well. They point out that only those transshipment ar-

rangements involving more than one carrier on a side would be brought under section 15. Where one leg of the voyage (that which touches American shores) was performed by a single carrier (regardless of the number of lines that might be acting jointly on the other side of the agreement) such arrangements would be "utterly immune from such control."[9] "In short," they say, "individual carriers could and would monopolize the transshipment business to and from the United States . . . a result which could hardly be considered conducive to the well-being of the commerce of the United States." The Examiner agrees.

Hearing Counsel are aware of this problem. They feel that transshipment agreements are at the most restrictive extreme of the spectrum of the anticompetitive devices covered by section 15 and, apparently, they do not wish to exclude from regulation every such device not having multiple parties on a side. In their reply brief they wisely urge the Commission not to make a "determination in this case which would have the effect of disclaiming jurisdiction over originating local segments of through movements to the United States . . .". And they urge the Commission to adopt "a flexible rule as to jurisdiction, based upon the exigencies of particular trades." At another point they propose that the Commission "not make the broad determination in this case that all first carriers are jurisdictional or nonjurisdictional."

Hearing Counsel are perfectly correct that each and every transshipment agreement should be looked at on its own merits. However, this cannot be achieved by a flexible and varying approach to Question No. 1, as cases arise in the future. The Act must be applied uniformly to all carriers. The dilemma seen by Hearing Counsel stems from their attempt to treat a single transshipment agreement in the same way as the adoption of an entire dual rate system. The needed "flexibility" is achieved by accepting Agreement 9311 for what it is—a single contract between a group of carriers acting as one, as the party of the first part, and another group of carriers acting as one, as the party of the second part, both of which groups are subject to section 15. In this way, and no other, the entire arrangement can be scrutinized, as intended by Congress in the enactment of section 15.

The incidental agreement between the members of each group, first to negotiate and then to sign, are merged into Agreement 9311 and every facet of those individual agreements can be examined by the Commission as a part of its scrutiny of Agreement 9311. The converse does not hold true, however, for, standing alone, the agreement among

[9] The initial decision served Mar. 24, 1966, in Docket No. 65–17, 10 FMC 183 "Transshipment, etc., From Indonesia," would have this result.

the conference members to enter into Agreement 9311 is not the same contract as Agreement 9311. It is a different contract because it involves different parties, the former does not necessarily contain or reflect the terms and conditions of the latter, and (under the erroneous theory that First Parties are not subject to section 15) would cover only a portion of the geographic area covered by Agreement 9311.

It covers a different geographic area, if First Carriers are held not to be subject to the Act, for this reason: First Carriers can be found not to be subject to the Act only if they are deemed not to be participating in the transportation of property between the United States and a foreign country. Such a decision would require, out of consistency in the use of language, that Second Carriers not be deemed to be participating in the transportation of property between the Thai ports and Singapore in their transshipment operations. Thus the agreement among each set of carriers would be confined to that route in which they are said to be participating, under this theory. Regulation would necessarily start at Singapore, even though the cargo never touches the soil there but instead moves from south Thailand in a continuous line of direct transport to the United States.

If it were possible in some way to isolate the arrangement between the one set of the carriers—rather, if a case should arise where this were required or permitted—the arrangement would undoubtedly be subject to section 15. In answer to Question No. 5, then, if the arrangement between Second Carriers could be isolated in this way it would appear to be approvable under section 15. The Examiner is not sure just how far such a limited and partial inquiry would go, but surely if the entire Agreement 9311 is approvable (as decided under question 3) one of its antecedent parts, standing alone, could not be found to create evils that would contravene the statute. This arrangement among Second Carriers, if there was one, has not been submitted for approval, of course. Under this initial decision it need not be.

Question No. 6: Whether Agreement No. 9311 represents the complete understanding between the parties.

None of the parties contend that the document filed for approval does not represent the complete understanding between the parties. A conference witness testified that Agreement 9311 represents the complete understanding of the parties. There is no evidence in the record that it does not. This finding has reference to the written Agreement 9311 between the First Carriers, on the one hand, and the Second Carriers, on the other. The record is wholly inadequate to form the basis for a decision as to whether there was some other agreement or

agreements among the shiplines that make up Second Carriers or what the terms of it might have been. This matter was raised after the record was closed. However, the Examiner does not feel that this raises any problem, since the agreement among the Second Carriers to negotiate and to enter into Agreement 9311 was merged into Agreement 9311. Question No. 6 is answered in the affirmative.

Question No. 7: Whether Agreement No. 9311 or the arrangement between the Second Carriers to enter into Agreement No. 9311 has been carried out in whole or part without approval of the Commission as required by section 15.

There is no evidence in the record that Agreement 9311 has been carried out in any way. The conference witness testified that it has not. Under this initial decision, no other agreement between or among these parties requires section 15 approval. Therefore there has been no violation of the Act on this score. However, this Question No. 7 tends to point up another weakness in the theory that an "agreement-to-agree," "agreement-to-negotiate" or a "half-agreement" among the conference members is subject to the Act. These so-called agreements necessarily have been carried out before Agreement 9311 was presented to the Commission for approval. In this case, it is apparent that none of the evils sought to be prohibited by section 15 could be perpetrated at least until there was a meeting of the minds and a contract arrived at between the two groups of carriers. These groups submitted their Agreement 9311 for approval when this occurred and this must be taken as timely submission. That agreement has not been carried out.

4. Special Comment

The question at the core of this proceeding is whether First Carriers fall within the definition of section 1 of the Act, so that the agreement between that group and the group known as Second Carriers requires approval under section 15 before it lawfully can be carried out. The Examiner is convinced that this straightforward issue must be answered in the affirmative. Since there is no evidence that the agreement will run afoul of the standards of section 15, this disposes of the proceeding.

The Order of Investigation does not disclose reasons for the inclusion of Questions No. 4 and 5, having to do with some agreement other than No. 9311. Such questions could be asked as appropriately in any section 15 proceeding involving more than one carrier or person on one side or the other. It has been pointed out that the record herein is inadequate to provide a basis for a meaningful decision as to such questions.

It would also be a mistake to attempt to joust with the strawmen built up by the parties in connection with the question whether First Carriers are subject to section 15; e.g., whether terminal operators in the Thailand ports fall within section 15. These questions are not involved here and they only cloud the issue, but there may be incidental problems of a corollary nature in this general area that need answers. For example, some kind of rule might be devised whereby the run-of-the-mill transshipment agreement would be deemed to pass muster under the Act if no objection to it is voiced; perhaps some so-called transshipment arrangements, where the originating leg falls entirely within the domestic area of one foreign country and that are actually concerned with little more than lighterage there, could be excluded. This entire area might be an appropriate subject for an evidentiary rulemaking proceeding where, once the Commission lays Question No. 1, above, to rest, all interested parties could be heard, a proper record of the facts developed, and these peripheral issues resolved. In the instant proceeding, however, it would involve considerable risk for the decision to go beyond the real issue. The Examiner has attempted to decide all the questions included in the Order simply because the questions were asked by the Commission or its staff. He would not otherwise have gone into Questions 4 and 5.

5. Ultimate Conclusion

First Carriers and Second Carriers are common carriers by water within the meaning of section 15 of the Act. Agreement No. 9311, a transshipment agreement between these two groups, is subject to section 15.

Agreement No. 9311 has not been shown to be unjustly discriminatory or unfair as between the interests named in section 15, to operate to the detriment of the commerce of the United States, to be contrary to the public interest, or to be in violation of the Act. The agreement should therefore be approved, as it will serve valid transportation purposes.

(Signed) E. Robert Seaver,
Presiding Examiner.

Washington, D.C., *March 31, 1966.*

APPENDIX A

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

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

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

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not in-

volve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

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

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

APPENDIX B

FEDERAL MARITIME COMMISSION,
Washington, D.C.

IN REPLY REFER TO:

Foreign Trade
Circular Letter No. 64-1

To: All carriers subject to section 15 and/or 18(b) of the Shipping Act, 1916.
Subject: Delegation of authority by the Federal Maritime Commission to approve unprotested transshipment agreements.

In an effort to expedite the handling of requests for approval of routine transshipment agreements, under Section 15 of the Shipping Act, 1916, the Federal Maritime Commission has delegated authority to the Director, Bureau of Foreign Regulation, to approve such agreements under Section 15, when they contain certain provisions and are found not inconsistent with the standards for approval contained in that section.

The Director of the Bureau of Foreign Regulation is delegated authority to approve transshipment agreements which contain the following provisions:

1. Complete name of the parties entering into the arrangement and specifically setting forth the portion of the trade that each party will cover, including: ports or areas of origin and destination; cargo to be carried; and ports or ranges of ports at which cargo will be transshipped;
2. Responsibility of parties for establishing and filing the applicable through rates, rules, regulations and other tariff matters;
3. Provisions for the apportionment of the through revenue and transshipment expenses stated in percentages, or specific dollar amounts;
4. When applicable, provisions for application and apportionment of other expenses such as wharfage, special handling, lighterage, tonnage dues, surcharges, and other such charges assessed by a governmental authority;

5. When desired by the parties, provisions for indemnification between the parties for liabilities incurred from loss, damage, delay or misdelivery of goods;

6. Provision for the termination of the agreement within a stated notice period; and

7. Provisions for the submission to the Federal Maritime Commission for approval of any modification or addition to the agreement.

To qualify for action under this delegation of authority, transshipment agreements should not contain any additional substantive provisions, or provisions which create any exclusive rights or which in any manner restrict competition.

If carriers engaged in the foreign commerce of the United States desire to have the processing of routine transshipment agreements under Section 15 of the Shipping Act, 1916, handled expeditiously under this newly delegated authority, they should make every effort to see that their filed transshipment agreements comply with the above criteria. Any such agreements which fail to include any of the required provisions or which include exclusive or anti-competitive provisions beyond those listed above, will require exchanges of correspondence between the staff and the parties, and/or final action by the Commission itself rather than the more expeditious handling at the staff level.

Sincerely yours,

WILLIAM A. STIGLER, *Director, Bureau of Foreign Regulation.*

JULY 15, 1964.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1007

PACIFIC COAST EUROPEAN CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

SUPPLEMENTAL ORDER ON REMAND

Decided October 20, 1966

On March 27, 1964, we issued our report entitled "The Dual Rate Cases," 8 FMC 16, together with an order in Docket No. 1007, which approved a form of dual rate contract to be used by the Pacific Coast European Conference for the purpose of according contract rates.

On February 3, 1965, the U.S. Court of Appeals for the Ninth Circuit in *Pacific Coast European Conference* v. *United States*, 350 F. 2d 197, set aside our order and remanded the proceeding with directions to allow respondent to be heard as to certain provisions which we had required in the contract. The court concluded in its opinion that:

> . . . opportunity must be afforded petitioners to participate in rule making in such manner as the Commission may direct pursuant to § 4(b) [of the Administrative Procedure Act]; such participation, however, to be limited to such clauses of the proposed contract as were not, in subject matter, dealt with in the hearings in petitioners' adjudicatory dockets or in Docket 1111. 350 F. 2d at 206.[1]

The court added, however, that:

> . . . as to that portion [of the contract, in which petitioners have already participated], the Commission is, of course, free forthwith to promulgate rules and establish the substance of approved contracts as to petitioners. 350 F. 2d at 206.

On June 24, 1965, pursuant to the direction of the court of appeals, we issued a Notice of Proposed Rulemaking and an Order on Remand in Docket No. 1007. The Notice of Proposed Rulemaking allowed opportunity for comment by interested parties on two contract provi-

[1] By order dated May 28, 1963, we severed 5 issues common to all dual rate proceedings from the issues in Docket No. 1007 and other similar proceedings. The Commission directed that these issues be consolidated for hearing before a panel of 5 examiners in Docket No. 1111, "Dual Rate Contracts, 1963—Adjudication of Major Issues."

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sions which we found had not been noticed according to the requirements of the Administrative Procedure Act.[2] The Order on Remand reapproved for use by respondent a dual rate contract, in the same form appended to our order in The Dual Rate Cases, supra, less the two clauses which were the subject of our proposed rulemaking notice.

On July 26, 1965, respondent filed a Petition for Reopening and Reconsideration of Orders on Remand. Respondent alleged therein that the Commission had "misinterpreted its duty on remand" in that (1) the court had directed the Commission to forthwith promulgate "rules" and the Commission had instead issued "orders" and (2) contract clauses which had not been the subject of prior Commission proceedings had been included in the prescribed contracts. In order to be as completely informed on the subject as possible, the Commission, on February 16, 1966, invited the Conference to submit comments and to specify just what clauses, in its opinion, had not been dealt with in either Docket No. 1007 or Docket No. 1111.

In response to the Commission's invitation, the respondent specified three clauses which, in its opinion, were not "dealt with according to the law," conceding, however, that the clauses were dealt with "in the purely lay sense in Docket 1111. . . ."[3]

By order served on September 22, 1966, the Commission denied respondent's petition to reopen and reconsider the Order on Remand. The Commission determined that "all three clauses which the Conference contends were not dealt with in the administrative proceedings were indeed dealt with and 'according to law'." The Commission, however, concluded that final action on the matter would be held in abeyance for 20 days to allow respondent the opportunity to file any appropriate comments relative to the two clauses noticed in the Commission's Notice of Proposed Rulemaking of June 24, 1965.

Subsequently, by telegram dated and received on October 11, 1966, Conference counsel informed the Commission that there were "no objections to clauses proposed in rulemaking of June 24, 1965."

THEREFORE, IT IS ORDERED, That the agreement submitted to the Commission by the respondent in the above proceeding is hereby approved by us in the form attached to this order, the Commission having found, for reasons stated in our report entered on March 27, 1964, that

[2] The only response to our notice was a letter from U.S. Borax & Chemical Corp., which favored the adoption of the 2 clauses set out in the notice. The Conference submitted no comments.

[3] The 3 clauses specified by respondent related to (1) the provision for exclusion for cargo carried in merchant-owned vessels where the term of the charter is for 6 months or longer, (2) those provisions dealing with termination for breach, and (3) the provision dealing with the opening of rates.

approval should be conditioned on the inclusion of certain modifications made by the Commission; and

IT IS FURTHER ORDERED, That the terms of the agreement attached hereto (subject to our order of July 31, 1964, making certain enumerated clauses optional rather than mandatory) be used by the respondent to the exclusion of any other terms and provisions for the purpose of according contract rates.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX A

APPROVED CONTRACT FORM

(Docket 1007)

PACIFIC COAST EUROPEAN CONFERENCE

417 Montgomery Street, San Francisco 4, California

SHIPPER RATE AGREEMENT

THIS AGREEMENT, made as of the day and date set forth below, by and between the SHIPPER named below and the several steamship lines named at the end hereof, hereinafter called the CARRIERS,

WITNESSETH:

1. (a) The Shipper undertakes to ship or cause to be shipped all of its ocean shipments, for which contract and non-contract rates are offered, from Pacific Coast ports of the States of Washington, Oregon and California, to ports of call in the United Kingdom of Great Britain and Northern Ireland, Ireland, the Scandinavian Peninsula, Continental Europe, including ports on and in the Baltic and the Mediterranean Seas, as well as the seas bordering thereon (except the Black Sea), and Morocco, on vessels of the Carriers unless otherwise provided in this agreement.

The term "Shipper" shall include the party signing this contract as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this contract and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Shipper" any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Shipper" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this contract on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its (their) shipments to the vessels of the Carriers the Shipper promises and declares that it is his (their) intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Shipper.

The Carriers agree that they will not provide contract rates to anyone not bound by a shippers rate agreement with the Carriers. The Shipper agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this contract, by making shipments under this contract on behalf of any such person. The contract rates shown in the applicable tariff shall be less than the non-contract rates by 15% of the non-contract rates.

(b) This Agreement excludes cargo of the Shipper which is loaded and carried in bulk without mark or count, except liquid bulk cargoes, other than chemicals

and petroleum products; in less than full shipload lots, or cargo carried in merchant-owned vessels or merchant-chartered vessels where the term of the charter is for six months or longer.

(c) (1) If the Shipper has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Shipper shall select one or more of the Carriers.

(2) If Shipper's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Shipper to select the carrier, Shipper shall be deemed to have the legal right to select the carrier.

(3) It shall be deemed a breach of this Agreement, if before the time of shipment, the Shipper, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(4) For the purposes of this Article, the Shipper shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment.

(a) with respect to which the Shipper arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

(b) with respect to which the Shipper's name appears on the bill of lading or export declaration as shipper or consignee.

(5) Nothing contained in this Agreement shall require the Shipper to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

(d) This agreement does not require the Shipper to divert shipments of goods from natural transportation routes not served by conference vessels where direct carriage is available. Provided, however, that where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Shipper shall be obligated to select the Carriers' service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Shipper intends to assert his rights under this article to use a carrier who is not a party hereto, and the port through which Shipper intends to ship or receive his goods is within the scope of this Agreement, Shipper shall first so notify the conference in accordance with the provisions of Article 4 hereof.

2. (a) If, at any time, the Shipper shall make any shipment or shipments in violation of any provision of this Agreement, the Shipper shall pay liquidated damages to the Conference in lieu of actual damages which would be difficult or impractical to determine. Such liquidated damages shall be paid in the amount of freight which the Shipper would have paid had such shipment or shipments moved via a Conference Carrier computed at the contract rate in effect at the time of the shipment less the estimated cost of loading and unloading which would have been incurred had the shipment been made on a Conference vessel.

(b) (1) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within 30 days after receipt of notice by registered mail from the Conference that they are

due and payable the Conference shall suspend the Merchant's rights and obligations under the contract until he pays such damages.

(2) If, within 30 days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within 30 days thereafter proceed in accordance with Article 9, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within 30 days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages.

(3) No suspension shall abrogate any cause of action which shall have arisen prior to the suspension.

(4) Payment of damages shall automatically terminate suspension.

(5) The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within 10 days after the event.

(c) Except as hereinabove provided, damages for breach of this Agreement shall be actual damages to be determined after breach in accordance with the principles of contract law.

(d) In order that the conference may investigate the facts as to any shipment of the Shipper that has moved, or that the Shipper or the conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Shipper, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Shipper where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the Shipper and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended.

(e) Within ten (10) days after the event in any transaction in which the Merchant is a party and the legal right to select the carrier is vested in a person other than the Merchant, and if he has knowledge that the shipment has been made via a nonconference carrier, the Merchant shall notify the conference in writing of this fact, giving the names of the merchant and his customer, the commodity involved and the quantity thereof, and the name of the nonconference carrier; *Provided, however,* That where the activities of Merchants are so extensive in area or the nature or volume of his sales makes it impracticable to give notice within ten (10) days, the Merchant shall give notice as promptly as possible after the event.

3. This agreement is not and shall not be construed to be a contract of carriage with the Carriers or any one of them. Shipments under this Agreement are subject to all the terms and conditions of the current Conference Tariff on file with the Federal Maritime Commission and the respective Carrier's engagement note, permit, dock receipt, mate's receipt and bill of lading regularly in use by the individual Carrier when shipments are tendered. With respect to contracts of carriage made between the Shipper and one of the Carriers, none of the other companies referred to as Carriers shall be liable jointly or severally, or in any way or to any extent.

4. The Carriers severally agree to furnish from time to time, when requested, at the applicable contract rates and subject to the conditions hereafter stated, space for the aforesaid shipments of the Shipper to the discharging ports of the

Carrier(s), provided that such space is available when the Shipper makes application therefor. In the event that none of the Carriers is able to furnish reasonably prompt space for specific shipments when requested by the Shipper, the latter will be free to forward such shipments by any vessel other than those of the Carriers without violating this Agreement, provided that the Shipper first notifies the Conference at San Francisco in writing of its inability to obtain space required, and allows the Conference forty-eight hours after receipt of such notice to confirm that the space is not available.

5. For the purpose of giving Shipper notices of changes in rates, the Shipper may furnish the Conference a list of commodities in which the Shipper is interested. If requested by the Shipper (but not otherwise) the Shipper shall thereafter receive written notice of changes of rates applicable to said commodities.

6. (a) The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results in an increase or decrease in cost to the Shipper, except as provided by Section 18(b)(2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however*, the rates of freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance of the increases by publishing them ninety (90) calendar days in advance in the Pacific Coast European Conference Tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the Shipper, the Shipper may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid, of the proposed increase: *Further provided, however*, that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the Shipper in writing that they elect to continue this Agreement under the existing effective rates and, in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the Shipper's notice of termination had never been given.

(b) The Conference shall offer to the Shipper a subscription to its tariffs at a reasonably compensatory price, however, the Shipper shall be bound by all notices accomplished as aforesaid without regard to whether it subscribes to the Conference tariff. Tariffs shall be open to the Shipper's inspection at the Conference offices and at each of the offices of the Carriers during regular business hours.

(c) The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date through filing with the Federal Maritime Commission rather than to have become effective with the signing of this Agreement and notices of proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this agreement.

7. (a) In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the carriers in the trade covered by this Agreement, the carrier or carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the shipper

of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by any carrier or carriers, said carrier or carriers shall forthwith reassume its or their rights and obligations hereunder and notify the Shipper on fifteen (15) days' written notice that its suspension is terminated.

(b) In the event of any of the conditions enumerated in Article 7a, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than 15 days' written notice to the Shipper, who may notify the carrier or carriers in writing not less than 10 days' before increases are to become effective of its intention to suspend this Agreement insofar as such increase or increases is or are concerned, and in such event the Agreement shall be suspended as of the effective date of such increase or increases, unless the carrier or carriers shall give written notice that such increase or increases have been rescinded and cancelled.

(c) In the event of any extraordinary conditions not enumerated in Article 7a, which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions; provided, however, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The Shipper may, not less than 10 days before increases are to become effective, notify the carrier or carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the carrier or carriers shall give notice that such increase or increases have been rescinded and cancelled.

8. (a) The Shipper and the Carriers recognize that mutual benefits are derived from freedom on the part of the Carriers to open rates, where conditions in the Trade require such action, without thereby terminating the dual-rate system as applicable to the commodity involved; therefore, it is agreed that the Conference, to meet the demands of the Shipper and of the Trade may suspend the application of the contract as to any commodity through the opening of the rate on such commodity (including opening subject to maximum or minimum rates) provided that none of the Carriers during a period of ninety days after the date when the opening of such rate becomes effective shall quote a rate in excess of the Conference contract rate applicable to such commodity on the effective date of the opening of the rate and provided further that the rate shall not thereafter be closed and the commodity returned to the application of the contract system on less than ninety days' notice by the Carriers through the filing of contract-non-contract rates in their tariff.

(b) Additional commodities may be placed on a contract rate basis from time to time.

9. Should the Carriers during the period of this Agreement reduce rates on any commodity on which contract rates are applicable, the Shipper shall be given the full benefit of such reduced rates during the period same remains in effect.

10. In case of dispute, the Shipper and the Carrier(s) each agree to submit the matter under dispute to arbitration, each appointing an arbitrator and the two so chosen shall select an umpire to which Arbitration Committee all data requested in connection with the matter in dispute shall be made available. Decision of two or more members of the said Committee shall be binding on the parties and the arbitration shall be made under and pursuant to the terms and conditions of the United States Arbitration Act, *9 U.S.C. 1 et seq.*, all of which

terms and conditions shall be binding upon the parties hereto. Nothing herein shall deprive the Federal Maritime Commission of its jurisdiction.

11. Unless earlier terminated as herein provided, this Agreement shall remain in effect indefinitely, provided, however, it may be terminated by either party giving to the other ninety (90) days written notice of intention to terminate the same.

12. This agreement shall be construed in the light of the Shipping Act, 1916, and the Rules and Regulations of the Federal Maritime Commission.

13. This agreement may be amended from time to time with the permission of the Federal Maritime Commission.

*--
SHIPPER (Show full Corporate, Company or Individual Name)

*--
(Street Address)

*--
(City, Postal Zone and State)

*By---
(Signature of Company Official and Title)

*--
(Typed Name of Official and Title)

*--
(Dated as of)

For and on behalf of the Carriers shown on the reverse hereof:

By---

SHIPPER is requested to fill in the required data in spaces indicated **by** stars (*)

CARRIERS

Referred to on face hereof (List of Conference Members)

FEDERAL MARITIME COMMISSION

DOCKET NO. 1153

TRUCK AND LIGHTER LOADING AND UNLOADING PRACTICES AT NEW YORK HARBOR

Decided December 15, 1966

Agreements between respondents and ocean carriers whereby revenue collected from lightermen is refunded to carriers found to exist.

Agreements between respondents and ocean carriers whereby revenue collected from lightermen is refunded to carriers do not violate Article 2 of respondent's conference agreement.

Record is not adequate to determine whether agreements between respondents and ocean carriers whereby revenue collected from lightermen is refunded to carriers are subject to section 15 of the Shipping Act.

Mark P. Schlefer, *John Cunningham*, *Richard J. Gage*, and *Robert J. Nolan* for respondents.

Herbert Burstein, *Samuel B. Zinder*, and *Arthur Liberstein* for intervenor Empire State Highway Transportation Association, Inc.

Arthur Liberstein, and *Charles Landesman* for intervenor Wm. Spencer & Son Corporation.

Christopher E. Heckman for intervenors Harbor Carriers of the Port of New York, James Hughes, Inc., Henry Gillen Sons' Lighterage, Inc., McAllister Lighterage Line, Inc., and Petterson Lighterage & Towing Corporation.

Thomas M. Knebel for intervenor Middle Atlantic Conference.

James M. Henderson, *Douglas W. Binns*, and *Jacob P. Billig* for intervenors Port of New York Authority and Export Packers Association of New York, Inc.

D. J. Speert for intervenor Brooklyn Chamber of Commerce.

Leo A. Larkin, and *Samuel Mandell* for intervenor The City of New York.

Thomas R. Matias, *Robert J. Blackwell*, *Roger A. McShea* and *Donald J. Brunner* as Hearing Counsel.

SUPPLEMENTAL REPORT*

BY THE COMMISSION (John Harllee, *Chairman*, Ashton C. Barrett, *Vice Chairman;* James V. Day, George H. Hearn, *Commissioners*).

On May 16, 1966, we served our report in the above-entitled docket. Our report culminated an extensive investigation into the practices of the New York Terminal Conference (respondent) in regard to the loading and unloading services its members provide for trucks and lighters at the various terminals in the port of New York. In our report we condemned certain practices and tariff provisions of respondents as contrary to sections 16 and 17 of the Shipping Act, 1916 (Act).

We reserved decision, however, on certain aspects of the investigation. This report disposes of those issues upon which decision was previously reserved.

FACTS

The issues upon which we deferred decision in our previous report are raised by part (6) of the order of investigation. They are: (1) Whether agreements exist between respondent terminal operators and the ocean carriers using respondent's facilities whereby part of the revenues collected by respondents from lighter operators is refunded to the carriers; (2) whether such agreements are subject to section 15 of the Act; and (3) whether such agreements violate Article 2[1] of respondents' conference agreement which prohibits refunds "in any manner or by any device."

Intervenor, Empire State Highway Transportation Association, Inc. (Empire), sought to obtain certain terminal and stevedoring contracts from respondents in an attempt to gain information concerning any such refund agreements. Upon the request of Empire, the Examiner issued a subpena to respondents which requested:

> * * * all contracts and agreements with or between any steamship company concerning or dealing in any way with terminal operators, terminal service, and/or the loading and unloading of trucks and lighters in New York Harbor.

In response to the subpena, respondents' conference chairman, Richard J. Gage, produced seven stevedoring contracts. Mr. Gage stated that he considered this to be compliance with the subpena. The Examiner, however, ruled that since there was evidence that as many

*First Report: Vol. 9, FMC, Reports, p. 505.

[1] The pertinent part of Article 2 of respondents' conference agreement No. 8005 states: "* * * and no rates or charges assessed or collected pursuant to such tariffs shall be directly or indirectly refunded or remitted in whole or in part in any manner or by any device."

as 500 such contracts were in existence, this could not be deemed compliance with the subpena. The Commission therefore sought further enforcement of the subpena in the District Court for the District of Columbia. On July 28, 1965, the court dismissed the petition for enforcement without stated reasons.

Subsequently, on January 28, 1966, upon request of Empire, new subpenas were issued to certain respondents requiring them to produce the same documents which had been requested in the original subpena. The new subpenas were issued to remedy certain alleged procedural defects in connection with the original subpena.

Respondents failed to comply with the new subpenas. Thereafter, on February 15, 1966, a petition was filed in the U.S. Dictrict Court for the Southern District of New York requesting enforcement thereof. This proceeding subsequently was transferred to the U.S. District Court for the District of Columbia. The later court by order dated April 29, 1966, denied the petition, while assuring the Commission that it would not be precluded from issuing new subpenas narrower in scope and more specific with respect to the documents sought. Empire, however, advised the Commission that it would not request the issuance of any further subpenas in this proceeding.

Upon the conclusion of the subpena enforcement proceedings, the Chief Examiner ordered that a decision be reached on the remaining issues and ordered that briefs be filed by all parties.

Examiner A. L. Jordan subsequently issued his supplemental initial decision and the proceeding is now before us upon exceptions to his decision.

DISCUSSION

The Examiner concluded: (1) There are agreements between respondents and the ocean carriers whereby certain revenues collected from lighter operators are "refunded" to the carriers; (2) such agreements are not subject to section 15 of the Act; and (3) such agreements do not violate Article 2 of respondents' conference agreement.

No party to this proceeding excepts to the Examiner's conclusions (1) and (3). We are also in agreement with the Examiner on these two conclusions and adopt them as our own.

Intervenors Empire and Middle Atlantic Conference, however, both except to the Examiner's conclusion that the refund agreements are not subject to section 15 of the Act. Alternative exceptions have been offered by these parties. They suggest first that the record in this proceeding is inadequate for making a determination about the applicability of section 15 to these refund agreements. They suggest, in the alternative, that if the Commission finds the record to be adequate, it

requires a finding that the refund agreements are subject to section 15.

Upon review we find the record to be inadequate to determine the applicability of section 15 to these agreements. We conclude that the Examiner erred in determining that the agreements were not subject to section 15.

There has been some confusion among the parties and also by the Examiner as to how many or what kind of contracts are in the record, and also as to which contract provisions are the subject of this proceeding.

It should be stressed that the order of investigation refers specifically to agreements concerning refund of revenue collected from *lighter* operators.[2] Accordingly, we are not here concerned with any contract provisions which pertain to disposition of money collected from *truck* operators.

The Examiner refers to seven contracts which have been furnished by respondents and quotes provisions from them. It is true that respondent produced seven contracts in compliance with the subpena.[3] However, none of these seven contracts contains provisions for refund to a carrier of money collected from lightermen. In fact, six of the seven specifically provide for the collection and *retention* by the terminal operator of all revenue provided in connection with loading and unloading lighters. The seventh contract is not between a terminal operator and a steamship line and therefore is not of the type under investigation here.[4]

Even though none of the contracts produced in compliance with the subpena contain provision for refund of lighter revenue, nevertheless the record does contain some evidence that such refund arrangements exist. At the prehearing conference, Hearing Counsel requested respondents to produce all contract provisions which vary from the normal provision whereby a respondent retains the money collected under the lighterage tariff. Counsel for the respondents agreed to provide copies of such contract provisions but declined to provide the entire stevedoring contracts. In response to Hearing Counsel's request, counsel for the respondents produced Exhibit 24. This exhibit purports to contain all existing provisions which provide for refund of lighter revenue by any respondent. Two such provisions are quoted in the exhibit as follows:

> Income from handling lighters to be remitted to Steamship Line when collected by Contractor (terminal).

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[2] The order reads: "Whether any agreements exist * * * whereby part of the revenues collected from *lighter* operators is refunded to the carriers * * *." [Emphasis supplied.]

[3] These seven contracts were introduced as Exhibits C-3, C-4, C-5, C-12, C-13, C-14, and C-15.

[4] Exhibit C-3 is the contract which is not of the type under investigation.

All monies received as reimbursement or compensation for the use of labor on lighters * * * shall accrue to the Steamship Company and shall be refunded to the latter in due course.

Another respondent has an arrangement by which lighterage tariff revenues are refunded to the ocean carriers less 10 percent for bookkeeping expense. This arrangement has not been reduced to a contract provision, however.

It is also stated in this exhibit that these provisions are employed because the stevedoring and terminal services in these instances are performed by the terminal operator for the ocean carrier on a cost-plus basis. Remissions of lighter revenue are said to be made to the ocean carrier because the ocean carrier has paid the terminal operator for this service in its cost-plus arrangement and is believed to be entitled to reimbursement. The exhibit contains no other part of any contract except the bare refund provisions above quoted. Nowhere does the record contain any contracts which include this type of provision.

We can conclude from the record that some stevedoring contracts do exist between respondents and the ocean carriers whereby money collected from lighter operators is refunded to the ocean carriers. We have not seen such contracts, however. We have seen the refund provisions but have not seen them in the context of the entire stevedoring contract. We are unable to determine the effect of such provisions until we see the context in which they actually appear and are used. To say one way or another what competitive effect such a provision has on a lighterman, or an ocean carrier, would be pure conjecture at this point.

The Examiner offered no reasons for his conclusion that the refund agreements are not subject to section 15. We do not agree with this conclusion. The record will not support a finding that the refund agreements are subject to section 15. Neither will the record support a finding that the agreements are not subject to section 15. Accordingly, we can make no finding on this point.

Additional justification exists for making no findings as to section 15 applicability to the refund agreements. In our previous report in this same docket, we found the provisions of respondents' Lighterage Tariff No. 2 which imposed direct transfer loading and unloading charges on lightermen to be contrary to section 17 of the Act. We also ordered respondents to delete this charge from their tariff. The revenue collected pursuant to this tariff is the same revenue which is the subject of the refund arrangements between respondents and the ocean carriers. Since respondents should no longer assess a charge against the lightermen for this service, it follows quite simply that respondents should not receive this revenue from lightermen. Consequently, no rev-

enue can be refunded to the ocean carriers pursuant to the refund agreements involved here. Since no future refunds can be made pursuant to these agreements, the question of the applicability of section 15 to these agreements becomes moot.

CONCLUSION

We agree with the Examiner's findings that agreements exist between respondents and steamship lines whereby certain revenues collected from lighter operators are to be refunded to the ocean carriers; and that such agreements do not violate Article 2 of respondents' conference agreement. We do not make a finding, however, on the question of the applicability of section 15 to such agreements. The Examiner's finding that section 15 is not applicable is reversed.

Since this report disposes of all the remaining issues, the proceeding in Docket No. 1153 is hereby discontinued.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1166

AGREEMENTS No. 6200–7, 6200–8, AND 6200–B

UNITED STATES ATLANTIC & GULF/AUSTRALIA-NEW ZEALAND CONFERENCE

Decided December 16, 1966

A modification to the basic agreement of a conference operating outbound from U.S. Atlantic and Gulf ports to Australia-New Zealand, which provides for the establishment of a separate Great Lakes section to establish rates from the Great Lakes upon the affirmative vote of three-fourths of the members of the section, is approvable under section 15 of the Shipping Act, 1916 because the arrangement will effect administrative economies by bringing separate trades under a single conference administration.

A provision in a modification to a conference agreement, establishing a separate section to cover the Great Lakes trade, which requires that a rate established by the Great Lakes section lower than the comparable rate from the Atlantic and Gulf must be approved by a two-thirds vote of the members of the conference, is detrimental to the commerce of the United States and contrary to public interest because it is harmful to shippers using the Great Lakes and would handicap the growth and development of the Great Lakes trade.

Elmer C. Maddy, *Paul F. McGuire*, and *Baldvin Einarson* for U.S. Atlantic & Gulf/Australia-New Zealand Conference, respondent.

Jerome H. Heckman, *Robert Tiernan*, and *Vincent D. Simmons* for the Dow Chemical Company and Dow Chemical International S.A., interveners.

James M. Henderson, *Arthur L. Winn, Jr.*, *Samuel H. Moerman*, and *J. Raymond Clark* for the Port of New York Authority and North Atlantic Ports Association, interveners (with *Sidney Goldstein*, General Counsel, and *F. A. Mulhern*, Attorney, for the Port of New York Authority).

Warren A. Jackman, *Stuart B. Bradley*, and *Daniel K. Schlorf* for Federal Commerce and Navigation Company Limited and Federal Commonwealth Line, interveners.

Robert Jorgensen for International Association of Great Lakes Ports, intervener, and *Ronald Parizek* for Port of Chicago, a member of said association.

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

REPORT ON REMAND

BY THE COMMISSION: (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman;* James V. Day and George H. Hearn, *Commissioners*).

This proceeding is before the Commission upon remand from the U.S. Court of Appeals for the District of Columbia Circuit in *U.S. Atl. & Gulf/Australia-N.Zea. Con.* v. *F.M.C.*, 364 F. 2d 696 (D.C. Cir. June 30, 1966). The Commission instituted this investigation on December 23, 1963, to determine whether three amendments to the organic agreement of the U.S. Atlantic & Gulf/Australia-New Zealand Conference (Agreement No. 6200) should be approved under section 15 of the Shipping Act, 1916 (46 U.S.C. § 814) and whether the conference should be permitted under section 14b of the Shipping Act, 1916 (46 U.S.C. § 813(a)) to extend its dual rate contract system to include shipments through Great Lakes ports.

Agreement No. 6200 covers the establishment of rates, charges, and practices for the carriage of cargo from Atlantic and Gulf ports of the United States to ports in Australia, New Zealand, and certain South Pacific Islands. The amendments to the basic agreement would:

1. Add Great Lakes and St. Lawrence River ports of the United States to the trade covered by the conference and extend the scope of the dual rate contract to shipments from these ports (Agreement No. 6200–8, par. 1);

2. Establish a separate "Great Lakes section" within the conference, to be composed of member lines operating regular services or member lines demonstrating an intent to operate in the Great Lakes from Great Lakes ports, which would establish rates and conditions applicable to carriage from Great Lakes ports, subject to the consent of two-thirds of all conference members to any rate lower than the corresponding rate from any other conference area.[1] (Agreement No. 6200–8, par. 2); and

3. Change the present requirement of unanimous assent to any action under the agreement to two-thirds assent, except as otherwise

[1] As originally submitted, the consent of three-fourths of the conference members was required. The Examiner, however, while approving this provision in principle saw no reason for requiring a greater majority to ratify a lower rate from the Lakes than for ordinary conference action. Accordingly, his recommended approval was subject to the conference's modifying their agreement to require approval only by a two-thirds majority. The conference has indicated their assent to this modification.

specifically provided and except that any modification of the basic agreement would require unanimous consent (Agreement No. 6200-7, par. 2).

In our previous decision, *Agreement—U.S. Atlantic & Gulf/Australia-N. Zealand Con.*, 9 F.M.C. 1 (1965), we recognized that members of steamship conferences could effect certain administrative economies by bringing separate trade areas under a single conference administration, thereby permitting the use of one office and one staff where several might otherwise be required. Thus, the Commission approved the establishment of a single administration, the U.S. Atlantic and Gulf/Australia-New Zealand Conference, to handle both the Atlantic and Gulf trade and the Great Lakes trade. However, the Commission found that the trade from the Great Lakes to Australia-New Zealand was naturally competitive with the trade from the Atlantic and Gulf and that section 15 required that the rates from each area should be set independently. In addition, the Commission refused to extend to the Great Lakes the dual rate contract applicable at Atlantic and Gulf ports because the extension of the contract system would be detrimental to the commerce of the United States, discriminatory against Great Lakes ports in favor of Atlantic and Gulf ports, and contrary to the public interest. The Commission also refused to approve the three-fourths voting provision within the Great Lakes section and substituted a two-thirds vote because the Atlantic and Gulf section of the conference utilizes a two-thirds vote, and a three-fourths vote, since it appeared that only three carriers would be eligible for membership in the Great Lakes section, was tantamount to a veto in the hands of a single member.[2]

Upon appeal respondents argued that the Commission erroneously interpreted section 15. Respondents argued that section 15 does not require the right of independent action by carriers in the Great Lakes because the Atlantic and Gulf trade and the Great Lakes trade are supplementary, not competitive. Secondly, the conference argued that the Commission failed to make proper findings as a basis for changing the three-fourths voting provision to two-thirds in the Great Lakes section. Finally, the conference argued that the Commission erred in disapproving Agreement No. 6200-8 and in refusing to permit the use of one dual rate contract in all trades covered by the conference.

The Court of Appeals sustained the Commission's refusal to allow the conference to extend the coverage of the established dual rate system to the Great Lakes. However, the court held that, with respect

[2] As a result of these findings, the Commission approved Agreement No. 6200-7 (par. 2) and disapproved Agreement No. 6200-8 with permission to the conference to submit a new amendment, consistent with the Commission's report, for consideration.

to the disapproval of the three-fourths voting rule, the Commission failed to identify which of one or more of the statutory standards in section 15 is transgressed by the voting rule. The court, therefore, remanded the issue to the Commission for reconsideration.

Similarly, the court had difficulty with the handling of the proposal that the Atlantic and Gulf section of the conference retain the right to veto any rate set by the Great Lakes section which was below the Atlantic and Gulf rate. Since the court had remanded the case with respect to the voting requirements in the Great Lakes section, it decided also to remand the independent action issue to the Commission to make more explicit findings and conclusions.

In this report we shall reconsider the two remanded issues as directed by the court.

FACTS

In the past, Great Lakes ports of the United States were a relatively unimportant shipping area because of adverse conditions inherent in the Lakes—inadequate port facilities, a short navigation season, and limited common carrier service. With the opening of the St. Lawrence Seaway in 1959, however, the Lakes became the fourth sea coast of the United States. Since the opening of the Seaway, the movement of cargo has steadily increased.

At present, many shippers move their goods from the Great Lakes. Nevertheless, certain inherent disadvantages limit the ability of Lakes ports to attract cargo. Goods can move from Lakes ports only during a 6–7 month sailing season. Consequently when the Lakes are closed to navigation, all shippers, regardless of their loyalty to or preference for Lakes ports, must look to the Atlantic or Gulf for service. In addition, transit time from Atlantic ports to Australia and New Zealand varies, depending upon the ports involved, from 25 to 35 days, while transit time from Chicago to the first port in Australia is about 54 days, and from Detroit it is about 43 days. And the length of voyages from the Lakes may be increased by congestion in the locks. Where speed is essential, therefore, shippers must rely on the Atlantic or Gulf.

Despite these difficulties, however, Lakes ports have certain advantages over the Atlantic and Gulf. Shippers with plants on or near the Lakes find that common carrier service at their doorstep saves the cost of inland transportation to Atlantic or Gulf ports, a factor which is a strong inducement to ship from the Lakes despite the lengthy transit time and limited service.

At the close of the record in this proceeding, the conference had six members. Three of these—A/B Atlanttrafik; American and Australian Steamship Line, Joint Service (A & A); and Port and Asso-

ciated Lines, Joint Service (Port)—would be eligible for membership in the proposed Great Lakes section according to the eligibility requirements set forth in Agreement 6200–8. The individual tariffs filed by these lines for transportation of cargo from the Lakes to Australia and New Zealand generally provide for a differential or arbitrary over conference rates applicable at Atlantic and Gulf ports of $5.00 per ton for ports in the Detroit-Toledo range and $6.00 for ports in the Chicago-Milwaukee range. If the conference is extended to the Lakes, the members will maintain as a general rule some differential over Atlantic and Gulf rates to compensate for the additional steaming time and other costs incurred in serving the Lakes.

Of the three conference lines who have expressed an intent to serve the Lakes, only Atlanttrafik has actually made a sailing. During 1963, it made 11 sailings out of the Great Lakes port of Detroit. Of these, 8 also called at Chicago. Atlanttrafik, however, has not attracted sufficient cargo to fill its vessels from Lakes ports alone, and it has found it necessary to call at Montreal, other St. Lawrence River ports, and U.S. Atlantic Coast ports.

A & A and Port collectively propose to provide monthly service from the Lakes through a sailing arrangement pursuant to FMC Agreement No. 7996–3. In conjunction with this proposed Lakes service, A & A and Port will call at Montreal and Canadian ports east thereof but will not call at U.S. Atlantic or Gulf ports. A & A and Port would continue their present separate service from U.S. Atlantic and Gulf ports.

Although A & A and Port have filed tariffs covering the Great Lakes, and have solicited cargo, they have not as yet secured cargo sufficient to justify a sailing from the Lakes. Most of their solicitation has been directed to automobile shippers who account for about 70% of the revenue in the Great Lakes trade. Competition for this cargo is keen between the conference members and with independent carriers as well.

Carriers in the Lakes compete for the same types of cargoes as carriers serving seaboard ports. Indeed, practically all commodities moving through the Lakes are also exported through other ranges. In many instances, shippers located at interior points may have a choice of moving cargo from the Lakes or seaboard. Frequently a shipper will use both the Lakes and the Atlantic and Gulf during the navigation season. While some shippers require this flexibility, other shippers prefer to use the Lakes on a regular basis even though the rates from this area might be higher than seaboard rates. In fact, some products move only during the navigation season. On the other hand, some shippers from interior points rely entirely on the Atlantic and Gulf

to take advantage of the better service and faster transit even though overland transportation costs are higher. In summary, there is direct competition between the Great Lakes and the Atlantic and Gulf from the viewpoint of carriers, shippers, and ports. Because of this competition, cargo is diverted from one range to another to take advantage of various savings in the cost of transportation, including lower ocean rates.

DISCUSSION

We will consider initially the provision of Agreement No. 6200–8 (par. 2) which provides that rates shall be established within the Great Lakes section upon the affirmative vote of three-fourths of the members of that section. In our previous decision, we altered the agreement to provide for a two-thirds rather than a three-fourths vote. The Court of Appeals stated (364 F. 2d at 699):

> The rationality of the Commission's disapproval of the ¾ voting requirement within the Section is not, however, so readily apparent. The Commission's discussion of this matter is as sparing in detail as it is flat in conclusion. After noting that the record disclosed three carriers as potential members of the Section, the Commission observed that the ¾ requirement "permits one carrier to exercise a practical veto over the rate making decisions of that section. We cannot approve such an agreement . . ." This says no more to us than that, where unanimity is made the order of the day, approval must be withheld. In particular, the Commission does not identify which one or more of the statutory standards is transgressed by this provision; and those standards are embedded in a statute which says in terms that the Commission shall disapprove those agreements which conflict with the enumerated standards "and shall approve all other agreements, modifications or cancellations."

Our further review of the record discloses little evidence upon which the Commission could find that a three-fourths voting rule for the Great Lakes section might be expected to operate in violation of section 15. Under the circumstances, we shall reverse our holding that the voting requirement within the Great Lakes section be changed. Accordingly we approve the establishment of a Great Lakes section to be governed by a three-fourths voting rule. In this connection it should be noted that if the three-fourths vote is later found to be unduly restrictive of ordinary conference business, the Commission may take steps based upon actual experience rather than speculation to change the voting rule.

We consider now the provision of Agreement No. 6200–8 (par. 2) which provides that in no case shall a rate on a given commodity from a Great Lakes port of the United States be less than the corresponding rate from other conference areas except with consent of two-thirds of the conference members.

The Examiner approved the provision. Considering the fact of substantially higher cost of service from the Lakes, the Examiner could find no reasonable excuse for a rate from the Lakes ever to be lower than the corresponding rate from the Atlantic and Gulf. If it became necessary to meet competition in the Lakes the Examiner found no reason to assume that the non-Lakes members of the conference would take a purely dog-in-the-manger attitude to prevent a Lakes carrier from meeting the competition. In addition, the Examiner reasoned if the Lakes rate were cut to meet foreign competition, propriety would suggest that the Atlantic and Gulf rate be cut to at least as low a point, in order to avoid putting a shipper from the Lakes in a preferred position with respect to its seaboard competition. Finally, the Examiner found that any general, sustained reduction of Lakes rates below Atlantic and Gulf levels would not only require subsidization of Lakes service by Atlantic and Gulf cargo, but might well lead to general instability of rates.

Thus, the Examiner concluded that proper provision for over-all conference consent to Great Lakes rates fixed by the Great Lakes section at a point below Atlantic and Gulf rates is not unreasonable in the circumstances and would not unjustly affect shippers, ports, or carriers. It does not substantially detract from the salutary effect of the Great Lakes section provision, and it would tend to maintain a fair relation between Lakes rates and Atlantic and Gulf rates.

The Commission in its earlier report recognized that certain administrative economies can be effected by permitting separate trade areas to be brought under a single conference administration and, therefore, authorized the conference to extend its administration to the Great Lakes area. However, the Commission disapproved the proposed conference amendment requiring the approval of two-thirds of all conference members to set a rate for the Lakes section lower than that applicable to Atlantic-Gulf shipments.

The Court of Appeals remanded this issue to the Commission for reconsideration because the Commission erroneously interpreted the independent action language in section 15 to dictate automatic disapproval.

Upon reconsideration, we are convinced that the result reached in our earlier decision was correct. In reaffirming our previous holding, we find that the arrangement would be detrimental to the commerce of the United States and contrary to the public interest and must therefore be disapproved under section 15.

As found above, carriers in the Lakes compete for the same types of cargoes as carriers serving seaboard ports. Shippers at inland points

have an option during the navigation season of using either range depending upon a balance of myriad transportation factors, including the level of rates. Cargo is diverted from one range to the other in response to the competitive factors.

Witnesses for the conference recognized the existence of competition between the two trading areas. One witness was opposed to the creation of a separate Great Lakes conference because this would "create further competition for us which we wish to avoid". Another witness stated that some shippers shipped both from Atlantic-Gulf as well as from Lakes ports, which is further indication that competition between the two areas exists.

While a lower rate from the Lakes would seldom be established because of the additional expenses in carrying cargo out of the Lakes, the Great Lakes carriers should nonetheless be free to set such rates. The free exercise of rate-making initiative by Lakes carriers will, as it has in the past, continue to promote and strengthen commerce moving through the Lakes. On the other hand, the situation proposed by the conference would be harmful to shippers who use or may wish to use the Great Lakes by depriving them of freedom to negotiate rates with carriers serving the Lakes and by ameliorating a carrier's incentive to serve the Lakes. Likewise, the arrangement, by its tendency to encourage cargo to move overland to seaboard ports, frustrates the full utilization of Great Lakes ports.

Therefore, the provision, which allows the existence of a veto power in carriers serving only Atlantic and Gulf ports poses a threat to the commerce of the United States and to public interest far greater than any rate competition that may ensue between the two trades. Great Lakes ports are developing into the fourth coast of this country and have already obtained an important position in our commerce. Any rate control over common carrier operations in the Lakes by Atlantic and Gulf carriers, who are principally if not exclusively motivated by the best interests of their own trades, would handicap the growth and development of the Lakes trade by encouraging cargo to move overland to seaboard ports and by tending to discourage the establishment of better and more frequent service from the Great Lakes. We, therefore, find on this record that the agreement in this respect is detrimental to the commerce of the United States and contrary to the public interest. It, therefore, must be disapproved under section 15.

The conference may submit a revised agreement, not inconsistent with the terms of this report, for our consideration.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1187

REDUCED RATES ON MACHINERY AND TRACTORS FROM UNITED STATES ATLANTIC PORTS TO PORTS IN PUERTO RICO

DOCKET NO. 1187 (SUB. 1)

FURTHER REDUCTION IN RATES ON MACHINERY AND TRACTORS FROM UNITED STATES PORTS TO PORTS IN PUERTO RICO

Decided January 12, 1967

Authority reaffirmed to require that (1) in the absence of valid transportation ratemaking factors militating against such result, cargo move through naturally tributary areas, and (2) where it becomes necessary in the public interest, high-value commodities move at rates high enough to enable the carriage of essential low-value commodities at rates lower than those at which said essential commodities would be carried in consideration of the usual transportation factors alone.

No need demonstrated to assert such authority on present state of record in this proceeding.

Carrier's present rates found to be lawful as just and reasonable.

Homer S. Carpenter and *Edward T. Cornell* for respondent TMT Trailer Ferry, Inc. (C. Gordon Anderson, Trustee).

John Mason and *Edward M. Shea* for respondent South Atlantic & Caribbean Line, Inc.

J. S. Provan and *Warren Price, Jr.* for respondent Sea-Land Service, Inc.

Amy Scupi for respondent American Union Transport, Inc.

Joseph Hodgson, Jr. for respondent Seatrain Lines, Inc.

William L. Marbury, Donald MacLeay, and *Harold E. Mesirow* for intervener Maryland Port Authority.

John T. Rigby for intervener Commonwealth of Puerto Rico.

Sidney Goldstein, General Counsel, *F. A. Mulhern*, Attorney, *Arthur L. Winn, Jr., Samuel L. Moerman, J. Raymond Clark*, and *James M. Henderson* for intervener Port of New York Authority.

Donald J. Brunner and *Thomas Christensen*, Hearing Counsel.

REPORT ON REMAND*

By the Commission (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman;* James V. Day, *Commissioner*):

Proceedings*

On May 10, 1966, the Commission entered its Report and Order in the captioned proceedings setting the minimum rates of 50 cents per cubic foot on heavy machinery moving from United States North Atlantic ports to Puerto Rico and 48 cents per cubic foot on the same commodity moving from United States South Atlantic (Florida) ports to Puerto Rico. It also approved (but did not fix) a 28 cents per cubic foot rate on "road scrapers," a very large form of roadbuilding machinery, for the two carriers from Florida ports, South Atlantic and Caribbean Lines, Inc. (SACL) and TMT Trailer Ferry (TMT). The basis for this decision was that the proposed rates of SACL and TMT, 37 cents per cubic foot, or for that matter, any rates lower than 48 cents per cubic foot on the subject commodity, would be unjust and unreasonable within the meaning of section 4 of the Intercoastal Shipping Act, 1933 (the 1933 Act), because such rates would unreasonably prejudice North Atlantic ports by drawing away, in the absence of "transportation conditions" justifying such diversion, cargo "naturally tributary" to such ports in violation of section 16, First of the Shipping Act. 1916. Such determination was made irrespective of the fact that the 37-cent rates had been shown to be fully compensatory. An additional ground for the fixing of a 48-cent minimum rate for the South Atlantic carriers was that such a rate would enable the North Atlantic carriers to move at lower rates commodities essential to the welfare of the Commonwealth of Puerto Rico. The minimum rates of the North Atlantic carriers had been set at 50 cents per cubic foot because rates below that level would not have been compensatory.

On May 25, 1966, TMT filed a Petition to Review the Commission's decision with the Court of Appeals for the District of Columbia Circuit. The Commission moved the court to remand the proceeding to it to "reconsider the issues after the taking of further evidence and opportunity to the parties to reargue the legal issues involved." The motion requested the court to remand "to enable the Commission to forthwith vacate the order under review and to reopen the proceeding for the taking of further evidence and for such further action as may be appropriate in the circumstances." On November 14, 1966, the Court of Appeals granted the motion, conditioned upon the filing with it of

*See vol. 9, FMC Reports, 465.

our report on the proceedings on remand within 60 days from the date of the court's order.

On November 23, 1966, the Commission vacated its order and reopened these proceedings and requested evidence and argument on the issues stated below. Hearings were held before Examiner Herbert K. Greer on December 13–15, 1966, after which, with the concurrence of all parties and pursuant to order of the Commission, the record was certified to the Commission for decision. Briefs have been received from all parties; oral argument was held.

Issues for Resolution

The Commission sought to resolve the following issues:

1. Prejudice to New York resulting from diversion of traffic due to TMT's rates;

2. The Commission's authority to set rates which will enable New York and Florida ports to each get the traffic originating in territory from which inland freight costs are lower to the respective ports;

3. Whether high value commodities should take a high rate in order to enable New York carriers to secure some of the high value commodity traffic and thus to be able to carry goods essentials to the needs of the Commonwealth of Puerto Rico at a low rate; and

4. Are the lesser distances from Florida ports to Puerto Rican ports than from North Atlantic ports to Puerto Rican ports a factor which alone or in conjunction with the other matters in this proceeding warrant a differential in rates between the aforementioned continental ranges of ports to Puerto Rican ports on the commodities under investigation and, if so, in what amounts?

Discussion and Conclusions

A. *The Legal Issues*

The above issues upon which evidence was received and argument made in this remanded proceeding are primarily matters involving the authority of this Commission to utilize certain principles in determining the reasonableness of rates and, if necessary, in fixing minimum reasonable rates. Basically, the Commission, in its prior report in this proceeding, asserted its authority to insure that, in the absence of valid transportation ratemaking factors militating against such result (including cost of transportation to carrier, value to shipper and distance between transit points as further discussed under issue (4) below), cargo move through naturally tributary areas (issue (2), supra). It also asserted its authority to insure that, where it becomes necessary in the public interest, high value commodities move at rates

high enough to enable the carriage of essential low value commodities at rates lower than those at which the low value commodities would be carried solely in consideration of the usual transportation factors alone (issue (3)).

The Commission is still of the opinion that it possesses such authority. The cases cited in our prior report amply indicate the legal bases for these positions.[1] TMT contests our power to increase rates which are compensatory and the validity of our determination that it unreasonably prejudices North Atlantic ports when it does not serve such ports. The *New York* and *Ayrshire* cases, *supra*, both indicate that TMT is incorrect. *New York* does not depend upon the 1940 amendment to the Interstate Commerce Act as TMT asserts, insofar as its application to the instant proceeding is concerned. Perhaps prior to 1940 the Interstate Commerce Commission could not correct unlawful discriminations against "regions," but mere "regions" are not involved in this proceeding—"ports" and "port areas" are. As TMT conceded in its petition to the court to review our prior report:

> The purpose of Section 16 First was "to prevent discrimination by the water carriers between ports and port districts since those are the only points served by such water lines."

Furthermore, the *Ayrshire* case, not dealt with at all by TMT, does not even mention the 1940 amendment.

Hearing Counsel maintain that any reliance upon "equalization" cases like *Portland*, *supra*, is wrongly placed as the instant proceeding is not an equalization case, and that TMT's minimum rate should be fixed at 48 cents merely because a lower rate would be "wasteful of revenue." Firstly, we never contended that this proceeding was an equalization case. It does not involve, as Hearing Counsel correctly indicate, varying rates for an identical service. Nevertheless, the policy of promoting the movement of cargo through ports through which it should normally move applies equally to equalization cases and the instant case. Moreover, section 16, First of the Shipping Act. 1916, doesn't say only unreasonable prejudice which comes about as the result of an equalization system is unlawful—it says *all* unreasonable prejudice is unlawful. Insofar as a carrier utilizes rates to enable it unreasonably to prejudice a port locality, the carrier's conduct is unlawful whether it is the result of an unlawful equalization or a single unjustifiably low ocean rate which has the same effect.

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[1] [Issue (2).] *City of Portland* v. *Pacific Westbound Conference*, 4 F.M.B. 664 (1955); *United States* v. *Illinois Cent. R.R.*, 263 U.S. 515 (1924); *New York* v. *United States*, 331 U.S. 284 (1947); *Ayrshire Corp.* v. *United States*, 335 U.S. 573 (1949).

[Issue (3).] *Reduced Rates On Autos—N. Atl Coast to Puerto Rico*, 8 F.M.C. 404 (1965); *B. & O.R. Co.* v. *United States*, 345 U.S. 146 (1953); *Government of Guam* v. *Federal Maritime Commission*, 329 F. 2d 251 (D.C. Cir. 1964).

Secondly, insofar as the "wastefulness of revenue" argument is concerned, we must disagree that such "wastefulness" alone is unlawful. Wastefulness in the context of this proceeding, and stripped of its evil connotations, merely means the failure to charge what the traffic will bear. We know of no principle which would require a carrier to charge rates higher than he chose to charge unless (1) the carrier's level of rates was so low that it or other carriers were about to be driven from a trade which would be left with inadequate service (*Intercoastal Rate Structure*, 2 U.S.M.C. 285, 301–303 (1940)); or (2) the carrier's rates had an unlawful impact upon someone or thing, e.g., another carrier, shipper, or port. TMT's 37-cent rate was, as Hearing Counsel admit, fully compensatory, and, as we noted in our initial report in this proceeding, "the 37-cent rate would not drive any of the respondents out of the business [Puerto Rican trade], particularly in light of the fact that the North Atlantic carriers had carried only about 5.5% of the heavy machinery traffic." Hence, in order for a 48-cent minimum rate to be fixed for TMT, it became necessary to discover an unlawful impact that the 37-cent rate had. The rate had an unlawful impact upon the North Atlantic port locality. The 37-cent rate was found to be unlawful by the Commission in part because of an effect the "wastefulness of revenue" achieved. It was found unlawful not simply because TMT could have earned as much revenue at 48 cents as at 37 cents but because it had earned this revenue at the 37-cent rate by attracting cargo which should have moved through the port of New York area.

With regard to issue (4), what use may be made of distance in determining rates is indicated in many cases, including *United States* v. *Illinois Cent. R.R.*, *supra*. Particularly, distance has an important bearing where because of a shorter distance between transit points a carrier incurs lesser costs.[2]

B. *The Factual Issues*

The factual issues involved in this proceeding are "prejudice" to the port of New York (issue (1)) and the necessity to invoke the authority which is the subject matter of the remaining three issues, and which authority we have affirmed above.

The North Atlantic carriers have since our order of May 10, 1966, maintained rates of 50 cents per cubic foot on heavy machinery and the

[2] SACL's Exhibit 22, excluded by the Examiner and not made the subject of an offer of proof, was utilized in portions of SACL's brief, and a motion to strike those pages of the brief dealing with it was made at oral argument. Exhibit 22 purported to show that the lesser distance between the South Atlantic and Puerto Rico vis-a-vis the North Atlantic and Puerto Rico was responsible for lower costs of the South Atlantic carriers. Because of our disposition of the issues in this proceeding, it becomes unnecessary for us to rule on the motion to strike.

South Atlantic carriers have maintained rates at 48 cents per cubic foot. Since our order was vacated on November 23, 1966, they have voluntarily maintained such rates.

The result of the carryings for the first three quarters of 1966 indicates a movement of naturally tributary cargo back through the port of New York, and there is no indication that the port is being unlawfully prejudiced at the present time.

There additionally appears to be no need to act with respect to the public interest at it relates to the needs of the Puerto Rican economy in this proceeding as the Commonwealth itself has pointed out. As the Commonwealth highlights, in this proceeding there is no justification for adjusting the machinery rates to insure the movement of low value essential commodities inasmuch as the reopened record here does not indicate the need of the North Atlantic carriers for a revenue "cushion" from the movement of heavy machinery or even that such cushion would increase their carriage of commodities essential to Puerto Rico.[3]

TMT, in its brief to the Commission on remand states that:

> We feel sure that the lessons of the litigation have not been lost on the carriers and that restraints will be exercised in the future.

It is to be hoped that TMT is correct and that all parties in this proceeding have learned the lessons to be gained from, and the dangers inherent in, unreasonably low rates.

There appearing no necessity on the current record in this proceeding to set minimum rates, and no evidence having been presented on remand which would indicate a contrary conclusion, the rates currently in effect are found lawful as just and reasonable, and the proceeding is discontinued.

SEPARATE OPINION OF COMMISSIONER GEORGE H. HEARN

Now that my colleagues have had another opportunity to review the issues in this proceeding, I am delighted to see that they agree with the conclusion expressed in my original dissent [4] concerning the important issue in this rate case, to wit, not setting a minimum rate or floor. Another look at the case indicates that this is the prime issue.

To deny the shipping public the benefit of lower rates which the carriers are willing and able to offer, in my opinion, is appalling.

The reopening of this record does not reflect any evidence which will allow me to make a determination on the other questions raised

[3] It thus becomes unnecessary to deal further with Sea-Land's Exhibit 3, excluded by the Examiner, which purported to indicate the extent to which Sea-Land carried certain low-rated commodities.

[4] Commissioner Hearn's dissent, vol. 9, FMC Reports, p. 498.

by the parties and the Commission, consequently, I reiterate the reasoning and position outlined in the dissent, supra.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65–48

NORTH ATLANTIC PORTUGAL FREIGHT CONFERENCE
EXCLUSIVE PATRONAGE (TRIPLE RATE) SYSTEM AND CONTRACT

Proposed exclusive patronage (triple rate) system and contract found unjustly discriminatory between shippers and exporters, detrimental to the commerce of the United States, and contrary to the public interest; the contract also found unlawful because providing for more than one spread between ordinary rates and rates charged contract shippers. Application disapproved.

Richard W. Kurrus and *James N. Jacobi* for respondents.

Francis P. Desmond and *Don A. Boyd* for intervener, E. I. du Pont de Nemours and Company, and *Jerome H. Heckman* and *Robert R. Tiernan* for intervener, The Dow Chemical Company and Dow Chemical International, S.A.

Howard A. Levy, *E. Duncan Hamner, Jr.*, and *Donald J. Brunner* as Hearing Counsel.

INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER [1]

This proceeding was instituted by the Commission pursuant to sections 14b and 22 of the Shipping Act, 1916, as amended (the Act), to determine whether:

(1) the proposed system and form of exclusive patronage (triple rate) contract of the member lines of the North Atlantic Portugal Freight Conference meet the requirements of Section 14b, or will be detrimental to the commerce of the United States, contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; and (2) the application of the Conference for permission to institute the proposed system should be granted pursuant to said Section 14b, and if so (3) the proposed form of exclusive patronage (triple rate) contract should be approved, disapproved or modified in accordance with the requirements of Section 14b and the Commission's decision in *The Dual Rate Cases.*

[1] This decision became the decision of the Commission on January 17, 1967. Rule 13(g), Rules of Practice and Procedure, 46 CFR 502.227.

The respondents are the North Atlantic Portugal Freight Conference and its six member lines, namely, American Export Isbrandtsen Lines, Inc.; Companhia de Navegacao Carregadores Acoreanos (Portuguese Line); Fabre Lines; Fresco Line; and Italian Line. Service is provided from United States North Atlantic ports in the Hampton Roads/Maine range to ports in Portugal. Italian Line serves Portugal for the carriage of cargo only with its passenger vessels. The other five conference lines operate regularly in the trade. Collectively the conference lines offer about 9 sailings a month.

E. I. du Pont de Nemours and Company (du Pont), and Dow Chemical Company and Dow Chemical International, S.A. (Dow), interveners, oppose the proposed exclusive patronage (triple rate) system. Hearing Counsel also oppose the proposed system. The opposition of these parties is to the triple rate feature of the proposed article 6 of the merchant's rate agreement. The other clauses of the proposed agreement conform generally with the clauses approved in *The Dual Rate Cases*, 8 F.M.C. 16 (1964).

Under the proposed article 6, freight rates would be set at three levels. The ordinary rate, that is the maximum, or tariff, rate would be charged where neither the shipper nor the consignee of a shipment is a signer of the proposed agreement. A rate based on a 7.5 percent discount would be charged where either the shipper or the consignee but not both, is a signer of the agreement. A rate based on a 15 percent discount would be charged where both the shipper and the consignee of a shipment are signers.

There was a steamship conference in this trade prior to 1955. From 1955 to September, 1964, there was no conference, and the trade was beset by instability. The present North Atlantic Portugal Freight Conference was approved by the Commission on July 22, 1964, and began functioning on or about September 15, 1964. Prior to the formation of the present conference in 1964, the rates were at low, depressed, and unprofitable levels. Many rates were noncompensatory. The new conference has been successful in stablizing the trade. The low rates no longer exist, and the rates as awhole are back to the 1955 level or higher. The 1955 rates are considered to have been at a reasonably profitable level. In November, 1965, there was a general increase in conference rates of 10 percent. The conference presently has no open rates other than on bulk commodities.

The cargo in this trade to Portugal amounts to about 30,000 long tons yearly, including manufactured items, steel products, agricultural products, oils, wax, auto parts, cosmetics, cigarettes, tobacco, foodstuffs, airplane parts, and others. Portugal has a population about the same as that of New York City.

There is no regular non-conference competition in this trade. Within the past year there were said to be non-conference sailings to Portugal on four or five occasions. The record instances only three sailings, but with few details. One lot of 550 tons of tobacco was shipped via Jugolinja (the Yugoslav Line) at a rate about 10 percent below the conference rate. Butter of unspecified tonnage was shipped via Concordia or Costa lines. There was also a shipment of steel, tonnage not specified, which may have been a part of the Tagus River project. This project involved the movement of parts of a prefabricated bridge. The respondents believe that there are about 35 steamship lines operating from United States Atlantic ports to Mediterranean Sea ports, or operating through the Mediterranean eastward, which lines might arrange to serve Portugal if the cargoes were attractive. The respondents also believe that there is potential competition from cargo shipped from United States North Atlantic ports to the European gateway ports of Antwerp, Amsterdam, and Rotterdam, or to the French Atlantic ports of the Bordeaux-Dunkirk range, with subsequent transshipment either overland or by water to Portugal, but the record discloses no specific instances of such competition. Transshipment is not a unique feature of the Portugal trade.

One fact about this trade stands out. The trade has been stable since the conference was reformed in 1964. And this trade has been stable notwithstanding the fact that the conference has had no exclusive patronage system, that is, the conference has no dual rate system or comparable exclusive patronage system. Although the conference now seeks a triple rate system, it has not tried a dual rate system.

There are between 200 and 300 consignees in Portugal receiving cargo shipped in this trade on a relatively regular basis. The conference lines have considered the adoption of an exclusive-patronage dual-rate system, but believe that it would be extremely difficult to sign any considerable number of consignees under a dual-rate system.

Although most of the cargo moving in this trade is sold under FOB or FAS terms, with the consignees having control of the routing, the respondents believe that an exclusive patronage system which would contract only with consignees would not be feasible. Respondents' reason is their view that a significant portion of the cargo is routed by shippers, or that the routing could be controlled by the shippers, citing as examples the shipments of du Pont and Dow.

On the other hand, the respondents seemingly refute their own contention of significant routing by shippers, by contending also that the expressed forebodings of Dow and du Pont relate not to the use of the proposed exclusive patronage (triple rate) contract in this trade, but to its possible use in other trades. Respondents refer to the facts,

that Dow shipped 191,139 tons of cargo on conference vessels throughout the world in the year 1965, but with only 10 tons shipped in this U.S. Atlantic-Portugal trade; and that du Pont annually exports 25,000 shipments which generate ocean freight revenues in excess of $10,000,000, but with only 700 tons (weight) or 770 tons (freight) shipped in the U.S. Atlantic-Portugal trade.

Under the proposed triple-rate contract, the respondents expect to sign about 75 percent of the regular consignees in Portugal. Respondents believe that the shippers would have neither obligation nor reason to solicit contract signers in Portugal, inasmuch as such solicitation would be done by the sales representatives of conference lines. It is intended that the conference office in New York City maintain a complete and current record of all contract signatories, and that this record would be available to interested inquirers. The proposed exclusive patronage system and contract, however, contain no requirement that the conference office maintain such a record and make it available.

The proposed triple rate system is new and different from any such system now in effect in our foreign commerce. The suggestion of a triple-rate exclusive patronage system was not raised throughout the legislative history of the Dual Rate Act, section 14b, Public Law 87–346, 75 Stat. 762, October 3, 1961.

The record contains no evidence that any specific shipper in the United States supports the proposed triple rate exclusive patronage system.

The proposed triple-rate system is designed by the conference to curb or to eliminate nonconference competition. By tradition in Portugal and in many other European countries, discounts to consignees are consistent with usual business methods. Respondents have not tried to sign the consignees in Portugal to a dual rate contract, so they cannot be certain that the consignees would not sign this type of contract.

One of the underlying reasons assigned by the respondents for their proposal, and probably a principal reason, is that the triple rate system is expected to eliminate legal questions that have arisen under dual-rate contract systems concerning the question of who has the legal right to route the cargo, particularly in connection with the so-called "FOB/FAS loophole." For example, if a consignee were not a signatory to a dual rate contract, but had the right to route the cargo, he might route an FOB or FAS shipment by a nonconference carrier even though the shipper was a contract signer.

Du Pont sells much of its cargo shipped to Portugal on CIF terms to its Portugal affiliate. The remainder of its cargo to Portugal is purchased by non-affiliates on an FOB/FAS basis, but carrier selection

by these consignees occurs infrequently. Dow's export sales wherever possible are made on CIF terms.

The ability of du Pont and Dow to quote firm delivered prices will be greatly impeded under the proposed triple-rate system because of the need of first ascertaining whether the Portuguese customer has signed the conference contract. In other words, a signatory shipper in the United States shipping cargo to an unsigned consignee will be charged under the triple rate system the tariff rate less 7.5 percent, whereas another signatory shipper in the United States making a competitive shipment to a signatory consignee will benefit by a 15 percent discount from the tariff rate.

In contrast, a signatory shipper under a dual-rate system will know exactly what his freight costs will be, and more importantly, he will know what his shipper-competitor's freight costs will be. One of the principal purposes of a tariff is to make freight costs definite and certain, thereby avoiding unjust discrimination as between shippers.

Adoption of the proposed triple rate contract system would produce the result that a shipper would have to know whether the consignee is a contract signatory, or the signatory shipper would have to quote three prices on his goods, namely (1) an FOB price, (2) a CIF price allowing 7.5 percent discount on the ocean freight if the consignee is not a signatory, and (3) a CIF price allowing 15 percent discount on the ocean freight if the consignee is a signatory.

Doing business abroad is a difficult undertaking for United States exporters, and the quotation of three prices on the exported goods certainly would not simplify the job, and more likely would be an undue burden on the exporter trying to develop the foreign commerce of the United States.

Under the circumstances, particularly in view of the present stability of the trade, no need has been shown for an exclusive patronage contract as proposed in this trade, and in particular it is clearly evident that the proposed triple rate contract will lead to uncertainty as to the ocean freight charges which the contract shippers from the United States will pay. Therefore, it is concluded and found that the proposed exclusive patronage (triple rate) system will be unjustly discriminatory and unfair as between shippers and exporters from the United States, and that the proposed system because it will inhibit export shipments will be detrimental to the commerce of the United States, and contrary to the public interest of encouraging exports and fostering a favorable balance of trade. Accordingly, article 6 of the proposed system (the clause relating to triple rates) is disapproved, and the application of the North Atlantic Portugal Freight Confer-

ence for permission to institute an exclusive patronage triple rate system and contract is denied.

Disapproval of the proposed triple rate system, regardless of the merits of the proposal as discussed above, also appears to be required as a matter of law under section 14b(7) of the Act.

The statute requires that the Commission shall approve any exclusive patronage contract * * *, and provided the contract * * * (7) provides:

> for *a spread* between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which *spread* shall in no event be more than 15 per centum of the ordinary rates; * * *. [Emphasis supplied.]

The respondents' proposal provides not for a spread but for two spreads. Therefore the proposal is barred by section 14b(7), and it is so concluded and found.

(Signed) CHARLES E. MORGAN,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–52

IN THE MATTER OF THE MODIFICATION OF AGREEMENT 5700–4

Decided January 30, 1967

The Federal Maritime Commission is not required under the Administrative Procedure Act or the Shipping Act to hold an evidentiary hearing where no genuine or material issue of fact is presented.

Under the 1961 amendment to section 15 of the Shipping Act and General Orders 7 and 9 promulgated thereunder, conference agreements must contain adequate provisions for self-policing and the admission, withdrawal, and expulsion of members.

Agreement No. 5700–4 found to be in violation of section 15 and General Orders 7 and 9 and contrary to the public interest for failure to contain adequate provisions for self-policing and the admission, withdrawal, and expulsion of members.

The Commission may, in the exercise of its broad regulatory discretion, modify a conference agreement which, after notice and hearing, is found to be in violation of the Act or contrary to the public interest by ordering the addition of provisions which will bring such agreement into compliance with the requirements of the Act.

Charles F. Warren and *John P. Meade* for New York Freight Bureau (Hong Kong).

George F. Galland and *Amy Scupi* for States Marine Lines.

Donald J. Brunner and *Samuel B. Nemirow*, Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman;* George H. Hearn, *Commissioner*):

This proceeding was instituted by our Notice of Intent to Modify Agreement No. 5700–4* and Order to Show Cause Why Such Modifications Should Not Be Incorporated Into Said Agreement. This notice advised the parties that the Commission intended either to modify Agreement No. 5700–4 by adding provisions for self-policing and ad-

*See decision of Oct. 3, 1966, at p. 165.

mission, withdrawal and expulsion of members or to withdraw approval of the agreement for failure to contain such provisions.

BACKGROUND FACTS

In order to understand this proceeding and the conclusions we have reached it is neccessary to relate in some detail the events which have gone before. The New York Freight Bureau (Hong Kong) (hereafter referred to as the "Bureau") is a ratemaking conference serving the inbound trade from Hong Kong to U.S. Atlantic and Gulf ports. It has been in existence since 1924 and since 1937 has operated under approved Agreement 5700. Until 1964 this agreement remained substantially unchanged. (Such changes as were made dealt with the rotation of the Chairmanship and minor changes in the geographic scope of the agreement, etc.) The modification approved on July 29, 1960, was designated Agreement No. 5700–4.

The 1961 amendment to section 15 of the Shipping Act (act of October 3, 1961, Public Law 87–346, section 2, 75 Stat. 763), requires the Commission, after notice and hearing, to "disapprove, cancel or modify" any agreement:

> * * * which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

and provides further that:

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

Pursuant to this amendment and our general rulemaking authority under the Act, we promulgated General Order 7 on August 22, 1963 (28 F.R. 9257) and General Order 9 on May 1, 1964 (29 F.R. 5797), which deal respectively with self-policing systems and conference membership requirements.

General Order 7 states in pertinent part (46 C.F.R. 528.2):

> Conference agreements * * * shall contain a provision describing the method or system used by the parties in policing the obligations under the agreement, including the procedure for handling complaints and the functions and authority of every person having responsibility for administering the system * * *.

Similarly, General Order 9 (46 C.F.R. 523) specifies that conference agreements must contain certain provisions insuring reasonable standards for the admission, withdrawal and expulsion of members.

In compliance with the amendment to section 15 and the General Or-

ders referred to above, the Bureau filed two modifications to its basic agreement for our approval under section 15. Agreement No. 5700-6 [1] filed on February 10, 1964, provided for a system of self-policing which generally complied with the requirements of section 15 and General Order 7. Agreement No. 5700-7 filed on June 17, 1964, contained amendments designed to bring their agreement within the requirements of General Order 9.

These agreements were withdrawn before approval because after analysis of them the staff suggested to counsel for the Bureau that certain clarifying and conforming changes be made and that the two agreements be consolidated into one. In response to this suggestion, counsel for the Bureau withdrew Agreements 5700-6 and 5700-7 and filed a third agreement designated 5700-8 which contained the changes suggested by the staff but substantially repeated the provisions of 5700-6 and 5700-7.

We issued an order of conditional approval of Agreement 5700-8 in which the Bureau members were given 60 days within which to accept the modifications. Additional time for acceptance was sought by the Bureau and granted by us. The Order of Conditional Approval as extended was due to expire on May 2, 1966. However, on March 1, 1966, States Marine Lines (one of the member lines of the conference) sent a telegram to the Commission which stated in pertinent part: "* * * States Marine opposes the agreement and hereby withdraws same from Commission's consideration as far as States Marine is concerned * * *." On May 2, 1966, the Order of Conditional Approval expired by its own terms since no notification had been received by the Commission of acceptance by the Bureau membership.

On May 13, 1966, at the Bureau's request we approved Agreement 5700-8 in part, i.e. as to those portions which were deemed non-controversial because they had not been objected to by States Marine, and issued an order of investigation (Docket 66-32) with respect to the controversial portions.

The original order of investigation set down three issues for determination: (1) The expansion of the conference trade area to include the Great Lakes; (2) the voting provisions; and (3) modification of the self-policing provisions to include provision for reference of certain arbitration matters to the Federal Maritime Commission.

On June 13, 1966, States Marine filed a petition to reconsider our order of May 13, supra and, after considering this petition and the

[1] Agreement 5700-5 was a tonnage ceiling agreement of a temporary nature approved on September 21, 1962. It expired by its own terms on January 6, 1966. See our report in Docket 66-29, *Agreement No. 9431 Hong Kong Tonnage Ceiling Agreement,* served September 19, 1966, 10 F.M.C. 134 (1966).

Bureau's reply dated June 20, 1966, we issued an amended order in Docket 66–32 in which the issues raised in States Marine's petition for reconsideration were also set down for investigation. These amendments broadened the original order of investigation to include the following issues: (1) Whether Agreement 5700–8 was properly before the Commission for its approval under section 15; (2) if Agreement 5700–8 was properly before the Commission for approval, should the approval granted in our order of May 13, 1966 be continued; (3) if Agreement 5700–8 was not properly before the Commission for approval and the approval thereto was without force and effect, were Agreements 5700–6 and 5700–7 properly withdrawn, and if not, what is their present status as representing true and complete agreement of the parties; and (4) whether there is in existence a presently approved agreement to which all the parties signatory thereto now agree and should approval thereto be continued or should the agreement be modified, disapproved, or canceled.

Shortly before the time for hearings in Docket 66–32 the Bureau, feeling that several of the issues specified in the amended order of investigation were pure questions of law involving no genuine issues of material fact, filed its petition for a declaratory order for the "summary resolution of legal issues" on September 9, 1966. States Marine Lines joined the Bureau in requesting declaratory relief in its reply received on September 26, 1966.

Oral argument was waived and in our report issued on October 4, 1966, we decided that:

1. States Marine Lines' telegram protest of March 1, 1966, filed prior to approval of Agreement 5700–8 operated to withdraw Agreement No. 5700–8 from the Commission's consideration.

2. Our order of May 13, 1966, which approved Agreement 5700–8 in part was void *ab initio* since said agreement was not properly before the Commission for approval.

3. Agreements 5700–6 and 5700–7 had been withdrawn prior to approval.

4. That Agreement 5700–4 as approved on July 29, 1960, is presently in full force and effect and constitutes the basic agreement under which the New York Freight Bureau (Hong Kong) is permitted to operate.

5. Agreement 5700–4 does not satisfy the requirements of section 15 and General Orders 7 and 9 promulgated thereunder in that it does not contain a satisfactory system of self-policing and does not meet the required criteria for admission, withdrawal, and expulsion of members.

6. Proceedings in Docket No. 66–32 should be discontinued.

7. That the members of the New York Freight Bureau (Hong

Kong) should be required to show cause why Agreement 5700-4 should not be modified by us or, in the alternative, why continued approval of said agreement should not be withdrawn.

On the same date we issued our Notice of Intent to Modify and Order to Show Cause. This notice and order repeated conclusions set forth in our report of October 4, 1966, supra and stated further that:

The members of the New York Freight Bureau (Hong Kong) were able to agree upon amendments to this conference agreement which would satisfy the requirements of General Orders 7 and 9. Agreements 5700-6 and 5700-7 received the unanimous support of all the Bureau members.

We pointed out that there are only two courses of action available to the Commission. The first is to withdraw approval of Agreement 5700-4 and unless satisfactory self-policing and membership provisions are added to the agreement, this course is clearly necessary under section 15.

The second is for us to modify Agreement 5700-4 by adding amendments which would give the conference an adequate system of self-policing and proper provisions for admission, withdrawal, and expulsion.

Accordingly, the members of the Bureau were notified:

* * * pursuant to our authority under section 15 of the Shipping Act, 1916, that we intend to modify Agreement 5700-4 by deleting subparagraphs 10(b), 10(c), 10(d), and 10(e) and by adding new paragraphs 12 through 16, as set forth in the Appendix A hereto.

We expressed the view that there was:

* * * no need for the taking of evidence in this proceeding since no genuine issues of material fact are presented. The modifications to Agreement 5700-4, which the Commission proposes to make as specified in this notice, have twice been considered and "approved" [2] by the Commission as satisfying the requirements of section 15 and General Orders 7 and 9.

POSITIONS OF THE PARTIES

New York Freight Bureau (Hong Kong)

The Bureau supports generally the Commission's proposal to modify Agreement 5700-4 by adding self-policing and membership provisions. It points out, however, that the proposed modifications depart from the text of Agreement 5700-8 in three particulars: (1) By adding the requirements of General Order 18 in proposed Article 12; (2) by

[2] Agreements 5700-7 and 5700-8 received informal staff approval and Agreement 5700-8, which was substantially similar in all material respects has twice been approved by the Commission as to form.

adding a 20-day notice provision in proposed Article 14(g); and (3) by revising the language of proposed Article 14(h) relating to matters which may be referred to the Commission.

The Bureau does not object to the 20-day notice provision. It argues that General Order 18 exempts existing agreements from the requirement that a provision be incorporated for the filing of minutes. It contends that the language of Article 14(h) should conform to that which was approved in the Commission's order of May 13, 1966.

In a letter to the Secretary, dated November 23, 1966 (following oral argument), counsel for the Bureau suggests that the term "Secretary" be deleted whenever the term "Chairman/Secretary" is used in the proposed modifications. He notes States Marine's objection to the language "It is hereby agreed and declared by and between the parties hereto that:" and advises that the Bureau has no objection to the deletion of this or similar phrases formed in the text of the modifications.

States Marine Lines

States Marine Lines contends:

1. That the Commission may not "disapprove, cancel or modify" an agreement except after notice and hearing, and upon findings made on the basis of such hearing in accordance with the Administrative Procedure Act.

2. That even where all procedural directions are followed the Commission's power to "modify" an agreement is merely the power to disapprove it where the parties refuse to modify it in required particulars.

3. That the proclamation of passivity in Docket 66–29 is contrary to the present assertion of authority to rewrite carrier agreements to which the parties refuse concurrence.

4. That the use of such language as "It is hereby agreed * * *" in the proposed modifications is an anomaly and a contradiction in terms where one of the parties does not, in fact, agree.

5. That the law does not require a self-policing clause in the conference agreement.

6. That the law permits only disapproval of an agreement, "after notice and hearing, on a finding of inadequate policing of the obligations under it * * *."

7. That if a self-policing formula is required in all conference agreements by the self-policing provision of section 15, then a shippers' requests and complaints formula is also required.

8. That the self-policing system proposed by the Commission does not meet the procedural requirements of General Order 7 or the fundamental requirements of fairness.

9. That this proceeding should be suspended pending the outcome of the appeal from Docket 1095 now pending in the Court of Appeals.

States Marine Lines indicates its willingness to negotiate with the other members of the Bureau or, in the alternative, suggests that the Commission inaugurate a rulemaking proceeding with a view to work-out a self-policing formula applicable to all conferences.

Hearing Counsel

Hearing Counsel support the Commission's proposal to modify Agreement 5700-4. They contend that:

1. A section 15 agreement is not a mere private agreement but a public contract impressed with the public interest and permitted to exist only so long as it serves that interest.

2. The plain language of section 15 allows the Commission to modify an agreement without further reference to the parties in an appropriate case provided that notice and opportunity for a hearing is afforded the parties.

3. The provision in amended section 15 calling for the disapproval of any agreement upon a finding of inadequate policing of the obligations under it presupposes that some system for self-policing is in existence.

4. In order to qualify for continued section 15 approval a conference agreement must contain a formula by which self-policing of the obligations arising under the agreement will be accomplished.

5. The power to modify an agreement is not inconsistent with the so-called "proclamation of passivity" (Docket 66-29)[3] since the decision in that case was that there was no agreement before the Commission for approval whereas in the instant case there is an approved agreement in existence albeit a patently defective one.

6. Hearing Counsel distinguish the requirements for a self-policing system from provisions for entertaining shippers' requests and complaints by pointing out that the New York Freight Bureau (Hong Kong) is meeting this requirement by setting forth such procedures as part of its tariff as filed with the Commission.

7. Hearing Counsel oppose States Marine's contention that the Commission is attempting to modify Agreement 5700-4 "without a hearing." They note that States Marine refused to avail itself of the opportunity afforded to file affidavits of fact which might establish some basis for such a request.

8. Hearing Counsel join with the Bureau in suggesting that Article 12 (requiring the filing of minutes) be deleted from the proposed amendments.

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[3] *Hong Kong Tonnage Ceiling Agreement No. 9431*, served April 28, 1966.

Discussion

There are only three fundamental questions presented in this case:

1. Whether the Commission has the legal authority, after notice and hearing, to modify a section 15 agreement by adding provisions without further reference to the parties to the agreement to obtain their assent.
2. Whether the procedural requirements of "notice and hearing" have been met.
3. Whether the modifications to the agreement ordered herein are within the sound discretion of the Commission.

The Commission's Legal Authority to Modify

States Marine Lines is correct when it pointed out that the Commission has never previously used its statutory authority to modify an agreement directly. The usual practice has been, and is, to issue an order of conditional approval, i.e., the changes are referred back to the conference membership for acceptance and upon the filing of evidence of such acceptance, the modifications proposed by the Commission stand approved.

Nevertheless, the language of section 15, which provides in pertinent part:

> The Commission shall by order, after notice and hearing, disapprove, cancel or *modify* any agreement, or any modification or cancellation thereof, that it finds to be * * * contrary to the public interest, or to be in violation of this Act * * *. [Emphasis added.]

is in our view clear and unequivocal. There is nothing to construe. As the Court said in *Caminetti* v. *U.S.*, 242 U.S. 470, 485 (1916):

> Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meaning need no discussion.

States Marine Lines suggests that because the Commission has never before modified an agreement directly it is somehow foreclosed from doing so at this time. We know of no rule of statutory construction which would operate to "repeal" a portion of a statute simply because of nonuse and States Marine has cited none.

Moreover, as early as 1933 the Commission's predecessor expressed the view that it could, under the authority of section 15, order a modification [4] of a conference agreement:

> Upon a showing * * * that * * * modification of any section 15 agreement will remove a detriment to the commerce of the United States, the * * * [Commission] will, of course, take proper corrective action.

[4] *In Re: Rates in Canadian Currency,* 1 U.S.S.B. 264, 281 (1933).

Similarly in our report in Docket 1095[5] we repeated the view that:

* * * Our authority under section 15 of the Act is not simply the sterile power to accept or reject that which the parties to agreements file with us. Section 15 expressly grants us the power to modify agreements filed with us.

States Marine Lines argues that we cannot modify sua sponte an agreement without further reference to the parties for approval (viz a conditional approval) because such a modification does not comport with the definition of the word "agreement." This argument verges on frivolous. Of course, such an instrument is no longer the "agreement" of all of the members.

We do not pretend that the agreement (5700) as modified by us is acceptable to all of the parties to the agreement. On the contrary, our earlier report in this case makes it clear that we understand States Marine's position completely.

States Marine Lines is quite correct when it contends that when the Federal Maritime Commission modifies a section 15 agreement by direct action it ceases to be an "agreement of the parties". It becomes a *modified* agreement. In our opinion Congress vested in the Commission this authority to *modify* in order to meet the kind of situation which is here presented.

As we stated in *In Re: Pacific Coast European Conf.*:[6]

"Respondents' conference agreement is not some sacrosanct private arrangement but a public contract, impressed with a public interest and permitted to exist only so long as it serves that interest.

The District of Columbia Court of Appeals reinforced this position in *Swift and Co.* v. *F.M.C.*,[7] saying that a section 15 agreement:

* * * is not simply a private contract between private parties, the intent of the parties is only one relevant factor, and the * * * [Commission] not only can, but must, weigh such considerations as the effect of the interpretation on commerce and the public. Moreover, the agreement existed legally only because approved by the * * * [Commission]. The * * * [Commission] must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval.

Respondent, States Marine Lines' reliance upon our report in Docket No. 66-29 and the so-called "doctrine of passivity" is misplaced. In that case we decided that when one of the original parties to a new agreement filed for approval under section 15 withdraws from the

[5] *Agr. No. 150-21, T.P.F.C.J. and Agr. No. 3103-17, Japan-Atl. and Gulf Frt. Conf.*, Dkt. 1095, 9 F.M.C. 355.

[6] 7 F.M.C. 27, 37 (1961). (See also, *States Marine Lines v. Trans-Pacific Freight Conf.*, 7 F.M.C. 257 (1962); and *Mediterranean Pools Investigation*, Docket 1212, 9 F.M.C. 264.

[7] 306 F. 2d 277, 281 (1962).

agreement prior to approval, "that act destroys the subject matter of the Commission's jurisdiction." In other words, we cannot create or impose an agreement where none existed before.

However, where, as here, there is in existence an approved conference agreement the Commission's role is not and cannot be passive for we have an affirmative obligation under the Shipping Act to maintain a continuing surveillance over every approved agreement and the manner in which such agreements are implemented.

Several important distinctions must be made between Docket No. 66–29 and the instant case.

In Docket No. 66–29 we held that the so-called agreement under consideration was a new agreement—separate and distinct from the basic conference agreement. It was neither an amendment to nor a modification of Agreement No. 5700. We decided, therefore, that before we could even consider that instrument as an "agreement" within the meaning of section 15 of the Act there would have to be a showing that there was a continuing assent of all of the purported parties signatory to the agreement. Moreover, the scheme involved in the ceiling tonnage agreement was a voluntary undertaking and was not required by the Act or any of the Commission's General Orders.

Before it receives section 15 approval a conference agreement is no more than a contingent agreement depending for its vitality upon the happening of a condition subsequent, i.e., Commission approval.

However, once a conference agreement is approved the conference assumes a quasi-public character. It is more than a mere private association. A conference is accorded a privileged status under the law. It is permitted to do things in concert which, absent approval and regulation by the Federal Maritime Commission, would be in violation of the Shipping Act and, in most instances, the antitrust laws as well.

It is true that where a conference with a unanimous voting rule files an amendment to its basic agreement with us for approval and one of the members withdraws from the amendment prior to approval the amendment no longer may be considered by us as a *conference generated modification*. This is precisely the position we took in our earlier report in this case. In many cases this would end the matter.

However, the instant case presents a different problem. The modifications originally proposed by the conference membership and later rescinded by the unilateral fiat of one of its members were not optional kinds of changes which a conference could adopt or ignore at will, but rather were in compliance with the clear mandate of Congress and our General Orders 7 and 9.

Where a conference is a going concern, establishing rates for its members, operating under dual rate contract privileges and otherwise

regulating the terms and conditions for the movement of ocean freight in a particular trade, we have a clear duty under the Shipping Act to exercise our regulatory authority to the full extent indicated by the Act.

The Show Cause Procedures

In our notice and order to show cause we apprised the parties of our tentative view that Agreement No. 5700-4 was in violation of section 15 and General Orders 7 and 9, and *notified* them of our intent either to *modify* the agreement by adding certain provisions which were appended to the notice or to *withdraw* approval of the agreement altogether.

We expressed the opinion that there were no genuine issues of material fact and, therefore, no need for an evidentiary hearing. However, the door was left open when we said:

Should any of the parties to this proceeding consider that there are disputed issues of fact which are relevant to this proceeding, such facts shall be specified with particularity by means of affidavits setting forth such facts, together with a statement of their relevance to the issues in question. Should any other parties dispute these facts by a similar affidavit, the disputed issues of fact, if relevant, will be set down for an evidentiary hearing.

Since the parties filed only memoranda of law but no affidavits of fact as allowed by the language in the order to show cause, we hold that there is no reason for an evidentiary hearing. For example, there is no question of fact as to the deficiency of Agreement 5700-4 with respect to provisions for self-policing and membership. The agreement as it stands simply contains no such provisions.

States Marine Lines argues that the Commission is attempting to modify Agreement 5700-4 "without a hearing." They demand an evidentiary hearing while at the same time refusing to avail themselves of the opportunity afforded them to file affidavits of fact which might establish some basis for such a request.

States Marine was afforded a hearing as required by the Shipping Act and the Administrative Procedure Act, through this show cause proceeding. It is well established that:

* * * the Supreme Court has defined full hearings as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law of the step asked to be taken * * *. Where no genuine or material issue of fact is presented, the court or administrative body may pass upon the issues of law after affording the parties the right of argument * * *.[8]

[8] *Producers Livestock Marketing Assoc.* v. *U.S.*, 241 F. 2d 192 (10th Cir., 1957) aff'd 346 U.S. 282 (1958). See also: *American Airlines, Inc.,* v. *C.A.B.,* 359 F. 2d 624 (D.C. Cir., 1966) at pp. 632, 633.

Respondents have been given ample opportunity to present any "genuine or material issue of fact" and were granted oral argument. The parties' procedural rights to notice and hearing have been scrupulously observed.

Self-Policing Procedures:

In promulgating General Order 7 on August 22,1963 (28 F.R. 9257) we said in part:

> Some comments also challenged the Commission's authority to require the inclusion of self-policing as a condition precedent to approval (or continued approval) of an agreement under section 15. As amended by section 2 of Public Law 87–346 (75 Stat. 763–4), section 15 provides: "The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it * * *" This provision, in demanding the adequate policing of the obligations under the agreement, clearly presupposes the establishment of some precedure for that purpose. And the establishment of the self-policing procedure is necessarily predicated upon an agreement between the parties. It has been the consistent position of the Commission that such an agreement is a modification which is within the purview of section 15, and this is now expressly fortified by the statute itself. Under section 15, a "true and complete copy, or if oral a true and complete memorandum" of all agreements within the purview of the section must be filed with and approved by the Commission. An agreement which does not contain the procedure for self-policing which has been adopted by the parties is an incomplete agreement within the meaning of section 15. Conversely, it would seem to be obvious that if the parties make no provision for self-policing, they are ignoring the statute. In either case, their section 15 agreement would have to be disapproved unless the situation were corrected.

Earlier we held in *States Marine Lines* v. *Trans-Pacific Freight Conference*, 7 F.M.C. 257 (1962), affirmed *Trans-Pacific Freight Conference of Japan* v. *F.M.C.*, *et al*, 314 F. 2d 928 (9th Cir. 1963), that a system of self-policing is a necessary part of a basic conference agreement since it vitally affects the interrelationships of the parties.

Thus, States Marine's position that the law does not require a formula for self-policing to be included in the basic agreement is without merit.

The self-policing requirements of section 15 consists of two parts: (1) adequate *procedures* must be set forth in the basic conference agreement whereby the machinery for self-policing is established; and (2) there must be an *implementation* of that machinery in practice. By modifying respondents' agreement as proposed in the order to show cause, we are furnishing only the first element of this requirement, i.e., providing of the necessary machinery. The implementation of this machinery will be up to the conference and if it is not accomplished in good faith, then the requirements of the 1961 amendment to section

15 clearly dictate withdrawal of approval of the conference agreement. The approval of the agreement as modified will not preclude a subsequent finding of "inadequate policing of the obligations under it." However, unless the agreement is amended so as to include a system of self-policing, there is no possibility that the conference can legally police itself.

States Marine further argues that requiring of self-policing provisions in all section 15 agreements, without requiring such agreements to have provisions for the consideration of shippers' requests and complaints, is inconsistent under the language of amended section 15.

The requirement that conferences "adopt reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints" is procedural only and, unlike a self-policing system, does not effect a substantive change in the scope of the conference agreement. Such procedures neither create nor destroy rights. They merely prescribe how such rights as already exist may be exercised. Accordingly, such provisions are normally contained in the conference tariff schedules. Put another way, a conference can adopt and implement adequate procedures for dealing with shippers' complaints and requests without obtaining prior approval under section 15. Self-policing procedures, however, require our specific approval.

The Modified Agreement

A conference agreement must contain satisfactory self-policing and membership provisions and, since Agreement 5700-4 does not meet those requirements, we were faced with making a choice between cancellation or direct modification. In the circumstances of this case either course could be justified. However, on balance we believe that the public interest will be better served by modifying the conference agreement as ordered herein thereby making its continued approval possible, subject, of course, to continue surveillance as to the manner in which the self-policing and other provisions are carried out.

If we were to withdraw our approval we would be penalizing 16 out of 17 member lines which have indicated their willingness to comply with General Orders 7 and 9 and, in fact, have so agreed. In the instant case, it became abundantly clear that the conference was being thwarted at every turn by the recalcitrance of a single member, States Marine Lines. Governed as the conference is by a unanimous voting procedure, it is powerless to accept modifications proposed by the Commission in an order of conditional approval because this single member refuses to give its assent (even though earlier voting for the changes proposed).

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As to the actual modifications which are being ordered, it appears that there is no dispute among the parties as to the membership provisions (Articles 14 and 15 in the Appendix hereto). States Marine Lines has indicated its willingness to agree to such provisions.

There is no single self-policing system which we consider best, and we have purposely left this to the individual conferences in General Order 7 to allow them to work out the formula which will best suit their purposes. We have indicated only in general terms what such systems shall include as a minimum.

We have selected the particular self-policing system we did simply because *all* of the members of the New York Freight Bureau (Hong Kong) at one time agreed substantially to it (Agreement No. 5700-7) and all but States Marine Lines agree to it at the present time.

More importantly we have examined the self-policing system carefully and found, as a matter of law, that it satisfies the requirements of General Order 7.

States Marine Lines objects to the system and calls for an evidentiary hearing to determine such questions of fact as "conditions of the Hong Kong trade, the number of carriers in and out of the conference, the volume of cargo offering, the space available to carry it, and intensity of competition." States Marine would also have this evidentiary hearing go into such issues as the competence and character of the Chairman. In the first place, our order to show cause clearly specified that if an evidentiary hearing was desired, affidavits and supporting memoranda of relevance would have to be submitted. States Marine ignored this directive and has no standing now to complain. Secondly, the economic conditions in the Honk Kong trade are irrelevant to the question of the legal sufficiency of a self-policing system. The remaining reasons advanced by States Marine for an evidenitary hearing are premised on the assumption that the self-policing formula will not be applied justly and in good faith. This is mere speculation on the part of States Marine.

In short, States Marine's objections to the self-policing system consist mainly of conjectures as to how the self-policing system might be used as an instrument of oppression. We are duly concerned about the rights of an individual member of a conference and the doors of the Commission are always open to anyone with a legitimate complaint. If a conference does not administer its approved system of self-policing in a fair manner this would surely support a finding of "* * * inadequate policing of the obligations under it * * *" for which the mandatory penalty is disapproval of the entire conference agreement.

We have wide discretion in fashioning remedies. As the Supreme Court has said: [9]

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

In our opinion the circumstances of this case call for the modification of respondents' basic conference agreement in the manner set forth in the order and Appendix [10] hereto.

CONCLUSION

In summary, we conclude:

1. That this case presents no genuine issues of material fact and, therefore, there is no necessity for an evidentiary hearing.

2. The respondents have been furnished with a proper notice of our intent to modify or, in the alternative, withdraw approval of Agreement No. 5700-4 and a hearing thereon as required by section 15 of the Shipping Act.

3. That Agreement No. 5700-4 is in violation of section 15 of the Shipping Act in that it "fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal."

4. That Agreement No. 5700-4 is in violation of General Order 9 in that it fails to contain standard provisions required thereby.

5. That Agreement No. 5700-4 is contrary to the public interest in that it fails to provide for a system of self-policing of its members' obligations under it.

6. That Agreement No. 5700-4 is in violation of General Order 7 in that it fails to provide for a system of self-policing of its members' obligations under it.

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[9] *California, et al.* v. *U.S., et al.*, 320 U.S. 577, 583-584 (1944); *F.T.C.* v. *Mandel Bros., Inc.*, 359 U.S. 385, 393 (1959).

[10] The Bureau requested that the following changes be made in the modification as proposed in the order to show cause:

1. Deletion of Article 12;
2. Substitution of the term "Chairman" wherever the term "Chairman/Secretary" appears;
3. Deletion of a portion of the arbitration provision relating to Federal Maritime Commission jurisdiction; and
4. Deletion of the expression, "It is hereby agreed * * * etc." found in the beginning of Article 13 and other words of like effect.

No objections have been interposed. Accordingly, these changes have been made in the amended text of the modifications. (See Appendix hereto.)

7. That Agreement No. 5700-4 should be modified by deleting paragraphs 10(b), 10(c), 10(d) and 10(e) and by adding new paragraphs 12 through 15, as set forth in the Appendix A hereto.

An appropriate order will be entered.

Commissioner James V. Day Concurring:

I concur in the majority opinion except that I would defer the effective date of the order for 30 days. I would thus give the parties an opportunity, if they should now prefer upon review of the order herein, to reach an independent accord among themselves and to submit the same for Commission approval.

APPENDIX A

12. FAITHFUL PERFORMANCE: BOND

As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or of any award of judgment which may be rendered against them hereunder, the parties hereto shall deposit with the New York Freight Bureau Chairman the sum of US$30,000 (thirty thousand) or its equivalent in Hong Kong currency or a confirmed irrevocable letter of credit, in such form as may be approved by the New York Freight Bureau, in the aforesaid sum of US$30,000 (thirty thousand) or its equivalent in Hong Kong currency established by a bank being a member of the Hong Kong Exchange Banks Association and which is acceptable to the New York Freight Bureau, providing that it may be drawn upon by draft signed in the name of the New York Freight Bureau by the Chairman and by the authorized representatives of any two Member Lines and payable to the New York Freight Bureau to which there shall be attached a certificate signed by the Chairman to the effect that there has been assessed or adjudged against the party who shall have deposited the said letter of credit a penalty or penalties in the amount of the said draft. Such depositing party shall, in the event of the payment of the said draft, cause a new letter of credit in the sum of US$30,000 (thirty thousand) or its equivalent in Hong Kong currency, similar in its terms, to be issued immediately in replacement for that upon which the draft has been made. Among other such provisions as the New York Freight Bureau may require, the New York Freight Bureau may insist upon provisions in such letter of credit which will render it most certain that payment must be made by the bank immediately upon the compliance by the Chairman with the aforesaid conditions.

13. SELF-POLICING SYSTEM

(a) A report shall immediately be made in writing to the Chairman in respect of any information which appears to such party hereto to be reasonably reliable of the commission by any other party hereto of a violation of this Agreement.

(b) A report shall immediately be made in writing to the Chairman in respect of any information which such party hereto shall have received from any shipper or from any other source considered to be reliable that any party hereto has committed a violation of this Agreement.

(c) It shall be the duty of the Chairman to investigate immediately all such reports submitted by parties hereto in addition to any such reports in writing he may receive direct from shippers or from any other source considered to be reliable, for which purpose the Chairman shall hereby be authorized to engage the services of such qualified persons as he may consider necessary for a thorough and complete investigation to be made.

(d) It shall also be the duty of the Chairman to ascertain on his own initiative, whether or not the parties hereto have strictly complied with the terms of this Agreement, the provisions incorporated in the New York Freight Bureau tariff and all other decisions regularly and properly made by the parties hereto and, in the event that there is any reason to believe that there has been a violation of any of the aforesaid obligations, he shall file a complaint with respect thereto as above provided.

(e) The Chairman shall be furnished such pertinent records of the parties hereto, their agents, sub-agents, affiliates, subsidiaries, freight brokers, compradores and/or Chinese Freight Agents, wherever located, as may be required in the enforcement of this Agreement and the decisions of the New York Freight Bureau, and the failure of any party hereto either on their own behalf or the aforementioned additional parties shall constitute a violation of this Agreement.

(f) Upon the completion of such investigations, the Chairman shall lay before the membership his written report thereon, and such report shall include all relevant particulars thereto other than the identity of the party hereto or other person from whom the report originated.

(g) Such written reports shall constitute and are hereafter referred to as complaints. A copy thereof shall be furnished to the accused party not less than 20 days prior to the time that the matter is submitted to a vote of the parties as provided in subparagraph (h) of this paragraph.

(h) All such complaints shall be submitted to a vote of the parties hereto other than the party charged with the violation, after giving the party charged in the respective complaint an opportunity to adduce evidence in its defense. If the parties hereto, other than the party so charged shall, by a three-fourths affirmative vote of all parties entitled to vote, determine that the violation or violations alleged in the complaint have been provided, the party charged with the violation or violations shall be subject to liquidated damages as hereinafter provided in respect of each and every violation so proved; but if the party accused is dissatisfied with the decision reached as aforesaid, such party shall have the right to appeal, it being incumbent upon the accused party to make any such appeal within ten days following the aforementioned determination. In which event the question of violation shall be left to the determination of a majority of three arbitrators, one arbitrator to be nominated by the accused, the second by a three-fourth affirmative vote of the remaining parties, and the third arbitrator to be nominated by the arbitrators so chosen, it being incumbent upon the parties concerned to nominate the first and second arbitrators within thirty days of the appeal being made by the accused party. In the event the accused party does not appoint an arbitrator within the said thirty days, the accused party will thereby forfeit its right to appeal. Such arbitrations shall take place in Hong Kong and any decision so arrived at shall be binding and final, and such decision shall be equivalent to a legal judgment given by the highest court of law, and the parties to this Agreement thereby waive and abandon every right to take any legal action to obtain a review or reversal of the decision so made.

However, it shall not be a breach of this agreement for any line to refer any matter arbitrated to the Federal Maritime Commission for a decision as to whether or not the matter arbitrated constitutes a modification of this agreement.

(i) Inasmuch as it will be impossible to ascertain or measure the amount of damages which the parties hereto will suffer by reason of the breach of this Agreement, the damages suffered thereby by each party hereto shall be assessed on the basis of a three-fourths majority vote as above provided but that, in any event, such damages shall be subject to the undernoted maxima, exclusive of any arbitration costs which may accrue to the accused party:

(i) First offence----------	up to a maximum of US$10,000.00 or its equivalent in Hong Kong currency.
(ii) Second offence--------	up to a maximum of US$15,000.00 or its equivalent in Hong Kong currency.
(iii) Third offence---------	up to a maximum of US$20,000.00 or its equivalent in Hong Kong currency.
(iv) Fourth and any subsequent offences.	up to a maximum of US$30,000.00 or its equivalent in Hong Kong currency.

(j) The Chairman shall notify in writing the party against whom a violation shall have been found of the decision against it and the amount of liquidated damages which shall have been assessed against it. In the absence of any appeal by such notified party in accordance with the provisions of Article 13(h) hereof, the party thus notified shall pay the amount of such liquidated damages within a period of ten (10) days. In the event that it shall fail or refuse to make such payment within said period, the other parties may have resort to the performance bond which such party shall have deposited in accordance with the provisions contained in Article 12 of this Agreement; and the Chairman is hereby authorized, in case that a decision shall be made against it, to the effect that it has violated this Agreement, and in case liquidated damages are assessed against it and it shall fail to pay said damages within the period of ten (10) days after such notice has been given to it by the Chairman, to pay the amount of said liquidated damages to the other parties hereto from the cash which it shall have deposited or, if its performance bond shall be by way of a confirmed irrevocable letter of credit, to draw upon the letter of credit and pay the amount of such liquidated damages to the other parties from the proceeds thereof, such payments to the other parties being on a pro-rata basis. The costs incurred in arbitration proceedings shall be dealt with in the award.

(k) Each party hereto shall be fully responsible for the acts and omissions of its parent companies, agents, sub-agents, affiliates, subsidiaries, freight brokers, compradores and/or Chinese Freight Agents, and an act done or omitted to be done by an agent, sub-agent, affiliate, subsidiary, freight broker, compradore and/or Chinese Freight Agent, which would constitute a violation of this Agreement, if done or omitted to be done by the party itself, shall for all purposes hereof, constitute a violation of this Agreement by such party, for which such party shall be liable for damages in the same amount as if it had done or omitted the said act.

(l) In the event of the termination of this Agreement or the expulsion or voluntary withdrawal of any of the parties hereto, the performance bond deposited by the parties concerned shall be returned to them, together with accrued interest, but only after any complaints which may be pending against the parties concerned at the time of its expulsion or withdrawal or at the time of the termination of this Agreement, as the case may be, have been satisfied.

14. ADMISSION TO MEMBERSHIP

(a) Any common carrier by water which has been regularly engaged as a common carrier in the trade covered by this Agreement, or who furnishes evidence of ability and intention in good faith to institute and maintain such a common carrier service between ports within the scope of this Agreement, and who evidences an ability and intention in good faith to abide by all the terms and conditions of this Agreement, may hereafter become a party to the New York Freight Bureau, promptly following written application to the New York Freight Bureau for membership, such application to set forth evidence demonstrating compliance with the foregoing requirements, by affixing its signature hereto, or to a counterpart hereof, and by payment to the New York Freight Bureau of any outstanding financial obligation arising from prior membership of the New York Freight Bureau, and by posting with the New York Freight Bureau security for faithful performance of its obligations as provided in Article 13 hereof.

(b) Every application for membership shall be acted upon promptly.

(c) No carrier which has complied with the conditions set forth in paragraph (a) of this Article, shall be denied admission or readmission to membership.

(d) Prompt notice of admission to membership shall be furnished to the Federal Maritime Commission and no admission shall be effective prior to the postmark date of such notice.

(e) Advice of any denial of admission to membership, together with a statement of the reasons therefor, shall be furnished promptly to the Federal Maritime Commission.

15. WITHDRAWAL AND EXPULSION OF MEMBERSHIP

(a) Any party may withdraw from the Conference without penalty by giving at least sixty (60) days' written notice of intention to withdraw to the Conference: *Provided, however*, That action taken by the Conference to compel the payment of outstanding financial obligations by the resigning Member shall not be construed as a penalty for withdrawal.

(b) Notice of withdrawal of any party shall be furnished promptly to the Federal Maritime Commission.

(c) No party may be expelled against its will from this Conference except for failure to maintain a common carrier service between the ports within the scope of this Agreement, or for failure to abide by all the terms and conditions of this Agreement.

(d) No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished to the expelled Member and a copy of such notification submitted to the Federal Maritime Commission.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–52

IN THE MATTER OF THE MODIFICATION OF AGREEMENT 5700–4

ORDER

This proceeding having been instituted on order to show cause, the Commission having received memoranda of law and heard oral agrument on such order and having pursuant thereto issued on this date a report in this proceeding, which is hereby referred to and incorporated herein by reference,

Therefore, it is ordered, That Agreement No. 5700–4 be and the same hereby is modified by deleting paragraphs 10(b), 10(c), 10(d), and 10(e) and by adding new paragraphs 12 through 15 as set forth in the Appendix A.

By the Commission.

(Signed) THOMAS LISI,
Secretary.