FEDERAL MARITIME COMMISSION

DOCKET NO. 66–48

RATES AND PRACTICES OF THE PACIFIC NORTHWEST TIDEWATER ELEVATORS ASSOCIATION

Initial Decision Adopted March 6, 1968

The rates, rules, and regulations, other than the overtime charge, contained in the tariffs of the respondent marine grain terminal operators do not constitute nor result from unjust or unreasonable practices under section 17 of the Shipping Act, 1916.

The use of the Freas formula, modified in minor respects to fit the circumstances at a grain terminal, is a reasonable method of developing and segregating terminal costs and allocating these as between vessel and cargo.

The institution of a services' and facilities' charge by respondent marine grain terminals, similar to such a charge included in the tariffs of most other terminals on the Pacific Coast, is not an unjust or unreasonable practice in violation of section 17.

Adding an increment to a terminal overtime loading charge as an alleged incentive factor to induce the terminal to work during overtime hours, is an unjust and unreasonable practice in violation of section 17 when the overtime loading is required by the terminal.

Thomas J. White and *Norman E. Sutherland* for respondents.

George D. Rives and *Gerard K. Drummond* for petitioners.

Karl C. Grannan, Office of the General Counsel, for the intervener, United States Department of Agriculture; *Joseph A. Ryan*, *John C. Kennedy*, and *Charles W. Bucy*, on the brief.

Donald E. Leland and *Robert W. Graham* for intervener, Northwest Marine Terminal Association, Inc.

H. Stanton Orser and *John C. Harley* for intervener, California Association of Terminal Elevators.

Milton A. Mowat for intervener, Portland Commission of Public Docks.

Willard Walker and *Thomas J. White* for intervener, Port of Longview.

C. R. Nickerson filed a brief for the intervener, California Association of Port Authorities.

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

REPORT

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

This proceeding is before us on exceptions to the initial decision of E. Robert Seaver, presiding examiner, issued on August 11, 1967. Exceptions were filed and oral argument was held on December 6, 1967.

The investigation was prompted by a protest filed by the Portland Steamship Operators' Association (petitioner) in 1966 objecting to changes in the tariffs of the marine grain terminals in the Pacific Northwest which resulted, among other things, in sharply increased charges against the vessels.

The purpose of the investigation as specified in the order of investigation is "to determine whether the rates, rules and regulations contained in the tariffs of the elevator operators constitute unjust or unreasonable practices in violation of section 17." Named as respondents are the members of the Pacific Northwest Tidewater Elevators Association which operate grain terminals in question.

In his initial decision, the examiner concluded that the rates, rules and regulations contained in respondents' revised tariffs neither constitute nor result from unjust or unreasonable practices in violation of section 17 except as to the imposition of a flat overtime charge of $57 per hour for loading done at the terminal's behest, which he found to be excessive by $17 per hour.

The petitioner asssociation and Hearing Counsel excepted to the initial decision, while the respondent terminal operators supported the examiner's position.

These exceptions fall into two distinct categories. The first is a disagreement with the examiner's allocation of the costs of the wharf, the waterway and 50 percent of the shipping gallery to the vessel as well as the level of overtime rates charged the vessel. The second is directed at the cost accounting methods utilized by the terminal operators and approved by the examiner, whereby the overall annual revenue requirements of the terminals was calculated at 10.7 million dollars. Petitioners contend that this figure should not exceed 7.8 million dollars per year.

We find that the exceptions of petitioner and Hearing Counsel are essentially a reargument of contentions which were exhaustively briefed and considered by the examiner in his initial decision. Upon careful consideration of the record, the exceptions, briefs and argument of counsel, we conclude that the examiner's factual findings and

his conclusions with respect thereto were well supported and correct. Accordingly, except as noted herein, we adopt the initial decision as our own and make it a part hereof.*

There is some language in the initial decision which, despite the examiner's careful disclaimer, might be interpreted to mean that we are attemping to subject terminals' overall rate structures and levels of return to the same kind of regulation which we exercise over carrier rates under the Intercoastal Act. We do not believe that the conclusion of the examiner with respect to the reasonableness of respondents' rate of return on investment or his conclusions concerning the inclusion of leased property in the rate base, and respondents' method of valuing land and plant facilities, were necessary or relevant to his conclusions under the second paragraph of section 17, which is addressed to unjust or unreasonable practices or regulations. Thus, in adopting his initial decision, we neither agree nor disagree with these conclusions or the reasoning supporting them.

An appropriate order will be entered.

By the Commission.

[SEAL]

THOMAS LISI
Secretary

*Page one of the initial decision containing the headnotes and appearances has been omitted.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–48

RATES AND PRACTICES OF THE PACIFIC NORTHWEST TIDEWATER ELEVATORS ASSOCIATION

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether the rates, rules and regulations contained in the tariffs of the respondent elevator operators effective April 1, 1966 constitute unjust or unreasonable practices in violation of section 17 of the Shipping Act, 1916, and the Commission, having this date made and entered its Report adopting the examiner's initial decision, which Report and initial decision are made a part hereof by reference;

Therefore, it is ordered, That the overtime rate of $57 per hour contained in respondents' said tariffs be, and the same hereby is, approved provided that respondents modify and amend those portions of said tariffs by substituting a rate not to exceed $40 per hour in those instances where overtime loading is ordered or requested by the terminal, except that such approval shall become null and void unless the tariffs so modified are filed with the Commission not later than sixty (60) days from the date of service of this order.

By the Commission.

THOMAS LISI
Secretary

[SEAL]

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

I. BACKGROUND OF THE PROCEEDING

Institution of the Investigation

The Commission instituted this investigation under section 17 and section 22 of the Shipping Act, 1916 (46 U.S.C. 816, 821), to deter

[1] This decision became the decision of the Commission March 6, 1968.

mine the legality of the revisions in the tariff rates, rules, and practices that were put into effect on April 1, 1966, by the respondent marine grain terminals. The seven corporations named as respondents [2] operate ten marine grain terminals in the Pacific Northwest on the Willamette and Columbia Rivers and the Puget Sound in Portland, Oregon, and vicinity, and Vancouver, Tacoma, Kalama, Longview, and Seattle, Washington. The Louis Dreyfus Corp., Harbor Island Dock Co., North Pacific Grain Growers, Inc., and Peavy Co. each operate one elevator. Cargill, Inc. operates an elevator at Portland and one at Seattle, and Continental Grain Co. operates an elevator at Longview and another at Portland. The latter elevator is no longer in operation, but it was a going concern at the time of the cost study upon which the rate changes were based; therefore, its accounting data are included in the exhibits and will be considered in this decision. The accounts of Harbor Island Dock Co. were not included in the study because its geographical location and its method of operation make it unique, and the Cargill terminal at Seattle was not included in the study because the inclusion of one of the Cargill terminals was considered to be adequate. Thus, the accounting exhibits cover eight terminals. No objection was raised regarding the selection of these terminals and exclusion of the others.

All of the respondent terminals except Northern Pacific are operated by large, grain merchandising corporations that operate on a national and, in some cases, international scale. These corporations export 76.7% of the grain that moves through the terminals. All but 1.5% of the balance is exported by the United States Department of Agriculture (U.S.D.A.).

That portion of section 17 that is applicable to this proceeding provides:

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

Respondents, in the operation of their grain terminal elevators are "other persons" within the meaning of section 17 and as that term is defined in section 1 of the Shipping Act. *California* v. *United States*, 320 U.S. 577 (1944).

The "regulations and practices" that are under investigation here

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[2] The order of investigation included the Kerr Grain Corporation which operated a marine grain terminal at Portland, but before the hearing this facility was destroyed by fire and this respondent was dismissed from the proceeding.

consist of respondents' employment of certain accounting principles and formulas for the development and allocation of costs in connection with their April 1, 1966, rate adjustments which increased their overall charges by approximately four percent. A list of respondents' tariff charges paid by vessel owners and by grain exporters appears on page 399. The respondents are authorized to adopt uniform rates and tariff provisions, insofar as the charges assessed against ocean carriers are concerned, by virtue of an Agreement approved under section 15 of the Shipping Act, 1916, and their association is called The Pacific Northwest Tidewater Elevators Association (PNTEA). They file separate tariffs with the Commission, but their rates, rules, and other tariff provisions are almost identical and can be considered as one for the purpose of this decision.

The changes in the rate structure increase the charges paid by the vessels by about 45 percent, while it leaves unchanged those charges paid by "cargo," the term adopted by the parties to mean the grain exporters. Prior to the increase, the vessels paid 8.6 percent of the tariff charges of the respondents and the cargo paid the balance. After the change, the vessels pay about 12 percent of the total. The tariffs of the respondents were revised in the following respects:

1. A service and facilities charge was assessed for the first time against the vessels, ranging from 12 to 21 cents per ton of grain loaded on the vessel, depending upon the type of vessel. The charge was established on a sliding scale due to the variation in the ease of loading various types of vessels and the parties here do not object to the sliding scale, if there is to be a service and facilities charge at all.
2. An increase in 10 percent in the dockage charge in those instances where the dockage is collected by respondents. At other terminals, the dockage is collected by the public body that owns the terminal property. In all instances where the terminals are leased to one of the respondents the sums collected as dockage are paid over by the lessee-terminal to the public bodies that own the respective plants. More recently, the public bodies further increased the dockage charge on the average of 25 percent. This increase is not under investigation here, although it figures in the accounting schedules.
3. Elimination of the standby and deadtime charges that applied during periods of delay in loading caused by the vessel.
4. An increase in the rate for loading grain during penalty overtime hours, which varied from terminal to terminal between $69.30 and $85 per hour, to $94 per hour. Loading occurs very

infrequently during the penalty overtime period and the parties have not questioned the legality of this charge.

5. A reduction in the rate for loading grain during overtime hours under the union contracts from between $56.70 and $70 per hour to $57 per hour.

The amount of the resulting increases and decreases in the charges to the vessels over a year's time is shown on page 400.

The Portland Steamship Operators Association, Inc., filed with the Commission a protest against the revised tariff charges and petitioned for the institution of an investigation of the practices that led to the increase in the rates and charges of the respondents. The investigation was instituted at least in part as a result of that protest and petition and the Association was joined in the proceeding as petitioner in the order of investigation. The Association is comprised of persons holding executive positions with steamship companies or agents of steamship companies located in Portland, Oregon. About 95 percent of the vessels that load grain at the terminals are operated as tramp (irregular) carriers. Petitioners represent the tramp vessels as well as the few operators of vessels engaged as common carriers that load grain at the terminals.

The United States Department of Agriculture (U.S.D.A.) intervened in the proceeding as well as a number of associations of terminal operators, the California Association of Port Authorities, and the Port of Longview.

The Hearing

The hearing was held in Portland, Oregon, from February 7, 1967, to March 2, 1967, without interruption. The 109 exhibits admitted into the record include many voluminous accounting studies prepared by the expert witnesses who testified on behalf of respondents, petitioners, and Hearing Counsel. At the outset of the hearing, the Examiner, in the company of counsel for all the parties and the accounting witnesses, visited several of the terminals in order to become familiar with the physical layout of typical plants and to observe the loading operations.

In order to complete this resume of the background of the controversy it should be noted that the petitioner filed a complaint with the Commission on March 31, 1964, against some of the respondents, contending that various rates, charges, and practices were in violation of the Shipping Act. Docket No. 1177 was assigned to the complaint, but before any further proceedings were had in the action, the parties agreed to a settlement under the terms of which the respondents made certain reductions in the charges complained of, and the complaint

was dismissed. Under the settlement agreement, the respondents were to proceed immediately to have a "cost analysis of their grain terminal operation—prepared by Philip Linnekin, under the principles of the Freas formula." The agreement further provided that upon completion and review of the results of the study, respondents would review their tariffs and make such changes therein as they deemed advisable, and, after such changes were filed with the Commission, the petitioners should be free to take any action with respect thereto as they deemed advisable.

The accountant mentioned in the settlement aggrement, Philip E. Linnekin of San Francisco, has had a great deal of experience in the analysis of marine terminal rate structures, having assisted Howard G. Freas in his cost and revenue analysis in connection with Docket No. 640, which involved the rate structures at the marine terminals in the San Francisco area,[3] and having conducted the accounting analysis on behalf of marine terminals in connection with several other proceedings before the Commission and its predecessors involving the practices of marine terminals.

The accounting studies conducted by Linnekin pursuant to the settlement agreement consumed an entire year, and their results caused him to conclude that there was a deficiency in the revenue received by the respondent terminals from the vessels and that in order to correct this deficiency a services and facilities charge should be instituted by respondents. Gilbert J. Parr, a transportation rate consultant, with long experience in rail rate matters, reviewed the Linnekin studies and testified in support of them.

James Laurie, who has had lengthy experience in the field of transportation accounting, devoted several months to an analysis of the financial experience of respondents and their rate adjustments and he testified as an expert witness for petitioners. William T. Gatlin, the Supervisory Auditor in the Commission's Bureau of Financial Analysis, also devoted a considerable period of time to a study of the accounts of respondents and the Linnekin accounting data and exhibits. Mr. Gatlin testified as an expert witness for Hearing Counsel and supplied accounting exhibits reflecting his conclusions. Although Mr. Gatlin and Mr. Laurie had not previously conducted a cost analysis based on the Freas formula, their testimony demonstrated that their experience in the field of transportation fully qualified them as experts in this proceeding.

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[3] *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 (1948). The Freas formula and its preparation are described more fully, *infra*.

II. PRELIMINARY ISSUES

Jurisdiction

Respondents contend that the Commission lacks jurisdiction over the subject matter of the present controversy on the ground that section 17 does not grant to the Commission authority to investigate or determine the reasonableness of rates of ocean terminals. Acknowledging, at least by inference, that *California* v. *United States*, *supra*, upholds the Commission's exercise of jurisdiction over marine terminals, respondents argue that the *California* case did not involve the reasonableness of rates. They apparently feel that the Commission can look into their practices so long as the inquiry doesn't get into the net, dollar effect of the practices. Their contention that this proceeding is an investigation of the reasonableness of rates is based on the statements in the brief by Hearing Counsel that this investigation is concerned with the question whether respondents' rates are just and reasonable "as to level" and that "This means that the Federal Maritime Commission is now subjecting marine terminals to the same species of regulation as it has for years domestic offshore carriers under the Intercoastal Shipping Act of 1933."

In its recent decision in *The Boston Shipping Association, Inc.* v. *Boston Marine Terminal Association, et al.*, June 28, 1967 (11 FMC 1), a contention like that of respondents was rejected and the Commission's reason is applicable here (11 FMC 4, footnote 7):

> Taking the position that this is a rate-making case, complainants also contended that we were without jurisdiction. They do not, however, challenge the level of the strike storage charge and their only concern is with its assessment against them. That the proper allocation of the costs of providing terminal services as between users of those services is a matter within our jurisdiction under Section 17 is too well settled to be disputed now. *Practices, etc., San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941), affirmed *California* v. *United States*, 320 U.S. 577 (1944); *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948).

It is not necessary in the instant proceeding to determine whether the Commission has jurisdiction over a controversy where the issue is the reasonableness of rates of marine terminals, like the issues mentioned by Hearing Counsel as arising under the Intercoastal Act. This is simply not such a case. The question involved here is whether the practices of respondents in their determination and allocation of costs are reasonable. It was the respondents themselves who selected the general method for testing these practices; namely, the application of cost accounting as a means of determining whether there is a deficiency in terminal revenue or, stated in a different way, whether the charges provide a fair return on investment. The Examiner and the other parties to the proceeding accepted this as a proper method here, but the

use of this system does not transform this proceding into a "rate case." The fact that that system resembles, in some respects, the system normally employed in a proceeding under thhe Intercoastal Act is of no moment. The approach employed in determining the reasonableness of rates differs from that used here in other respects.

The respondents introduced into evidence and relied upon the study and report made by Howard Freas in Docket No. 640, *supra*, and the same method of investigation was employed here as was employed in that proceeding. Mr. Freas pointed out in his report that his investigation was confined to a cost and revenue study and that it did not include any consideration of the other rate-making factors such as value of the service and other considerations that go into an investigation of the reasonableness of rates. Such considerations played little or no part in this proceeding either. The U.S.D.A., Hearing Counsel, and petitioners support the Commission's jurisdiction, stating that *California* v. *United States* clearly supports the authority of the Commission to proceed in this type of investigation. Respondent terminals are an inseparable link in the transportation system that serves our waterborne foreign commerce. The plan of the Shipping Act would be frustrated and the rate-payers would be left to the mercies of the terminals if, having authorized their collective rate-making through section 15, thus eliminating rate competition, their practices in making the rates were held to be exempt from regulation.

Burden of Proof

The respondents and the petitioners each contend that the burden of proof in this proceeding is on the other, each arguing that the other is the "proponent of a rule or order" within the meaning of Rule 10(o) of the Commission's Rules of Practice and Procedure (46 CFR 502.155) and section 7(c) of the Administrative Procedure Act (5 U.S.C. 1006(c)). The A.P.A. and Rule 10(o) place the burden of proof upon the proponent of a rule or order. There is no failure of proof on any of the issues in this proceeding and the evidence does not preponderate equally between the antagonists on any issue. Therefore, there is no occasion to base any conclusion here on the failure of any party to sustain its burden of proof, *Alcoa S.S., Inc.* v. *Cia. Anonima Venezulana*, 7 F.M.C. 345, 358 (1962). This issue therefore is not in the case. The Examiner has devoted considerable attention to the question of burden of proof in such a proceeding, however, and has reached one conclusion with complete conviction. It is that much harm can be done by an attempt at generalities, by way of dicta, on the subject of burden of proof in administrative proceedings; and none will be attempted here.

The U.S.D.A. brief correctly points out that the various participants in a regulatory proceeding should see to it that the record is complete for decision and thus avoid having to reach conclusions on the basis of a failure to sustain a burden of proof. This has been adequately accomplished in this proceeding.

III. THE SUBSTANTIVE ISSUES

There is no dispute with respect to the amount of respondents' revenues received during the cost study period, which was the year ending July 1, 1964, under the rates then in effect. Furthermore, there is no dispute concerning the amount of additional revenue or the total revenue which respondents would have received during the cost study period had the April 1, 1966, rates been in effect during that period. No question is raised as to respondents' combining together the financial experience of all eight elevators in conducting its cost study, and petitioner correctly states that this practice achieves a desirable uniformity of rates. The method has been followed in previous Commission cases where, as here, it is appropriate. *Pacific Coast/Puerto Rico General Increase in Rates*, 7 F.M.C. 525, 533 (1963). Since the parties did not contest this method, arguments based on differences in net revenues between the terminals are irrelevant.

The subsidiary issues in the proceeding can best be described by briefly enumerating the contentions of the petitioners:

1. Only 23.3 percent of respondents' terminal costs should be chargeable to their wharfinger operation, and the other 76.7 percent charged to the grain dealing operation.
2. Respondents' property should be included in the rate base at depreciated original cost, rather than the estimated and undepreciated cost of reproduction.
3. In the case of the five terminals that lease their plants from public bodies,[4] the value of these properties should not be included in the rate base for the purpose of testing the adequacy of the revenues.
4. Depreciation expense should be based on actual investment (original cost), rather than an estimated reproduction cost.
5. They question the rate of return as related to rate base.
6. They contend that none of the costs incident to the shipping gallery or the waterway should be charged to the vessel but that these costs should be charged to the cargo; and that only 50 percent of the costs incident to the wharf should be charged to the vessel. Hearing Counsel and U.S.D.A. take a different position

[4] Those operated by Continental (at Longview), A.D.M., N.P.G.G., and Cargill.

on this question, which is described, *infra*, where these issues are discussed.

7. They question the calculation of incremental costs in arriving at the overtime charge.
8. They object to the imposition of any service and facilities charge by the marine grain terminals.
9. They contend that placing charges on a volume basis is an unfair practice because it puts a premium on inefficiency.

In addition to some of the questions raised by petitioners, Hearing Counsel question certain tariff definitions of respondents covering their wharfinger charges. The U.S.D.A. objects to the rate increases on the basis of their alleged effect on Government aid programs, as well as raising some of the issues described above. The other interveners, all of whom operate marine terminals, came into the case primarily to support the services and facilities charge recently inaugurated by respondents.

IV. RESPONDENTS' PRACTICES IN ESTABLISHING THE RATES IN QUESTION

Physical Characteristics of the Terminals and Method of Operation

The function of a marine grain terminal, like any other terminal, is to provide waterfront facilities and perform various services to accomplish the interchange of cargo between inland carriers and ocean carriers. They are not operated for the purpose of storing grain. Grain is brought to the terminals from country elevators [4a] by means of rail cars, trucks, or river barges, and, by the use of automated unloading machinery, it is conveyed underground into the terminal then elevated into the bins. When the grain is to be loaded aboard a vessel for export, a gate or valve at the bottom of the particular bin containing the type of grain to be loaded is opened and a system of underground conveyor belts and an elevating device move the grain to the scale room in the *headhouse*,[5] where it is tested, graded, and weighed by state inspectors. The terminal has completed any cleaning, weighing, and other processing done for the owner of the grain and at this point the actual loading begins.

The grain is moved to the vessel by means of the *shipping gallery* which consists of a system of conveyor belts housed in enclosed ramps that extend from the *headhouse*, which contains the scale room, the elevating machinery, and other facilities, to a point high above the

[4a] Contentions of the parties based on charges and operations at country elevators are irrelevant. They are so unlike marine terminal elevators that such a comparion is unwarranted.

[5] The underscored words describe important component parts of the elevator that figure prominently in the issues. Most of them are labelled in the picture on the following page.

wharf. At that point it intersects the other portion of the *shipping gallery* which runs parallel to and above the *wharf* for a distance long enough to serve large, ocean-going vessels.

Six *spouts* protrude at equal intervals from the *shipping gallery*, through which the grain is fed into the holds of the vessel. Two *spouts* may be used at a time and they can be moved laterally, up and down, or telescoped in and out, so as to reach the various holds, and "trim" them, by means of electric winches that are a part of the spouts. The aiming of the spouts and of the flow of grain into the holds is controlled by stevedores who are stationed on the vessel and are employed by and paid by the vessel owners. The rate of flow of grain and the type of grain is controlled by terminal employees, stationed in the terminal, in response to bell signals transmitted to them by the stevedores.

The picture on the next page depicts the plant of the Northern Pacific Grain Growers at Kalama, Washington. The loading spouts could not be labelled in the accompanying picture, but they are readily seen extending from the shipping gallery to the vessel. While it is not apparent from the picture,* the structure of the shipping gallery is entirely separate from the wharf. The towers that support the shipping gallery extend down through the wharf but they are not part of the wharf nor are they attached to it, because the wharf is not a stable enough structure to support the gallery.

During the year ending June 30, 1964, which was the year selected for the accounting study, 615 vessels loaded a total of 4,684,700 short tons of grain at the eight terminal elevators.[5a] This was an average of 412 tons per hour during the time ships were at the terminals. The terminals are capable of loading 800 tons per hour if there are no interruptions. A multi-spout terminal such as those of respondents can load vessels just about twice as fast as a simple, single spout terminal could. Approximately six or seven days are required, at the longest, to load a 10,000 ton vessel at one of the respondent's elevators, while a single spout elevator would take 12 to 15 days. The cost to the owner of delaying a vessel of the type that calls at respondents' elevators for one day would vary from $1,500 to about $4,000 depending on the size and nationality of the vessel. At a simple, one spout elevator it would be necessary to shift the vessel about as the various holds are loaded. This would burden the owner with the expense of tugs and line handlers in addition to the expense caused by the delay occasioned.

*The picture appearing in the initial decision is not reproduced here.

[5a] There was tacit agreement that the fiscal 1964 volume level will prevail in ensuing years and no evidence to the contrary was presented.

The economic life of the terminal structures is generally taken to be 50 years. The economic life of the machinery and equipment varies, but on the average it is about 20 years. Depreciation is taken by the elevators on a straight line basis and it was applied in this way in the cost studies here. No question has been raised as to the economic life of the property or to this method of taking depreciation.

A facility not identifiable in the accompanying picture is the barge dock which, at the various terminals, is either a unit separate from the wharf or a portion of the wharf used solely for berthing river barges bringing grain to the terminal. It is equipped with mechanical devices to discharge the grain onto the conveyor system that moves it to the terminal. The berthing facility for barges is used exclusively for this purpose and is not considered part of the wharf for this investigation.

The Formula Employed in Establishing the Rates and Charges

A general structure for a cost formula applicable to marine terminals was first prepared by Dr. Ford K. Edwards, at the time, in 1940, a transportation economist for the California Railroad Commission. This formula (called the Edwards-Differding formula) was introduced in evidence in Docket No. 555 before the United States Maritime Commission (U.S.M.C.).[6] In 1946, the Association of Marine Terminals in California requested the U.S.M.C. to conduct a study of its practices and formulas for establishing rates and charges. In connection with the formal investigation that ensued,[7] Docket No. 640, the Commission employed Howard G. Freas, a rate consultant who later became a member of the Interstate Commerce Commission, to conduct a financial study of the terminal operations and prepare a cost formula. Freas patterned his formula almost entirely after the Edwards-Differding formula.

Philip E. Linnekin, who conducted the cost study on behalf of respondents here, assisted Freas in the 1946 study. Linnekin employed the Freas and Edwards-Differding approach to the development of respondents' costs, the allocation thereof between vessel and cargo, and the designation of tariff charges. There is no dispute here as to the applicability of the Freas formula to a grain terminal operation, except that Hearing Counsel suggest that the "point of rest" concept, to be discussed later, is inappropriate for a grain terminal. The U.S.M.C. approved the application of Dr. Edwards' formula in Docket No. 555 and the Freas formula in Docket No. 640 and F.M.B. approved the application of the Freas formula to the terminals in the Pacific Northwest in *Terminal Rate Structure—Pacific N.W. Ports,*

[6] *Practices, etc. of San Francisco Bay Area Terminals,* 2 U.S.M.C. 588 (1941).
[7] *Terminal Rate Structure—California Ports,* 3 U.S.M.C. 57 (1948).

5 F.M.B. 53 (1956), Docket No. 744. The handling of bulk cargoes was included in the operations under study in those cases but where grain was concerned the method of operation was somewhat different than that employed by the respondents here. At the time of the earlier studies grain was either loaded in bags or by means of a clamshell. More recently, the Federal Maritime Commission approved the application of the Freas formula to modern grain terminals, including respondents', in a proceeding where the terminal charge for wharfage was upheld. *Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports*, 8 F.M.C. 653 (1965).

The development or identification of the terminal costs is one of the two major goals of the formula, and is at least as valuable as the second goal, which is the allocation of the costs between vessel and cargo. The costs were collected by Linnekin, as they were in the Freas study, under three general headings; plant costs (or carrying charges), equipment costs, and labor costs including administrative expense, as shown in Schedule I, which is attached as an appendix. This is a report sample covering just one of the eight terminals. It will be noted that these costs are prorated between the various physical components of the terminal. Prorating was done on the basis of land area or relative value, as appropriate. Schedule II, also attached, demonstrates how the plant costs and other costs are distributed to the various tariff charges. It should be borne in mind that at the time of the study there was no services and facilities charge and therefore the plant and equipment costs charged against the vessel appear under "dockage." Schedule III in the attached report sample was compiled for the purpose of segregating the straight-time loading costs which are chargeable to the cargo and the overtime costs which are chargeable to the vessel. It will be noted that the total loading costs in the third column on Schedule II are the same as the total loading costs shown in Schedule III. These schedules are incorporated in this decision in order to portray the method employed. Some of the figures thereon must be revised in accordance with the conclusions reached herein on various issues.[7a]

The schedules following the report samples reflect the combined experience of the eight terminals in the cost study year ending June 30, 1964. In allocating the costs between vessel and cargo, Linnekin stated that it was his intention to use the same general standard employed by Freas; that is, to apportion them in the proportion that vessel and cargo respectively use the facilities and receive the services provided. This "use" concept is applied, in part at least, by holding the

[7a] Many additional Schedules are used to refine and explain the basic Schedules I, II, and III.

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vessel responsible to the wharfinger for all usages and services from the "point of rest" of the cargo. This standard is discussed in more detail herein under the discussion of the allocation of the costs of the shipping gallery. All costs that are not assigned to the vessel are charged against the cargo. The parties do not question the fact that all terminal expenses, including a reasonable return on investment, are to be collected in the rates and charges of the terminals either from vessel or cargo. Many questions are raised, however, as to the inclusion of certain costs as wharfinger costs.

Applying the principles of the Freas formula, as he related them to the grain terminals, Linnekin concluded that the vessel should be charged with an appropriate allocation of general and administrative expense, as shown in the attached schedules, certain direct labor costs, and the following plant and equipment costs: 100% of the waterway; 100% of the wharf; 50% of the shipping gallery.

Wharf—Allocation of Costs Between Vessel and Cargo

Relying on the Freas allocation of the apron portion of the wharf to the vessel and upon their view of the use made of the wharf at a grain terminal by the vessel, respondents allocate the costs incident to the wharf entirely to the vessel. At a general cargo terminal, that portion of the wharf where the cargo is deposited and picked up by the ship's tackle is described as the apron. Freas allocated this portion of the wharf to the vessel because, as between vessel and cargo, it is used exclusively by the vessel and it is on the vessel side of the "point of rest." The portion of the open docks adjacent to a storage shed at a general cargo terminal, including that portion containing rail tracks, were allocated in part to the cargo by Freas. At the grain terminals, the wharf is not adjacent to the storage space and frequently is only connected to the land by a ramp, as shown in the preceding picture, and it is therefore analogous to the apron wharf. It is used as a means of tying up the ships, for provisioning and repairs of ships, and for access to the ships by the ships' personnel and stevedores.

Hearing Counsel, U.S.D.A., and petitioners contend that 50% of the wharf should be assigned to cargo.[7b] They have not shown specific uses of the wharf to any appreciable extent on behalf of cargo, however. Hearing Counsel states, "Since respondents are primarily grain merchandisers even the vessel is for their benefit, and since the wharf is an adjunct to a vessel, berthing it is certainly of benefit to respondents." On such a theory, all terminal costs would be charged against

[7b] If petitioners intended to leave the impression in their brief that the Commission determined in Docket No. 1084, *supra,* that all wharf costs were allocable to cargo, they misread that decision.

respondents as grain merchandisers and no allocation would be made between vessel and cargo. Hearing Counsel's recognition that the wharf is an "adjunct to a vessel" demonstrates that its costs should be allocated entirely to the vessel under the Freas formula.

Apart from their position with respect to the allocation of the costs of the wharf, petitioners advance a theory somewhat like that quoted above from the brief of Hearing Counsel. They argue that since nearly 80% of the grain loaded at the respondents' terminals is exported by respondents in connection with the merchandising end of their business, 80% of the total costs should first be allocated to the respondents as grain dealers and only the remaining 20% should be allocated as between vessel and cargo under the Freas formula. This argument overlooks the fact that the revenues shown in the Linnekin schedules include an accounting charge made against the various respondents for all of the tariff charges assessable against the cargo exported by them as grain dealers. In some instances the books and records of the respondents' terminals reflect these charges against the merchandising divisions. In the other cases Linnekin properly included the equivalent of such charges as revenue. As an accounting matter, this places the merchandising operation of respondents in the position of a stranger to the wharfinger operation. Under a proper allocation of the costs between vessel and cargo, as found herein, the cargo is assessed over 87% of all terminal costs. Rsepondents will bear this large proportion of the costs in connection with their exports of grain. Their dual operation need not subject them to the payment of costs expended for the benefit of others any more than a steamship company that operates a wharf would have to provide facilities for cargo without making a charge.

Petitioners attempt to draw a parallel between this situation and the non-wharfinger costs excluded from consideration in the Freas formula. The latter consist of such non-terminal operations as stevedoring, public warehousing, and pilotage. There is no analogy between the exclusion of the costs incident to these activities and the treatment of truly wharfinger costs on the ground that a separate division of respondents, located far away from the terminal, ships grain from the terminal. *Intercoastal SS Freight Assn.* v. *N.W.M.T. Association*, 4 F.M.B. 387 (1953), does not require a different result, as contended by petitioners. The issue in that case was quite different. The question there was whether checking service performed by the terminal was done for the benefit of the ship or the cargo. The Board's decision on that question has no bearing on apportionment of terminal costs where the terminal is the exporter of cargo.

Waterway—Allocation of Costs

That portion of the former terminal charges (now services and facilities) that is attributed to the cost item described as "waterway" is assessed for the use by the vessel of an appropriate area of the river adjacent to the wharf necessary for berthing the vessel. The Freas formula fixes the extent of this area as a strip of water extending 75 feet out into the river for the length of the wharf. This represents the amount of area needed for berthing. Linnekin adopts this assumption and arrives at the value, as did Freas, by applying the ratio that this area bears to the total land area used in the operation of the terminal to the total value of the land. Neither the terminals that own their facilities nor the lessors, of those that do not, own the land under the waterway; but under the law of Oregon and Washington the riparian owner or his lessee has the privilege of erecting a wharf and bringing vessels into the wharf. For this reason, the land used by the terminals, being contiguous to navigable water, has an enhanced value. As between vessel and cargo, the vessel makes exclusive use of this enhanced value and the Linnekin method of establishing the amount of this enhancement is a reasonable means of doing so.

Petitioners resist the apportionment of this item of cost to the vessel on the ground that none of the respondents have any investment in the land under the waterway, as some of them did that were the subject of the Freas study. This was not the basis of the Freas allocation since he stated on page 100 of his study, which forms a part of the record here as Exhibit 1:

> The assumption then is that the water area described is necessary for the vessel's use, that this is so regardless of whether the waterway is owned by the terminal or by the Government, and that the value of the adjoining shoreland is proportionately enhanced thereby.

The U.S.D.A. recognizes that the vessel receives some benefit from the waterway and that part of its cost should be attributed to the vessel, but they argue that "the marine grain terminal would ship no grain out of its elevator if it were not for the waterway" and therefore the vessel "should not be charged with 100% of the waterway expense." This argument overlooks the underlying basis upon which the allocations are made under the Freas formula, which received the general approval of U.S.D.A. in this proceeding. It could as easily be argued that since no grain could be shipped unless the vessel were able to come in to the wharf, the costs should be charged to the grain. This sort of reasoning would never lead to a conclusion as to the proper allocation of the cost of any of the terminal facilities since it departs entirely from the user concept.

Shipping Gallery—Allocation of Costs Between Vessel and Cargo

The parties are in sharp conflict regarding the proper allocation of terminal costs related to the shipping gallery. Officials of the respondents who testified on the subject would assign these costs to the vessel on the theory that the gallery is there for the sole benefit of the vessel. They stated that a simple one-spout device or shoot leading from the terminal to the vessel would serve the interests of the terminal adequately and that the high speed conveyor and multiple spout system benefits the vessel by rapid loading and eliminates delays that would be occasioned if there were but a single spout requiring frequent shifting of the vessel, which saves the vessel from $1,500 to $4,000 for each day saved. Loading the average ship at a single spout elevator would take at least 6 or 7 days, while only 2½ or 3 days are required at a multiple spout elevator.

Linnekin agreed that the gallery serves the vessel in this way and in addition, believed that the Freas formula bears out the conclusion that the gallery benefits the vessel because it compares to the aisle space between the point of rest of the cargo and the vessel at a general cargo terminal. The point of rest concept will be discussed later. Freas assigned the cost of such aisle space to the vessel. Linnekin was markedly and admittedly more conservative in this regard than his principles, however, and saw some benefit flowing to the cargo in this part of the terminal facilities. He urged the allocation of the gallery 50% to vessel and 50% to cargo. The cargo, as well as the ship, benefits from the faster loading and greater efficiency made possible by the gallery. This enures to the benefit of the seller, ultimately, by lowering the loading expenses. As a matter of physical use, of course, the grain is transported by means of the gallery. While the advantages of the gallery to the cargo may not be as immediate nor as apparent as those to the vessel, the Linnekin position is chargeable to the respondents, particularly in view of their general statement at another point that the positions they were advancing herein on all issues were those expressed by Linnekin. This is not to say that the proper allocation of gallery would necessarily be found to be 100% to the vessel, in the absence of Mr. Linnekin's more conservative approach. It simply means that we are not required to strain and struggle with the question as to what minor amount, if any, the vessel should be charged beyond the 50%. The allocation of 50% to the vessel is a conservative and acceptable estimate of the vessel's obligation.

The other parties would allocate the gallery solely to cargo on the additional theory that the seller undertakes, in the uniform FOB sales contract, to "deliver the grain to the end of the spout" and they con-

tend that the buyer would be charged twice for the use of this facility; first, as part of the purchase price of the grain and, second, if the cost is allocated to the vessel, when this charge is passed on to him as part of the charter hire or freight rate. This theory hinges on the argument made in the briefs that this cost "has in the past been borne by these grain traders." This latter argument is not conclusive because all costs borne by the grain traders in the past will continue to be borne by them in the future and not by the vessels. The terminals make no charges, directly, against buyer of the grain. Having found that there is a deficiency terminal revenue, as will be demonstrated later, the question here is: Who will bear the necessary *increase?* Whether it is vessel or cargo, this increase will only be paid and passed along to the consumer only once.

Furthermore, the grain sales contract between U.S.D.A. or one of the respondents, as grain seller, and a buyer of grain does not determine the propriety of any particular allocation of costs between vessel and cargo any more than does the provision of the charter party between the vessel and the grain buyer, who is the shipper. The standard charter is on a "free out" basis and, in addition, expressly obligates the vessel to pay the cost of loading the grain. These charter contracts do not govern the proper allocation of terminal costs between vessel and cargo. Freas stated:

> Division of responsibility between shipper and carrier is of no consequence in a study of this nature. The concern is with the responsibilty of each to the wharfinger.

The sound logic of this axiom also applies to the contractual division of responsibility between the buyer and the seller of the grain and probably with stronger reason. First, the seller is not always the terminal, and, second, regardless of the identity of the seller, it is more difficult for the seller to include terminal charges in his sales price than it is for the vessel to pass such charges along to the shipper. Grain prices are determined by the world market, while charter rates are established by petitioners for this trade alone and can be increased to reflect rising cost.

The charter and the sales contract alike must be interpreted, for this purpose, to mean that the terminal charges will be borne by the vessel (under the charter) and the seller (under the sales contract) only insofar as such charges are assessed against either of them. Therefore, neither contract can form the basis for allocating costs between vessel and seller (cargo). However, the business practices of the respondents, as grain dealers, and the petitioner-carriers, as evidenced by their respective contracts, do provide a clue to the explanation of the extreme

degree to which each party resists the allocation of costs that, ostensibly, would ultimately be borne by a third party (the buyer) anyway. This factor, understandably, hardly came to light in the evidence and the briefs. The incongruity of these contracts, if they are considered to be inconsistent, cannot be corrected in this proceeding, of course. However, the respective positions of respondents (as sellers of grain) and petitioners, in relation to their ability to recoup any increased charges from their customers, must be borne in mind.

The Freas formula is designed to develop the total costs of the terminal and then apportion them to vessel and cargo in proportion to the use made of the facilities provided and of the services rendered. The vessel is held responsible to the wharfinger for all usages and services from, but not including, the "point of rest" of the cargo. All other costs are assessed against the cargo. *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57, 59 (1948).

Taken in the context of his report, the "point of rest" criterion, which plays such an important role in such allocations, was used by Freas as a shorthand expression to define the traditional concept as to the respective duties of the carrier and shipper with respect to the transfer of cargo between them for the purpose of ocean transport. The shipper is traditionally obliged to bring cargo to a point where it can be reached by "ships tackle" and the ship has the responsibility to accept the cargo at that point—the "point of rest"—for loading aboard the vessel.

Unfortunately we do not have the benefit of a Freas view as to the point of rest of grain moving through a modern terminal elevator, for such facilities did not exist at the time he made his study. Freas fixed the point of rest for general cargo as a place on the pier where the ship can reach it, if there is no shed, or in the shed if there is one. In the latter event the aisle space is allocated to the vessel because the vessel has the duty to pick up the cargo in the shed and it uses the aisles in the process of loading. The apron of open wharves not having rail tracks are allocated to the ship for a certain distance (35 feet) back from the pier face that is deemed to be required for the lifting of cargo by the ship.

The parties are at odds over the location of the point of rest of the grain loaded at respondents' terminals. Petitioners say it is at the vessel end of the spout, as does Gatlin. Hearing Counsel departs, in a way, from the view of their accountant and discredits the point of rest concept as a factor to be considered in allocating the cost of the gallery. Respondents place the point of rest at the terminal end of the gallery, saying that it compares to the aisle space in a general cargo terminal.

The "point of rest" test is not entirely helpful with reference to the shipping gallery because of the physical difference between the grain-loading and the general-cargo-loading operations. The "end-of-ship's-hook" concept has no parallel in the case of a vessel loading grain.

If there is an analogy, the view of the respondents is more accurate because the grain is in continuous motion from the terminal end of the gallery until the loading process is completed. Also, the seller of the grain brings his grain to that point for loading. He employs the terminal for this purpose. Physically, there is no other place where he can make it available for the ship to load. Then the ship using stevedores jointly with the services and facilities of the terminal, receives the grain at that point for loading.

Elevator employees control the volume of flow of the grain and type of grain being loaded in response to signals from the stevedores. Thus the operation of the system is a joint undertaking between ship and elevator, the latter acting for cargo. The loading facility itself serves and benefits both ship and grain. It costs should be borne jointly and equally by vessel and cargo.

Petitioners argue that the gallery should be treated like Freas treated an oil pipeline on the piers in California, where none of its expense was allocated to the vessel. Linnekin correctly points out that there is little, if any, similarity between the two in cost, complexity, or operation. Even assuming that some degree of analogy exists, this comparison is outweighed by the other considerations described above.

For all tho foregoing reasons, the practice of the respondents in allocating 50% of the expense of the gallery to the vessel is not unreasonable under section 17.

Treatment of Leased Property

In the accounting procedure incident to the application of the "fair return on investment" standard, the Linnekin study treats the 5 respondents that lease their plants from public bodies [7c] as though they own the property. These five lease their properties on long-term leases which obligate them for periods up to 35 years. The obligations of the respondents under their leases have constituted the security for the issuance of revenue bonds by the public body to defray the cost of improvements. The pledge of the faith and credit of these large trading corporations, who operate the terminals, has, in this way, contributed to capital improvements in the terminals and it demonstrates the degree of the lessees' commitment. The long-term leases impose a

[7c] NPGG as sublessee from a railroad company.

risk and a burden on these lessees that is somewhat comparable to an investment in fee ownership.

However, the other parties object to this treatment of leased property, even though the rental payments are excluded from expenses in arriving at the revenue requirements of respondents on the grounds that: (1) This method provides a windfall to respondents since it would give them a return on property they do not own; (2) The Commission, in *Atlantic and Gulf—Puerto Rico General Increase*, 7 F.M.C. 87 (1962), and its predecessor in *Atlantic—Gulf/Puerto Rico General Increase in Rates and Charges*, 6 F.M.B. 14 (1960), excluded certain rented property from the rate base of the carriers involved in those cases. Hearing Counsel argues, in addition, that to allow respondents a return on leased property would require the rate-payers to pay a double return on investment, once to the lessor and once to the lessee.

Respondents contend that it is necessary and proper to treat leased property as owned for the purpose of this test because: (1) The Freas study does so; (2) The respondents would be deprived of a profit if they were not allowed to use such property as a part of the base; and (3) It is desirable to have uniformity in the accounting methods and terminal rates of the respondents and this cannot be achieved without employing a uniform measure for the rate base. As to the latter point it can be noted that petitioners favor uniformity in the rates of the terminals.

That portion of the Freas study that developed the basic principles for the development of the costs incident to marine terminal operations is at least as valuable and informative as that portion of his system that treats with the allocation of these costs as between vessel and cargo. Freas found that it was desirable to treat leased property at though it were owned, where a substantial proportion of the terminals leased their property, and he conducted his cost accounting on that basis in the Docket No. 640 study. To reject this portion of his conclusions, or any other substantial element, and attempt to apply the remainder, would throw the result out of balance.

As Freas points out (page 28, Ex. 1), it is not unusual to treat rented property in this way. The Commission and its predecessor have done so where the prevailing circumstances were such that this treatment led to the fairest result. *Hawaiian Inter Island Rates*, 7 F.M.C. 151, 156 (1962); *General Increase in Alaskan Rates and Charges*, 5 F.M.B. 486, 498 (1958).

The Commission has uniformly employed the fair-return test in assessing the reasonableness of rate structures in the offshore domestic commerce. The only other means of determining whether alleged reve-

nue requirements are developed by means of reasonable practices is to compare revenues and expenses under the "operating ratio" theory. The Commission and its predecessors have rejected the use of this test and the parties here generally agree that its application to these terminals would not be feasible. An insurmountable drawback is the absence of the body of historical data necessary to establish a norm for a reasonable operating ratio for this type of business. Such a test also places a premium on increased expenses.

If all eight terminals rented their plants, and these were excluded from the rate base, they would be required to operate without profit. A confiscation of their property would result. With five of the eight renting their facilities, their profits would be reduced *pro tanto* by the exclusion of this property from the base. The unfairness of this result is apparent, and this is what led Freas to conclude that where a large proportion of the property is leased it should be treated as owned for this purpose of testing the reasonableness of the net return actually realized. It must be so treated here for the same reason and, in addition, to prevent a distortion of the Freas system by a dismemberment of its parts. The fair-return and rate base exercise never constitutes actual costs, of course. They were developed in the case law merely as a convenient economic test of business operations. Treating rented property as owned is no less realistic than the test itself.

The cases cited by petitioners involved instances where the leased property was only a small portion of that used by the carriers whose rates were under study. The inclusion of the leased property here will not give respondents a "windfall," as contended, because the rental is excluded from expenses in the cost account.[7d] A contrary result would give the ratepayer a windfall and could very well put the terminals out of business. This treatment of leased property will not allow a double return, as contended by Hearing Counsel, since the lessor and lessee are treated as one in this method of accounting.

V. RATE BASE AND RETURN ON INVESTMENT

Valuation Method—Original or Reproduction Cost

Respondents urge that estimated reproduction cost is the proper standard for evaluating their terminal structures and equipment in arriving at the rate base to test the reasonableness of the profits they will experience under their increased charges. They do not depreciate these costs which, according to their expert testimony, come to a total of $39,846,636 for all eight terminals. This figure is used in the Linnekin accounting schedules.

[7d] Rent is treated here as including the dockage paid over to the lessor and the total for the year was $1,285,388.

Petitioner strenuously resist the use of undepreciated, estimated reproduction cost for inclusion in the rate base. They argue that this would provide a fictitious, swollen allowance of return on investment to respondents. The Freas formula recommends consideration of both original and reproduction cost in arriving at fair value, but this is the one issue as to which the Freas approach cannot be accepted. At the time of the Freas study that approach to valuation had the sanction of the Commission's predecessor agency, but more recently the Commission has adopted, and has since employed without exception, the "prudent investment" approach whereby property and betterments thereto are valued at original cost, depreciated to the period under consideration. *Atlantic and Gulf—Puerto Rico General Increase in Rates and Charges*, 7 F.M.C. 87 (1962); *Pacific Coast/Hawaii etc. Increases in Rates*, 7 F.M.C. 260 (1962); *General Increase in Alaska Rates and Charges*, 7 F.M.C. 563 (1963); *Alcoa SS Co., Inc.—General Increase*, 9 F.M.C. 220 (1966). Respondents have advanced no valid theory that would distinguish this principle where grain terminals are concerned and I know of none. As a matter of fact, terminal property was part of that under consideration in the first of the cases cited above. This departure from the Freas approach can be balanced by making an appropriate adjustment in the rate of return he used.

Respondents also contend that the data on the original cost of their property is unreliable and that therefore we must turn to the estimates of reproduction cost. While it is true that the original cost of these structures has not been ascertained with pinpoint accuracy, such precision is not necessary for the purposes of proceedings of this nature. *Increased Rates on Sugar*, 7 F.M.C. 404, 411 (1962). The fact is that the reproduction cost estimates contended for by respondents are at least as unreliable as the original cost data. In some cases the estimates submitted by respondents are those of their employees. Such an estimate is likely to lack the objectivity that must attend the evaluation of property. In addition, there was confusion among respondents' witnesses as to just what the replacement cost should be based upon. Linnekin based his accounting figures on "replacement" cost and, later on, in the course of the hearing, after cross-examination on the point, he testified that he really meant "reproduction" cost. Fortunately, it is unnecessary to distinguish the two here or to choose between them because neither is acceptable. It will suffice to say that the evidence relating to these two words was both cloudy and voluminous.

As to the valuation of the land itself, it is quite true, as respondents say, that the evidence of original cost is so scanty and uncertain that it

should not be relied on. At the Examiner's request, an expert appraisal witness of respondents, S. M. Holbrook of Portland, did the best he could to estimate the value of the real estate as of the time the elevators were built, up to 50 years ago. He said that neither he nor anyone else could arrive at such estimates with confidence. Mr. Holbrook's background and experience are such that there probably would be no one better qualified to provide these historical values. The resulting figures, even if they were completely reliable, varied so erratically between elevators that this method is shown not to be the best valuation basis to employ. The tracts varied in estimated original cost from $250 per acre up to $40,000, as of the respective times the plants were built. In the Freas study this same problem was encountered and Freas therefore used current market value for the land. The parties, except petitioners, urge the use of this standard, and even petitioners used these figures in some of the accounting exhibits. The current market value of the land will be used here.

Land Value

The combined current market value of the land occupied by the terminals is reported as $1,076,677 by the respondents, through witness Linnekin. This comes very close to the $1,052,887 shown in witness Gatlin's exhibits. The original cost figures were either taken from their records by Gatlin or reported to him by the lessors. The Gatlin figures are a little low in that two of the tracts were shown at the conservative figure representing cost of acquisition, without any site preparation, and the Linnekin work papers indicate that two more also may have been so reported. The tabulations of both witnesses tend to inflate the value of the Terminal 7 property because they include the value of the entire 30 acre tract, while only 5.3 acres are devoted to the terminal operation. The riverfront land is substantially more valuable than the remainder, of course, so the Linnekin and Gatlin valuation of $113,860 for the terminal 7 land should be reduced, with the result that the combined current market value of the land of all the terminals will be rounded to $1,000,000 for the purpose of this decision, taking into account the Gatlin figure being a little low on at least two of the tracts. In arriving at this approximation of the value of the land, the question of the amount of land required for the terminal facilities has been taken into consideration, as urged by petitioners.

Value of Structures and Equipment—Original Cost Depreciated

Gatlin made a survey of the original cost depreciated of the structures and equipment used by respondents in their terminal elevator operations by inquiring of their officials, reviewing the records of the

respective owners and the Linnekin work papers, and reported a total value of $22,712,427. Linnekin reported a value on the basis of depreciated original cost of $24,726,688 for this property. His figure reflects depreciation up to the date of the study, while Gatlin continued the depreciation to the beginning of fiscal 1966. Linnekin also shows a greater value for the Cargill Terminal than Gatlin by about $1.5 million. Colonel Alfred M. Eschbach, Chief Engineer for Portland Public Docks, a highly qualified expert on terminal construction and valuation, gave in detail the construction cost of that terminal and the cost of the betterments added through the years. Public Docks owns the Cargill Terminal. These betterment figures are too numerous to set out here, but it will suffice to note that his figures tend to bear out the Gatlin exhibit and since the Linnekin estimate for this terminal was based solely on a calculation of the ratio of original cost to replacement cost of the other terminals and applying that ratio to the replacement cost of the Cargill Terminal, the Gatlin figure is more acceptable. The Gatlin total will be rounded upward to $23,000,000, however, to reflect a modest increment to approximately place the depreciated value as of the date of the cost study, rather than 1966, so that it may be compared to the revenue figures for the earlier date.

Working Capitol

Following the Freas formula, the respondents included a return on working capital as an expense in their cost study. This is a legitimate item of expense, reflecting the need for funds to meet cash operating expenses disbursed ahead of the collection of revenues. The fund can be measured by two months operating expenses, according to Freas, and this norm was used by respondents. Petitioners do not question this as an item of expense, but they contend that taking two months expenses is excessive because under their tariffs respondents can collect interest on accounts after 30 days. This tariff provision was added after the period of the cost study, however. Conducting the cost study on the basis of the tariff provisions as they existed at the time cannot be said to be an unreasonable practice.

Petitioners and Hearing Counsel also contend and respondents concede that they erred in including depreciation at one of the elevators and rent, at some, in working capital. This error only increased the costs allocated to vessels by about $2,500 and it is therefore not sufficiently significant to justify a recomputation of the net revenue. The recomputation of costs to correct this error would not appreciably change the result of the cost study either as to the vessel charges or overall.

Return on Investment

An appropirate rate of return on investment has never been established in connection with a determination as to what accounting and price-fixing procedures employed by grain terminals would constitute a "reasonable practice" within the meaning of section 17. The rate that would be considered reasonable will vary, to a degree, depending upon the degree of liberality employed in arriving at the rate base. It is of little consequence whether the base is liberal and the rate of return scant, or whether the reverse is true, so long as the two are properly related. It is the end result of the base-rate determination that is to be judged in deciding the reasonableness of charges. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). Linnekin used the conservative figure of 5% [8] return in making his study, but he based this on a valuation of property at undepreciated reproduction cost. In his opinion the return should be 12% if original cost figures, depreciated, are used as a base. The respondent companies aspire to a 10% return in their various enterprises and will not undertake a proposed venture unless at least such a return can be reasonably anticipated. Freas proposed a 7% return in his study in Docket No. 640 but the U.S.M.C. did not decide the question of an appropriate rate of return in that case. It is important to note that Freas considered both original cost and reproduction cost in arriving at the amount of the owner's investment.[9] Here we are using the substantially lower original cost figures. Since his standard for determining the rate base would produce a higher investment figure his recommended rate of return would have to be adjusted upward in order to produce an equivalent dollar return.

The economic risk incident to the operation of a grain terminal is at least as great as that of a common carrier by water operating in the offshore domestic trade. Financial success depends upon a steady and heavy flow of a single commodity through the terminal. The risk is therefore greater than that of a general cargo terminal. The flow of grain is governed by ever varying circumstances outside the control of the terminal operator, such as the effect of weather on the crops, the influence of international relations and national policy on Government aid programs, the varying requirements for food among the people of the importing countries, and the myriad factors that affect their ability to obtain it.

[8] All rates mentioned in this section refer to a net return after the payment of income taxes, which, including the 6% Oregon excise tax on corporate income, will be taken to be 50%, on the average.

[9] See p. 55 of his report, Ex. 1.

Petitioners concede that a 10% rate of return would be fair and Hearing Counsel urge that this rate be used. They contend that the base should include only the property to which respondents hold title, however, so this concession as to rate is not necessarily applicable to the base used here. In cases decided under the Intercoastal Shipping Act of 1933, 46 U.S.C. 845(a), the Commission has determined that rates of return of 10.59% and 8.32% [10] in the Hawaiian trade, a rate of 7.5% [11] and, in another case, 10% [12] in the Puerto Rico trade, and 9.07% in the Alaska trade [13] are not unreasonable. Varying circumstances, including the standards employed in arriving at the rate base, have required flexibility in the rate of return; but these precedents support the conclusion that a 10% return here is not beyond the area of reasonableness.

The public revenue bonds issued to finance the terminal improvements at the Kalama terminal bore a 4.81% interest rate. The rate would be 5.25% today. The elevators pay 5¾% interest on short term loans and up to 6¾% on 20 year loans. Linnekin properly excluded interest from expenses in his accounting schedules because this a factor included in the allowance of return on investment. The fact that interest rates are relatively high today must therefore be taken into account.

For all of these reasons, the employment of accounting and pricing practices for the establishment of charges that provide a return not in excess of 10% on the rate base employed here cannot be deemed to be an unreasonable practice within the meaning of section 17.

VI. COSTS

Depreciation

Petitioners and Hearing Counsel object to the use by respondents of depreciation, as an expense, that is based on the reproduction cost of facilities and equipment. They contend, correctly, that depreciation should be based on original cost. The purpose of allowing depreciation as an expense in arriving at net revenue is to compensate the regulated business enterprise for the depletion, wear and tear, and obsolescene of the property it devotes to public use. It would be inconsistent with this purpose to allow depreciation on an estimated cost of reproduction rather than the actual investment of the owner. Freas used original cost figures for depreciation and this will be done here, with the re-

[10] *Pacific Coast/Hawaii, etc., General Increase*, 7 F.M.C. 260 (1962).

[11] *Atlantic and Gulf Puerto Rico Conf.*, 6 F.M.B. 14 (1960); remanded on different grounds 288 F. 2d 419 (C.A.D.C. 1961) *sub nom. Commonwealth of Puerto Rico* v. *F.M.B.*

[12] *Alcoa SS Co., Inc., General Increase in Rates in the Atlantic Gulf Puerto Rico Trade*, 9 F.M.C. 220 (1966).

[13] *Alaska SS Co.* v. *F.M.C.*, 344 F. 2d 810 (C.A. 9, 1965); *General Increase in Alaskan Rates*, 8 F.M.C. 315, 334 (1964); also 7 F.M.C. 563, 583. In these cases and the others noted above, original cost depreciated was used as the rate base, as it is here.

sult that the combined costs of the eight terminals will be reduced by $315,799,[14] which is the amount of the excess depreciation allowed in the Linnekin accounting exhibits.

Total Costs

The $10,335,100 total elevator costs as reported by Linnekin includes a 10% return on undepreciated reproduction cost. This must be adjusted in accordance with the conclusions reached herein by first subtracting the $315,799 excess depreciation then adjusting the difference in order to reflect the valuation and return on investment found herein to reflect reasonable practices in these circumstances.

Under the method of accounting employed by the parties here, they include a reasonable return on investment as a cost item, in addition to taking depreciation as an expense, and come out with a figure representing an excess or deficiency in total revenue received. This is then compared with the amount of the increase in charges. In order to give effect to the conclusions reached herein relative to the proper standard of valuation and rate base, the Linnekin figure of $4,092,453,[15] representing a 10% return, before taxes, on the combined reproduction cost of the terminal properties and the land, is replaced by $4,800,000, which is a 20% return, before taxes, on the depreciated original cost of the property. As adjusted by this correction in the return and the excess depreciation, the total costs come to $10,726,848 for the year.

In apportioning these costs between vessel and cargo, it will be sufficiently accurate for our purpose to use the ratio that the vessel and cargo costs bear to one another in the Linnekin schedules. In the method employed by Linnekin in apportioning the costs, the values of the individual elements of the terminal were estimated separately and their depreciation figures were assigned to vessel or cargo as dictated by the application of the Freas allocations, modified to apply to a grain terminal. The values of the terminal components on the original cost basis are unavailable, but the above ratio will give a sufficiently accurate comparison. Vessel costs came to 12.8% of the total in the Linnekin schedules. Applying this ratio to the adjusted total cost ($10,726,848), the costs allocable to the vessel are $1,373,036 and the balance of $9,353,812 represents the costs allocable to cargo.

VII. REVENUES

During the period covered by the accounting study, the respondent terminals earned revenues in the total amount of $9,343,841, as re-

[14] The parties reached agreement on this figure, after the hearing. See letter of July 13, 1967, from counsel for petitioners to the Presiding Examiner. The property being treated as owned, depreciation is allowable. No contention was made to the contrary.

[15] See Exhibit 58, line 11.

ported in the exhibits prepared by Linnekin. He took these figures from accounting schedules submitted to him by the several respondents and neither petitioners nor Hearing Counsel, whose accounting witness reviewed the reports of the respondents, question these revenue figures.

Of this total, $803,709 was received from vessels that loaded at the terminals and $8,540,132 was received from cargo. The payments were made under the following tariff categories in the amounts shown:

Charges to Vessel:	
Dockage	$151, 838
Overtime flat charge	348, 706
Standby and deadtime	303, 165
Total	803, 709
Charges to Cargo:	
Wharfage	1, 680, 620
Storage	2, 122, 939
Receiving	2, 949, 896
Loading	1, 659, 179
Miscellaneous	127, 498
	8, 540, 132
Total revenue	9, 343, 841

VIII. REVENUE DEFICIENCY

It is seen from the foregoing figures that the total revenue fails to meet total costs by $1,383,007 which is about 14% of the total revenue.

The vessel revenue fails to meet vessel costs by $569,327, which is 70% of revenue received from the vessels.

The cargo revenue falls short of cargo costs by $813,716, or about 9% of the cargo revenue.

The total terminal charges of respondents were increased approximately 4% as a result of the rate adjustments under investigation. It is seen that this increase falls short of the percentage by which the total revenues were deficient to cover costs that include a reasonable return on investment. Therefore the increase, overall, cannot be said to constitute an unreasonable practice when judged by the revenue produced as related to costs.

The new rates applicable to the vessels results in a 45% increase in charges, taking into account the subsequent increase in dockage at an average increase of 25%. This increase in the charges assessed against the vessels is less than the 70% by which revenues from vessels were deficient to meet costs allocable to the vessels, so these increased charges cannot be said to result from unjust or unreasonable practices.

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Another method of stating or compiling the figures to demonstrate the effect of the increases, in terms of the reasonableness of the return, is shown in the following table. The figures showing the increase in dockage include the recent increases by the lessors, which averaged 25%:

	Total	Vessel	Cargo
Actual revenues for the year:			
Dockage	$151,838	151,838	
Overtime	348,706	348,706	
Standby and deadtime	303,165	303,165	
Cargo services	8,540,132		8,540,132
Total	9,343,841	803,709	8,540,132
Revenue calculated to show increases or (decreases):			
Dockage	37,959	37,959	
Overtime	(68,811)	(68,811)	
Standby and deadtime	(303,165)	(303,165)	
Service and facilities	702,705	702,705	
Cargo services and facilities			No change
Net increase	368,688	368,688	No change
Percent increase	3.9	45	
Return on investment:			
Total costs, excluding return	[16] 5,926,848	[17] 758,637	5,168,211
Revenue	9,343,841	803,709	8,540,132
Net revenue excluding return on investment	3,416,993	45,072	3,371,921
Net increase	368,688	368,688	None
Adjusted return	3,785,681	413,760	3,371,921
Investment	24,000,000	[18] 2,132,000	21,868,000
Return before taxes (percent)	15.7	19	15
Return after taxes (percent)	7.85	9.5	7.5

The return on investment computed on the basis of original cost depreciated does not exceed a reasonable return of 10%. This computation confirms the conclusion that neither the overall effect of the rate adjustment nor the increase assigned to the vessels can be considered to be the result of an unjust or unreasonable practice.

This analysis of the financial results of the rate changes reflects an attempt to distill the accounting evidence down to its essentials and, together with the description of the methods and principles em-

[16] $10,726,848 total from page 398 less $4,800,000 return on investment.

[17] 12.8% of total, which is the relationship between the Linnekin total cost figure and his costs allocated to the vessel.

[18] The reproduction costs of plant and facility items allocated to the vessel in the Linnekin compilation is 8.8% of the total investment. This same ratio is employed here to obtain a break-down as between vessel and cargo of the total investment based on depreciated original cost. This method is sufficiently accurate for the purpose of this test and it is necessary to use a ratio because the original cost values of the various elements of the terminals was not provided.

ployed by the accounting witnesses, this will suffice. An attempt to set forth all the numbers that underlie these results or settle every disagreement on minor accounting details would unduly extend this decision and would only cloud the explanation of the real basis for the conclusions reached.

The briefs of petitioners and respondents argue at length over accounting details. Cost finding is not an exact science and any cost and revenue study, upon meticulous examination, may be criticized for lack of precision or inconsequential errors. All that is required in testing the accounting evidence is a reasonable approximation of assignable costs and revenues based on appropriate methods of apportionment. *Increased Rates on Sugar*, 7 F.M.C. 404, 411 (1962). Due consideration has been given to every aspect of the accounting studies of the parties and it would add nothing to belabor this report with detailed comparisons of one with another.

IX TARIFF DESIGNATIONS

Service and Facilities Charge (S and F)

The respondents initiated the use of an S and F charge in connection with the general adjustment in their rates and as a direct result of the Linnekin cost study. At the same time, they discontinued the standby and deadtime charge which accounted for a total of $303,165 in revenue for the cost study year. The latter charge became absorbed in the S and F charge.

In addition, the S and F charge is designed to cover the elevator costs apportioned to vessel for a share of the wharf, and 50% of the shipping gallery. Also included in the charge are the relatively minor costs attributed to the use by vessel personnel of miscellaneous facilities furnished by the terminal such as lunchrooms, toilets, offices used by supercargo and other vessel personnel, parking areas, police and fire protection, plus electric power to the vessel and liaison services between the terminal and the vessel.

A substantial part of the evidence in this lengthy hearing was devoted to conflicting testimony over these latter, miscellaneous items. Petitioners spent much time resisting the liaison cost. In the absence of bookkeeping records that would permit a precise determination of the total amount of this cost, Linnekin estimated this cost at $72,000, representing the time of one $9,000 per year employee at each terminal. The services consist of answering telephone calls for the ship and concerning the ship, carrying messages and information to and from the ship, coordinating the loading operation, and the like. Officials of respondents testified that a more reasonable estimate would be twice

that amount. It is concluded from all the evidence on the subject that the cost estimate of $9,000 per terminal for this item is not unreasonable.

The total costs which form the basis for the S and F charge are $773,972 [18a] after certain adjustments are made in depreciation, return on working capital and other items as urged by petitioners. The cost per ton (4,684,700 tons loaded) comes to 16.5 cents. It is seen, therefore, that the S and F charge, which averages .15 cents per ton, does not exceed the costs of providing the services and facilities. The S and F charge would have produced revenues in the total amount of $702,705 if it had been in force during the cost study year. The total increase in charges to the vessel amounts to a little under 8 cents per ton. It is of interest to note that the going charter rate from Portland to India has been varying around $30 per long ton on American flag vessels and $12 per ton foreign, both on a free out basis. (Official notice has been taken of wheat price and the freight rate on American flag ships.) Petitioners acknowledge that the increased rates have not caused a decline in the volume of grain exported through the PNTEA terminals. Wheat is selling for about $60 per short ton, FOB.

Starting nearly 30 years ago, practically every ocean terminal on the Pacific Coast has adopted the use of an S and F charge for bulk cargo as well as general cargo. The Portland Commission of Public Docks, the Northwest Marine Terminal Association, Inc., the California Association of Terminal Elevators, and the California Association of Port Authorities, representing most of the Pacific Coast terminals, intervened in the proceeding and their officials testified in support of the use of an S and F charge at respondents' terminals. Their argument is summed up in the statement, with which I agree, that the industry-wide practice on the Pacific Coast and the Commission's acceptance of the Freas formula would have to be overthrown to support a finding that an S and F charge is not supported by actual costs or only by costs duplicated by other charges, as contended by petitioners. The record demonstrates that a grain terminal does not differ from other terminals as regards the propriety of such a tariff charge.

Counsel for the Seattle terminals make the significant point that confusion sometimes exists because of the failure to recognize the fact that where the S and F charge is an integral part of the tariff structure the costs allocated to it necessarily must include items which, if there were no S and F charge, would be allocated on accepted cost accounting principles to other charges. An example of this is seen in the schedule of

[18a] See Appendix I, Resp. Reply Br. Recomputation of this figure to reflect the lower base and higher rate is unnecessary because the two factors so nearly balance each other that the result is not appreciably changed.

cost items compiled by respondents in their cost study. See Schedule II and III, attached. All vessel costs were collected under the heading "dockage," simply because they had no S and F charge at the time of the study.[19]

Petitioners seem to miss this point when they say that the transfer of the charges from the "dockage" column to the new S and F charge results in a recovery of a "deficiency in dockage charges" through an S and F charge, a practice which they say the F.M.B. condemned in Docket No. 744, *Terminal Rate Structure—Pacific Northwest Ports*, *supra*. That case has no bearing on respondents' S and F charge. It dealt with the inclusion in an S and F charge of the costs of an expensive, and sometimes unperformed checking operation. Obviously, where a major terminal service is performed only for, say, half of the vessels that call, the charge for it should be the subject of a separate tariff item. Unlike the charge involved there, the costs PNTEA allocated to the vessels, and which form the main basis for the S and F charge, reflect the use of facilities and services by every vessel that loads at the terminal. These are the costs connected with the terminal wharf and gallery. Every vessel also will use and be provided one or more of the minor services and facilities, mentioned above, such as liaison services, telephone, parking lot, lunchroom, etc.

The Commission's conclusion in *Investigation of Wharfage Charges at Pacific Coast Ports*, *supra*, is more pertinent to the contentions made here. The commission held there, page 665 of 8 F.M.C.:

> Agriculture contends that the conveyor and spout, also the berthing facilities are necessary to the operation of the elevator and to a degree are a part of the investment in the elevator. It also maintains that whatever benefit the ship receives from the use of the wharf is compensated for by dockage, and in some cases service charges paid to the marine terminal elevator. As seen hereinbefore, these contentions cannot be sustained under the principle of the Freas formula.

The financial effect on the vessels would be no different if all these costs were recovered under a charge called "dockage." It is more realistic to separate them, however. Under the present tariff designations, "dockage" is nothing more than a "parking fee" for vessels,[19a] as several witnesses expressed it, collected by the lessors at some of the leased terminals or paid over to them by the lessees in the case of other terminals. It is more orderly, in these tariffs, to earmark dockage for what it is and confine it to the parking fee in the terminal tariffs just as it is in the tariffs of those public bodies (the lessors) that collect it directly from the ship. The establishment of an S and F charge re-

[19] The schedule "Summary of Revenues" is also appended hereto, after Schedule III, to show the amount of revenue under the various tariff items at the eight terminals.

[19a] Dockage charge is based on the tonnage of the vessel.

sulted from a deficiency in the total revenues received by the terminals from the vessels and not from a deficiency in dockage.

Hearing Counsel and U.S.D.A.'s objection to the S and F charge stems mainly from their disagreement with the allocation of the cost of the shipping gallery and wharf as between vessel and cargo. These matters are discussed elsewhere in this decision. It should be recognized, incidentally, that Freas recommended that U.S.M.C. consider charging all terminal costs to vessel and none to cargo, since all such costs are passed along to the buyer ultimately, regardless of their initial apportionment. This would avoid the complicated apportionment of costs between vessel and cargo. The objection to such a course is the disturbing effect it would have on long established tariff, chartering, and grain-sales practices; and it probably could be accomplished only in a rule making proceeding of general applicability.

Hearing Counsel also argue that since the wharf is not included in the description of the property leased in three of the terminal leases, Linnekin incorrectly included these wharf costs in arriving at the S and F charge. The reasons for this omission of the word "wharf" in the leases was not explained since the matter was raised for the first time in the brief, but the terminals enjoy the exclusive possession of these wharves and the wharves must be considered to be part of the consideration for which the rental is paid. Therefore the costs related to the wharfs were properly included.

The tariffs of respondents define the S and F charge as follows:

Service and Facilities Charge is the charge assessed ocean vessels, their owners, operators, or agents which receive or discharge cargo at the terminals for the use of terminal working areas in the delivery of cargo to or from ocean vessels and for services in connection with the receipt, delivery, care, custody and control of cargo required in the transfer of cargo from shippers, their agents or connecting carriers, to or from ocean vessels.

(NOTE: Service and Facilities Charge does not include any cargo handling, loading or unloading operations, nor any labor other than that which is involved in performing the services, nor any services or facilities the charge for which is included in other individual charges.)

This definition is quite similar to that in use by other terminals on the Pacific Coast. The Chief of the Commission's Division of Terminals, Eugene P. Stakem, testified that he does not object to the generality of the terms in which this definition is phrased. Petitioners find fault with this aspect of the definition but they do not propose any substitute. The only alternative would be some definition that would attempt to itemize the services and facilities for which the charge is made. There would be some merit to this because it would tend to eliminate the possibility that the terminals could change the services

and facilities that are provided without such change being disclosed in the tariff. Mr. Stakem believes this would be excessively cumbersome, however, and I agree. It would be something like the tariff of an ocean carrier attempting to enumerate every service performed and all the items of vessel equipment employed in connection with the transport of a parcel of cargo.

The adoption of the S and F charge by respondents and the tariff definition they have adopted are not unjust or unreasonable practices. Petitioners originally argued that since the S and F charge is on a volume basis, rather than a time basis, it promotes inefficiency on the part of the vessel. They appear to have abandoned this argument, at least in part, so it will be sufficient to observe that a rate on a time basis, such as the discarded standby and deadtime charge, might as easily promote inefficiency on the part of the elevator. Petitioners, in their brief, recognize that "a per-ton charge is objective and not susceptible to manipulation as a per-hour charge might be."

Petitioners introduced an exhibit showing that the change to a volume rate will cause a very substantial increase in the charges to some types of vessels, ranging up to a sixfold increase for certain types that require few interruptions for trimming. This results from the fact that such a ship incurred small standby charge in relating to its capacity under the old, hourly basis. The change to an S and F charge, based on tonnage loaded, hits such a vessel hardest. Other types of vessels will experience an increase less than the 45% average, of course. The replacement of the standby charge against the vessel (where loading is interrupted for shifting the vessel and the like) and deadtime charge (where the vessel arrives late or departs before the end of a shift) by the S and F charge has an important advantage for both shipowner and terminal. It will end the continuous friction caused between them by disagreements over the number of workmen whose time is to be charged, the cause of the delay, and over the question whether the vessel should pay the charge when the workmen idled by the departure of the ship before the end of a shift are not sent home but are set to work around the plant until the end of the shift.

Respondents conducted an extensive study of the relative costs in loading various types of ships such as tankers, self-trimming bulk carriers, non self-trimming bulk carriers, vessels with multiple decks, and others. This resulted in the sliding scale S and F charge which ranges from 10 cents per short ton for self-trimming vessels to 21 cents per short ton for three deck vessels. This sliding scale is an innovation in grain terminal tariffs and petitioners agree that it is more equitable than one rate for all vessels, if there must be an S and F charge.

The U.S.D.A. opposition to the increase in charges assessed against the vessel, directed primarily at the S and F charge, is based on their concern that this increase will result in increased freight rates, with an attendant diminution in the amount of grain that can be purchased by foreign governments under the P.L. 480 programs. This decrease in purchases was not shown to have materialized, but even if it has been the respondents could not be expected to subsidize the program by adhering to tariff rates that do not provide a reasonable return.

The United States Government at times provides a subsidy to American exporters of wheat in connection with the aid programs to permit them to compete successfully with foreign markets. At present, no subsidy of this kind is being paid. Even if it were, or if subsidy payments are required in the future, this will not result from the increased terminal rates because the increases are not paid by the exporter.

U.S.D.A. may be required to pay part of the increases because 50% of the grain is required to be shipped on United States flag vessels under P.L. 480, and U.S.D.A. pays the difference between the foreign flag freight rate and the American flag freight rate. Assuming the foreign flag vessel owners do not raise their rates as much as the Americans as a result of the terminal rate increase, which has not been proved, this would increase the Government's expenditures. However, the Government is not excepted from the rule that requires the user of the services of a regulated industry to pay a rate that provides a fair return.

Wharfage

Wharfage is the tariff item charged to cargo "for the use of grain facilities that is assessed on all grain received therein whether or not such grain is eventually delivered to the vessel." The U.S.D.A. witness testified that this definition was changed at the time the rates were revised on April 1, 1966, and he and Hearing Counsel raise various objections to the definition. The record does not bear out this testimony, for the earlier tariff of Continental Portland Elevators, replaced by the April 1, 1966, revision contains the same definition (Ex. 34).

The objection is primarily that the definition is so vague and uncertain that it does not disclose the services or usages covered by the charge. The definition of wharfage in Commission General Order 15, not mentioned by the parties, is not applicable because it covers charges assessed against both vessel and cargo. No proposal was advanced in this proceeding for a more precise definition. It is suggested that a definition for "wharfage," better suited to terminals that impose a services and facilities charge, be devised for general use by the Com-

mission's staff if they do not consider the one presently in use at such terminals to be adequate. The use of the name "wharfage" comes from an ancient practice and the name itself is probably a misnomer, today, since it does not include the use of the wharf at such terminals.

Overtime

Petitioners and respondents are also in complete disagreement over the reasonable amount to be charged the vessel for overtime loading. This charge appears in the tariffs as the "overtime flat charge." Under the terminals' labor contract, overtime is paid to the workmen before 8:00 a.m. and after 3:00 p.m. weekdays and all day Saturday, Sunday, and holidays. Vessels loading during these periods are charged overtime at the rate of $57 per hour under the new rates. This constitutes a decrease, overall, from the previous rates that varied between the terminals from $56.70 at Peavey to $70 at Archer-Daniels-Midland. The average revenue per hour under the old rates was $68.52. For a total of 5,089 hours overtime loading in the study year, $348,706 was charged. This charge is assessed during overtime in addition to the normal straight time loading charges assessed against the cargo. Grain terminals on the Gulf Coast and on the Great Lakes assess overtime charges that are substantially higher than those of respondents.

The overtime work performed during the cost study year was requested by the vessels about 85% of the time and by the terminal about 15% of the time. Overtime charges at the grain terminals are less than the cost to the owner of an idle ship and, where the vessel is loading both grain and general cargo for a single voyage, less than overtime charges at general cargo terminals. When the terminals require overtime loading it is sometimes because of a backlog of rail cars awaiting unloading. This has, on occasion, resulted in a rail embargo at the terminals, but not frequently. At other times the terminal has required overtime loading because other vessels are waiting to load.

The terminals prefer not to load during overtime periods because they cannot find equally good workmen for employment during overtime hours, with a resulting slow-down in the rate of loading. They have also experienced casualty losses at night, in a few instances, through the loading of the wrong grade of grain, requiring them to unload the grain at their expense. The evidence in the record in regard to the percentage of the time there is a vessel at the wharves shows that terminal space is normally available during straight time loading periods.

The tariffs of respondents give the terminals the right to refuse to load during overtime hours. There is no evidence that this right has been exercised. An inference can be drawn that the reason for this is

the fact that the rate for overtime loading includes an increment over cost in order to provide an incentive to the terminal to load grain during overtime hours and a discouraging factor to prevent the vessels from increasing their requests for overtime loading.

The Rules of the Port at Portland provide that if a terminal requests a ship to load overtime, and the ship refuses, the ship loses its turn and must vacate the berth in favor of the next vessel that is willing to load overtime. This rule has not been exercised by respondents and there is no evidence that ships have refused any requests.

The records of all of the respondents do not contain adequate data to permit a direct development of those items of cost assignable to overtime operations for (1) fringe benefits connected with the direct labor costs, (2) cost of indirect labor such as clerical, supervision, and clean-up crews, (3) fringe benefits for indirect labor, (4) administrative expense, and (5) "other elevator" expense. There is no regulation that requires the respondents to maintain such data and the absence of it therefore does not raise any presumption against respondents. Linnekin employed prorating methods that resulted in total overtime cost of $50.32 per hour and proposed the $57 rate so as to include the incentive described above. He also took into account the fact that no portion of the additional expense of overtime unloading of cars, made necessary by overtime ship loading, was charged to the vessel. Laurie disputes the Linnekin method of prorating various costs in arriving at the overtime factor and, using different methods, says the cost, without any administrative or "other elevator" costs, is $35.60 (Ex. 85). The Linnekin figure included $7.17 for administrative and "other elevator" costs. Laurie disputes the accuracy of this, too, but does not provide a different figure. Hearing Counsel state that they find the $57 rate to be a reasonable charge and U.S.D.A. does not raise any objection to it. The costs should include a prorated portion of administrative and "other elevator" expense, but the precise amount cannot be determined.

Considering all of the above factors, the method employed by respondents for fixing the amount of the overtime charge provides a sufficiently reasonable approximation of the costs for the purpose to be served here, and it cannot be said to be an unreasonable practice. It is unnecessary to go into a detailed analysis of the many disputes over the prorating methods employed by the respective accountants who prepared the cost studies. A careful review of their methods shows that even if mathematical precision were the goal, neither method could be said to be an unreasonable practice. Some element of incentive is desirable and the dollar amount of this cannot be measured by

cost accounting. Furthermore, any reduction in overtime loading charges would have to be picked up by increasing other charges if the terminal is to avoid a revenue deficiency. At least a part of this would fall to the vessels.

However, it is manifestly unfair, as petitioners contend, for the terminal to receive an "incentive" increment in the overtime loading charge when the overtime loading is done at the request of the terminal. Indeed, it would seem more fair for the incentive factor to weigh in favor of the vessel. For this reason, the inclusion of this factor is found to be an unjust and unreasonable practice when the terminal requests overtime loading. In the Linnekin figures the incentive factor amounts to at least $7.00 per hour. It actually exceeds this, because the prorating done by Linnekin is questionable as to some items and respondents have been given the benefit of the doubt due to the incentive feature. In arriving at a reasonable charge where the terminal orders the overtime, the element of increased costs for unloading cars also cannot be taken into account. The charge should be further reduced in order to provide an incentive to the vessel. It is concluded, in the light of these considerations, that an overtime loading rate in excess of $40 per hour must be deemed to be the result of unjust and unreasonable practices in those instances where the terminal orders the overtime.

The form of charter parties often employed by petitioners places the cost of overtime loading on the charterer when it is ordered by the terminal. On occasion, the vessel owner, acting through his agent, has requested the terminal to require overtime loading so that the cost would be borne directly by the charterer; and the terminals have acceded to the request. It is hoped and expected that this highly questionable practice will cease. The reduction of the overtime loading charge to a cost basis, as provided above, should eliminate the temptation of the terminal people to go along with this practice, the legality of which, it should be noted, is not the subject of this proceeding.

Hearing Counsel urged with considerable emphasis, in connection with overtime and other charges, that direct charges of costs should be made, rather than charges based on the derivation of estimated costs through prorating and estimates. The point is a sound one, but it cannot be done when the books do not reveal the costs, in separate accounts, for all the different services and facilities provided. While the prorating is troublesome, this record will not support a conclusion that uniform systems of more detailed accounts would have to be required in order for the Commission to investigate the reasonableness

of terminal practices. No other means suggests itself for accomplishing the end sought by Hearing Counsel.

Billing Practices

Hearing Counsel also object to billing practices of respondents in those instances where they bill self-trimming vessels 14 cents per ton for S and F, when the charge should have been 10 cents, merely because the vessels had slow-loading wing tanks. This departs from the tariff rate and is therefore unlawful. The practice is beyond the scope of this investigation, however. In the course of the hearing, when this practice came to light, reminding respondents of their duty to follow the precise terms of their tariffs, they expressed an intention to discontinue the practice.

ULTIMATE CONCLUSION

For the foregoing reasons, after careful consideration of the record as a whole and based upon the material facts therein, it is concluded that that the rates, rules and regulations contained in the tariffs of the respondents do not constitute nor result from unjust or unreasonable practices in violation of section 17 except that the overtime flat charge of $57 per hour, in those instances where overtime loading is ordered or requested by the terminal, was adopted as a result of such practices. The rate for the overtime flat charge, when overtime loading is ordered or requested by the terminal, would not exceed $40 per hour if established in accordance with just and reasonable practices. The present rate of respondents for the overtime flat charge, when the terminal orders or requests the overtime loading, shall be canceled by respondents immediately when this decision becomes final and a new rate substituted therefor that shall not exceed $40 per hour, determined herein to be the maximum rate that could be adopted by virtue of just and reasonable practices within the meaning of section 17.

An appropriate order will be entered to carry out these conclusions and to discontinue this proceeding.

(Signed) E. ROBERT SEAVER
Presiding Examiner

REPORT SAMPLE

Schedule I—Plant Carrying Charge

Line No.	Cost item	Total cost	Waterway	Barge dock	Wharf	Storage	Headhouse	Trucks and roadways	Car-truck dumps	Rented space	Shipping gallery	Other
1	Return on land	$13, 540	$2, 695		$1, 462	$3, 425	$203	$2, 911	$271	$108		$2, 465
2	Return on structures	603, 950		$31, 000	39, 000	346, 250	110, 000	4, 000	22, 700	3, 500	$41, 000	6, 500
3	Depreciation on structures	128, 185		7, 750	9, 750	70, 562	22, 000	1, 000	4, 660	700	10, 250	1, 513
4	Maintenance of structures	47, 020		2, 398	3, 056	26, 942	8, 558	329	1, 787	283	3, 197	470
5	Fire insurance	10, 628		542	691	6, 090	1, 934	74	404	64	723	106
6	Property taxes	73, 115	292	3, 656	4, 826	41, 383	13, 014	804	2, 705	439	4, 826	1, 170
7	Total plant costs	876, 438	2, 987	45, 346	58, 785	494, 652	155, 709	9, 118	32, 527	5, 094	59, 996	12, 224

REPORT SAMPLE

Schedule II—Costs Allocated to Services

Line No.	Cost item	Total cost	Dockage	Loading	Wharfage	Storage	Receiving	Standby	Deadtime	Rentals	Miscellaneous
	Plant costs (From Schedule I):										
1	Waterway	$2,987	$2,987								
2	Barge dock	45.346					$45,346				
3	Wharf	58,785	58,785								
4	Storage	494,652			$143,449	$351,203					
5	Headhouse	155,709		$49,671	49,671	7,630	48,737				
6	Tracks and roadways	9,118			9,118						
7	Car and truck dumps	32,527					32,527				
8	Rented space	5,094								$5,094	
9	Shipping galleries	59,996	29,998	29,998							
10	Other	12,224	1,296	1,125	2,860	5,073	1,797			73	
11	Total plant costs	876,438	93,066	80,794	205,098	363,906	128,407			5,167	
	Equipment costs:										
12	Barge unload	26,700					26,700				
13	Shipping gallery	32,035	16,017	16,018							
14	Elevator legs	42,000		14,070	14,070		13,860				
15	Conveyors	56,000		18,760	18,760		18,480				
16	Car and truck dumps	21,075					21,075				
17	Headhouse—General	45,450		14,499	14,498	2,227	14,226				
18	Storage—General	20,100			5,829	14,271					
19	Pollution control	9,750	1,034	897	2,281	4,046	1,433			59	
20	Automotive	645	68	59	151	268	95			4	
21	Total equipment costs	253,755	17,119	64.303	55,589	20,812	95,869			63	
	Labor costs (Including Labor Related Overhead):										
22	Handling labor	319,788		160,890		23,700	112,681	$13,293	$6,169		$3,055
23	Maintenance—Non-Plant	32,037	993	13,103	3,236	2,595	12,110				
24	Sanitation, etc	25,323	1,950	5,419	4,634	7,242	5,976			102	
25	Supervision	46,849		23,037		4,216	19,395				141
26	Elevator clerical	40,733	3,137	8,717	7,454	11,650	9,612			163	
27	Total labor costs	464,730	6,080	211,226	15,324	49,403	159,774	13,293	6,169	265	3,196
28	Other elevator expense	60,849	4,381	13,569	10,588	16,550	14,665	487	304	183	122
29	Administrative expense	188,271	13,556	41,984	32,759	51,210	45,373	1,506	941	565	377
30	Total cost	1,844,043	134,202	411,876	319,358	501,881	444,088	15,286	7,414	6,243	3,695

REPORT SAMPLE

Schedule III—Loading Costs

Line No.	Cost item	Totals (From Schedule II)	Straight time	Overtime
	Plant Costs:			
1	Headhouse	$49, 671	$49, 671	
2	Shipping gallery	29, 998	29, 998	
3	Other	1, 125	1, 125	
4	Total plant cost	80, 794	80, 794	
	Equipment Costs:			
5	Shipping gallery	16, 018	16, 018	
6	Elevator legs	14, 070	14, 070	
7	Conveyors	18, 760	18, 760	
8	Headhouse	14, 499	14, 499	
9	Pollution control	897	897	
10	Automotive	59	59	
11	Total equipment cost	64, 303	64, 303	
12	Handling labor	160, 890	142, 811	$18, 079
13	Maintenance	13, 103	10, 024	3, 079
14	Sanitation, etc	5, 419	4, 146	1, 273
15	Supervision	23, 097	17, 669	5, 428
16	Elevator clerical	8, 717	6, 669	2, 048
17	Total labor cost	211, 226	181, 319	29, 907
18	Other elevator expense	13, 569	12, 212	1, 357
19	Administrative expense	41, 984	37, 786	4, 198
20	Total costs	411, 876	376, 414	35, 462

PACIFIC NORTHWEST TIDEWATER ELEVATOR ASSOCIATION

Summary of cost Allocations—Schedule I (Plant Costs)

Terminal No.	Total cost	Waterway	Barge dock	Wharf	Storage	Headhouse	Tracks and roadways	Car and truck dumps	Shipping gallery	Rented offices	Other
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)
1	$289,035	$2,167	$8,500	$28,190	$172,948	$39,694	$6,401	$7,398	$19,311		$4,426
2	362,154	1,261	13,337	22,742	240,878	51,414	10,808	12,572	58	$1,512	7,572
3	295,434	11,844	5,488	26,801	141,958	79,930	5,479		17,192		6,742
4	876,438	2,987	45,346	58,785	494,652	155,709	9,118	32,527	59,996	5,094	12,224
5	456,248	1,530		53,835	224,179	78,890	4,480	32,457	55,749	997	4,131
6	198,715	4,680	5,139	8,464	116,057	17,527	2,712	25,357	12,091		6,688
7	492,912	1,860		74,911	256,978	115,888	30,051	142		6,903	6,179
8	1,071,454	2,650	11,791	25,546	629,880	265,370	7,025	79,032	46,989		3,171
Total	4,042,390	28,979	89,601	299,274	2,277,530	804,422	76,074	189,485	211,386	14,506	51,133

PACIFIC NORTHWEST TIDEWATER ELEVATOR ASSOCIATION

Summary of Cost Allocations—Schedules II and III

Terminal No.	Total costs	Services performed for vessels					Services performed for cargo					
		Total vessel	Dockage	Standby	Deadtime	Overtime loading	Total cargo	Wharfage	Storage	Receiving	Loading	Rentals and miscellaneous
	(a)	(b	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)
Plant costs:												
1	$289, 035	$40, 264	$40, 264				$248, 771	$69, 502	$126, 993	$29, 370	$22, 906	
2	362, 154	24, 548	24, 548				337, 606	85, 900	191, 216	43, 578	15, 362	$1, 550
3	295, 434	48, 347	48, 347				247, 087	79, 170	98, 370	33, 186	36, 361	
4	876, 438	93, 066	93, 066				783, 372	205, 098	363, 906	128, 407	80, 794	5, 167
5	456, 248	84, 000	84, 000				372, 248	147, 489	112, 396	57, 669	53, 685	1, 009
6	198, 715	19, 858	19, 858				178, 857	45, 155	84, 208	37, 396	12, 098	
7	492, 912	77, 747	77, 747				415, 165	168, 154	164, 180	38, 050	37, 792	6, 989
8	1, 071, 454	51, 843	51, 843				1, 019, 611	287, 260	446, 820	177, 595	107, 936	
Total	4, 042, 390	439, 673	439, 673				3, 602, 717	1, 087, 728	1, 588, 089	545, 251	366, 934	14, 715
Equipment costs:												
1	264, 921	4, 585	4, 585				260, 336	67, 370	15, 874	115, 066	62, 026	
2	214, 804	7, 452	7, 452				207, 352	48, 804	28, 627	93, 587	36, 264	70
3	105, 846	4, 384	4, 384				101, 462	25, 388	9, 216	44, 739	22, 119	
4	253, 755	17, 119	17, 119				236, 636	55, 589	20, 812	95, 869	64, 303	63
5	147, 977	12, 702	12, 702				135, 275	37, 345	9, 770	48, 069	40, 082	9
6	147, 669	5, 740	5, 740				141, 929	34, 540	24, 772	59, 090	23, 527	
7	270, 120	23, 772	23, 772				246, 348	56, 272	2, 106	102, 837	85, 133	
8	361, 384	37, 053	37, 053				324, 331	75, 405	28, 203	120, 081	100, 642	
Total	1, 766, 476	112, 807	112, 807				1, 653, 669	400, 713	139, 380	679, 338	434, 096	142
Labor costs:												
1	335, 021	57, 625	5, 073	$24, 817	$2, 839	$24, 896	277, 396	20, 867	40, 861	136, 122	77, 746	1, 800
2	328, 224	58, 272	4, 771	18, 859		34, 642	269, 952	21, 589	30, 968	133, 485	63, 314	20, 596
3	113, 448	25, 168	5, 513	5, 817		13, 838	88, 280	11, 873	11, 264	46, 174	6, 579	12, 390
4	464, 730	55, 449	6, 080	13, 293	6, 169	29, 907	409, 281	15, 324	49, 403	159, 774	181, 319	3, 461
5	349, 451	42, 267	2, 443	13, 026	3, 271	23, 527	307, 184	5, 545	27, 751	127, 511	142, 186	4, 191
6	314, 025	79, 722	1, 692	46, 696	1, 838	29, 496	234, 303	5, 190	7, 146	113, 114	108, 609	244
7	229, 973	50, 881	3, 659	15, 965	14, 263	16, 994	179, 092	8, 415	2, 639	118, 756	46, 843	2, 439
8	569, 506	133, 886	13, 023	41, 352	6, 648	72, 863	435, 620	53, 813	82, 438	177, 230	75, 883	46, 256
Total	2, 704, 378	503, 270	42, 254	179, 825	35, 028	246, 163	2, 201, 108	142, 616	252, 470	1, 012, 166	702, 479	91, 377
Liaison labor adjustment		75, 000	75, 000				(75, 000)	(14, 475)	(20, 475)	(26, 925)	(13, 050)	(75)
Total	2, 704, 378	578, 270	117, 254	179, 825	35, 028	246, 163	2, 126, 108	128, 141	231, 995	985, 241	689, 429	91, 302

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PACIFIC NORTHWEST TIDEWATER ELEVATOR ASSOCIATION—Continued

Summary of Cost Allocations—Schedules II and III—Continued

Terminal No.	Total costs	Services performed for vessels					Services performed for cargo					
		Total vessel	Dockage	Standby	Deadtime	Overtime loading	Total cargo	Wharfage	Storage	Receiving	Loading	Rentals and miscellaneous
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)
Other elevator expense:												
1	$73,002	$7,253	$3,793	$1,896	$135	$1,429	$65,749	$12,056	$19,293	$21,403	$12,862	$135
2	70,010	4,904	2,561	1,312		1,031	65,106	10,745	24,906	18,679	9,277	1,499
3	28,232	3,851	3,124	304		423	24,381	6,248	6,972	6,663	3,807	691
4	60,849	6,529	4,381	487	304	1,357	54,320	10,588	16,550	14,665	12,212	305
5	43,129	6,372	4,589	615	123	1,045	36,757	8,808	8,837	9,505	9,402	205
6	107,714	14,686	4,292	7,327	314	2,753	93,028	13,503	21,463	33,181	24,776	105
7	50,008	7,272	4,979	752	658	883	42,736	10,991	11,163	12,259	7,947	376
8	84,375	7,830	4,303	1,772	253	1,502	76,545	17,550	23,456	20,081	13,517	1,941
Total	517,319	58,697	32,022	14,465	1,787	10,423	458,622	90,489	132,640	136,436	93,800	5,257
Administrative expense:												
1	136,461	14,615	7,642	3,821	273	2,879	121,846	24,290	28,247	43,122	25,914	273
2	277,997	21,823	11,398	5,838		4,587	256,174	47,815	77,283	83,121	41,283	6,672
3	70,888	10,710	8,688	846		1,176	66,178	17,377	17,761	18,530	10,588	1,922
4	188,271	20,201	13,556	1,506	941	4,198	168,070	32,759	51,210	45,373	37,786	942
5	143,653	22,337	16,089	2,155	430	3,663	121,316	30,886	23,415	33,327	32,969	719
6	105,192	14,759	4,313	7,363	316	2,767	90,433	13,570	18,514	33,346	24,898	105
7	93,479	14,471	9,909	1,496	1,309	1,757	79,008	21,874	16,172	24,398	15,817	747
8	282,596	26,225	14,412	5,935	848	5,030	256,371	58,780	78,562	60,057	45,272	6,500
Total	1,304,537	145,141	86,007	28,960	4,117	26,057	1,159,396	247,351	311,164	348,074	234,527	17,880
Total cost:												
1	1,098,440	124,342	61,357	30,534	3,247	29,204	974,098	194,085	231,268	345,083	201,454	2,208
2	1,253,189	116,999	50,730	26,009		40,260	1,136,190	214,853	353,000	372,450	165,500	30,387
3	619,848	92,460	70,056	6,967		15,437	527,388	140,056	143,583	149,292	79,454	15,003
4	1,844,043	192,364	134,202	15,286	7,414	35,462	1,651,679	319,358	501,881	444,088	376,414	9,938
5	1,140,458	167,678	119,823	15,796	3,824	28,235	972,780	230,073	182,169	276,081	278,324	6,133
6	873,315	134,765	35,895	61,386	2,468	35,016	738,550	111,958	156,103	276,127	193,908	454
7	1,136,492	174,143	120,066	18,213	16,230	19,634	962,349	265,706	196,260	296,300	193,532	10,551
8	2,369,315	256,837	120,634	49,059	7,749	79,395	2,112,478	492,808	659,479	562,244	343,250	54,697
Total	10,335,100	1,259,588	712,763	223,250	40,932	282,643	9,075,512	1,968,897	2,423,743	2,721,565	1,831,836	129,371
Liaison labor adjustment		75,000	75,000				(75,000)	(14,475)	(20,475)	(26,925	(13,050)	(75)
Total	10,335,100	1,334,588	787,763	223,250	40,932	282,643	9,000,512	1,954,422	2,403,268	2,694,740	1,818,786	129,296

PACIFIC NORTHWEST TIDEWATER ELEVATOR ASSOCIATION

Summary of Revenues (Eight Elevators)

	Total	Terminal number							
		1	2	3	4	5	6	7	8
Vessel revenues:									
Dockage	$151, 838	$16, 454	$18, 159	$6, 605	$18, 461	$11, 304	$19, 739	$21, 539	$39, 577
Overtime	348, 706	38, 967	35, 181	16, 445	45, 185	28, 792	63, 864	26, 740	93, 532
Standby/Deadtime	303, 165	39, 162	26, 694	8, 550	27, 375	21, 783	76, 202	38, 532	64, 867
Total vessel	803, 709	94, 583	80, 034	31, 600	91, 021	61, 879	159, 805	86, 811	197, 976
Cargo revenues:									
Wharfage	1, 680, 620	202, 847	238, 110	60, 730	213, 135	147, 212	189, 560	202, 666	426, 360
Storage	2, 122, 939	198, 078	396, 140	54, 667	379, 324	300, 471	104, 098	244, 572	445, 589
Receiving	2, 949, 896	398, 540	416, 675	106, 277	285, 946	206, 140	374, 381	354, 666	807, 271
Loading	1, 659, 179	189, 978	213, 350	58, 480	219, 320	161, 102	189, 560	201, 029	426, 360
Miscellaneous	127, 498	2, 168	17, 690	19, 406	6, 950	5, 479	2, 273	4, 622	68, 910
Total cargo	8, 540, 132	991, 611	1, 281, 965	299, 560	1, 104, 675	820, 404	859, 872	1, 007, 555	2, 174, 490
Grand total	9, 343, 841	1, 086, 194	1, 361, 999	331, 160	1, 195, 696	882, 283	1, 019, 677	1, 094, 366	2, 372, 466

FEDERAL MARITIME COMMISSION

DOCKET NO. 65-34

IN THE MATTER OF DISCOUNTING CONTRACT/NONCONTRACT RATES PURSUANT TO THE PROVISIONS OF ITEM 735, NOTE 2, OF THE INDIA, PAKISTAN, CEYLON & BURMA OUTWARD FREIGHT CONFERENCE TARIFF NO. 10

Decided March 18, 1968

Conference's tariff provision permitting individual member lines to publish "discount dual rates" on certain iron and steel items, while attempting to bind contract signatories to exclusive patronage, found unlawful under section 14b of the Shipping Act, 1916.

Proceeding remanded to Examiner to obtain specific information on cost differentials between ports and existence and extent of carrier competition to enable determination of lawfulness under sections 16 and 17 of the Shipping Act, 1916, of discount rates restricted as to United States port of loading.

Elmer C. Maddy and *Baldvin Einarson* for the respondents.

Sidney Goldstein, *F. A. Mulhern*, *Arthur L. Winn, Jr.*, *Samuel H. Moerman*, *J. Raymond Clark*, *Robert E. Will*, and *James M. Henderson* for intervener, The Port of New York Authority.

William L. Marbury and *Philip G. Kraemer* for intervener, the Maryland Port Authority.

Donald J. Brunner, *Samuel B. Nemirow*, and *Roger A. McShea, III*, as Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

This proceeding was instituted by order of investigation dated August 27, 1965. The purpose of the proceeding was to determine whether certain practices of the India, Pakistan, Ceylon and Burma Outward Freight Conference (conference) have been or are now in violation of sections 14b, 16, 17 and 18(b) of the Shipping Act, 1916 (Act). The practices involved in the investigation are those concerning the application of conference tariff provisions regarding the transportation of iron or steel in the trading area of the conference.

The investigation was instituted as a result of the practice begun in 1961 by the conference of permitting member lines individually to discount conference rates on iron and steel articles by as much as 30 percent.

Hearings were held before Examiner Charles E. Morgan, who issued his initial decision November 2, 1967. Oral argument was heard January 10, 1968.

FACTS

The conference in question is composed of both U.S. and foreign flag lines.[1] The competition faced by the conference is mainly liner rather than tramp.[2] The trading area of the conference is from United States Atlantic and Gulf ports (Searsport, Maine to Brownsville, Tex.) to ports in India, Ceylon, Burma and Pakistan. India and Pakistan are the principal destination areas.

Tariff discount provision

As mentioned above, the discount rate provision in question here was instituted in 1961.

Prior to the institution of the discount rates involved in this proceeding, the conference had negotiated with the Indian Government a general project-type contract granting goods consigned to the Indian Government a rate reduction of 30 percent. This percentage later was changed to 25 percent. The Indian contract excluded a number of items from the 30-percent discount. Iron and steel were among the excluded items. A similar contract was negotiated with the Pakistani Government, also with a 30-percent discount.

In April of 1961, the conference decided to allow those member lines which wished to compete for the iron and steel business to discount the conference's rate on iron and steel items up to 30 percent. This dis-

[1] The members of the conference either at the time of the hearing or during the period in issue included American Export Isbrandtsen Lines. Inc. (American Export), American President Lines, Ltd., Central Gulf Steamship Corp. (Central Gulf) and Isthmian Lines (Isthmian), all United States-flag lines, and the foreign-flag lines, Hellenic Lines Ltd. (flag of Greece), Hoegh Lines (flag of Norway), Nedlloyd Line (flag of Netherlands), P. N. Djakarta Lloyd (flag of Indonesia), Scindia Steam Navigation Co., Ltd. (flag of India), and Shipping Corporation of India, Ltd. (flag of India). Other conference members, such as Stevenson Lines, were either in or out of the trade from time to time or did not play roles significant to the issues in this proceeding. Generally, all of the lines listed above provided service at New York, Baltimore, and New Orleans, with the exception of American Export which did not serve Gulf ports, Hoegh and Nedlloyd which did not serve Baltimore, and P. N. Djakarta Lloyd which served only New York. Several of these lines also served Philadelphia or Mobile or both.

[2] Nonconference lines serving this trade include Waterman Steamship Corp. (United States-flag), National Shipping Corporation of Pakistan, and Iranian Line. American Oriental Lines, Inc. at one time had United States-flag vessels on charter in this trade. The nonconference Pakistani-flag vessels seldom called at New York.

counting practice was later implemented by the addition to the conference tariff of a note which provided:

> Individual carriers may, at their discretion, discount these rates in an amount not exceeding 30%. All cargo carried at such discount pursuant to this rule shall be reported to the Conference Secretary for appropriate filing with the Federal Maritime Board.[3]

The 30-percent discount rule of the conference meant that the individual member lines of the conference would be authorized to quote rates on iron and steel moving to the destination areas of the conference with the conference rate discounted to a maximum of 30 percent. This meant that each individual line could, theoretically, have in effect a different rate on steel, and that the percentage of discount could vary from 0 to 30.

The conference explained that this method had been employed as a device to meet outside (independent) competition and that, according to the conference's view of the procedure, "discount" rates were preferable to "open" rates because under the former, the fidelity of contract signatories would be retained, whereas under the latter, the shipper would have to be released from his contract obligation during the period of "open" rates.

The conference also suggested that because of large prospective shipments under the Agency for International Development (AID) programs to India, the conference decided to allow its member lines which wished to compete for such shipments to discount the conference's rate on iron and steel items.

Prior to the institution of this discount rule, many of the rates on iron and steel had been open, but effective July 1, 1961, all iron and steel rates which had been open were closed, and reinstated at their original contract and noncontract rates.

Pursuant to the discount rule, conference member lines proceeded to publish their discounted rates. Consistent with the theory that such discounted rates were discounted conference dual rates, the member lines usually published both discounted contract and noncontract rates. However, no traffic moved on discounted noncontract rates.

This discounting practice continued in effect until shortly after the institution of this proceeding.

The institution of this proceeding was the subject of a discussion

[3] The items to which the discount provision applied were bars: plain, N.O.S., straight, not coils or rolls; bars, in coils, billet ends and billets; forgings; pig; plates, not curved or bent; plates, curved or bent; sheets in coils; sheets, plain, galvanized or corrugated; strip in coils; strip, flag, not coiled; tinplate and terneplate; waste-waste, tinplate or terneplate; wire, plain or galvanized; wire rods (except welding); wire shorts.

by the conference at its meeting on October 1, 1965. At this meeting, the conference approved a motion to delete its provision permitting discounting of rates on iron and steel articles by as much as 30 percent. On October 13, 1965, at another meeting, the conference agreed to open certain rates on iron and steel. The conference then sent a telegram to the Commission announcing that the rates on some 16 iron and steel commodities were now "open" to all ports effective October 15, 1965. By opening these rates, the conference apparently hoped to satisfy objections to its discount system and to obtain discontinuance of this proceeding. The telegram also noted that as of its date, the single open tariff rates of the individual lines for these 16 commodities in the conference's tariff would be shown at the same level as the former contract rates which had been on file currently for these lines.

In accordance with the telegram above, the individual lines, in lieu of their existing dual sets of rates on the 16 iron and steel articles, published new, single rates on each of these items. Simultaneously, on some of these 16 items, the individual lines published superseding lower rates, many of which were restricted by the United States-flag member lines to certain ports of origin in the United States. Many of the discount rates previously in effect likewise had been restricted to certain ports of origin.

The discount system as such was ended in October 1965 on the 16 iron and steel articles which constitute the heavy tonnage movements to India and Pakistan. Nevertheless, although the discount system under the 1961–65 *modus operandi* was gone, the rates to the extent which they had been discounted prior to October 15, 1965, on the 16 items, remained substantially in effect after that date under the new open-rate nomenclature. Not only the rates in dollars and cents, but also the port restrictions, remained substantially as before.

The conference filed a motion to dismiss this proceeding on the ground that the discount provision in issue was discontinued. We denied the motion to dismiss, and specifically stated in an amended order that we desired to determine the lawfulness of respondents' practices instituted since the commencement of the proceeding.

Port-restricted rates

As mentioned above, many of the conference members had discounted rates on iron and steel which discounts were restricted as to certain ports of origin in the United States. While American-flag lines in the trade, namely American Export, Central Gulf and Isthmian, adopted such restrictions, the foreign lines in the conference did not. Both American and foreign lines employed restricted rates as to ports of discharge on foreign soil.

Restricted discounts had been instituted both under the tariff discount provision and under the subsequent open rate provision.

The record shows many instances of port-restricted discounts to U.S. ports. Generally, the Port of New York has not been given discounts similar to those obtained by the so-called outports of Baltimore, Philadelphia, New Orleans and Mobile.

Among the three ports, Philadelphia, Baltimore and New York, conference tariff No. 11 shows that in 1965, discounted rates were granted for shipments of sheets, tinplate, billets, plates, bars, cuttings and strips, with the discounts limited to Baltimore only on seven occasions, Philadelphia on two occasions, Philadelphia and Baltimore on two occasions, and New York on one occasion. In addition, discounts were granted on Baltimore shipments, along with New Orleans and Mobile, on five occasions and on Baltimore and New Orleans shipments on one occasion.

In late 1965 and early 1966, discounts were granted on shipments from Baltimore alone on 21 occasions, Philadelphia alone on four occasions, Philadelphia and Baltimore on seven occasions, New Orleans and Baltimore on three occasions and New Orleans, Mobile and Baltimore on four occasions. The discounted rates were for billets, sheets, tinplate, terneplate, bars, plates, pig iron, and strips.

No discount rates from New York were offered during the *late* 1965 and early 1966 period. During 1962, however, several discount rates on various items were established for New York. In 1963, one such discount was established for New York. Again, however, Philadelphia and Baltimore received discount rates on many more occasions than did New York during these 2 years.

The Port of New York Authority (Port Authority), which intervened in this proceeding, has strongly objected to the port-restricted discount rates. The Port Authority suggests that the discount rates are the cause of the change of position of the Port of New York in respect to its percentage share of iron and steel shipments handled. The facts are that New York's position has deteriorated and the Port Authority would attribute it to the discount rates.

The record shows that in 1960, Baltimore and New York were about equal on a tonnage basis in iron and steel exports to India and Pakistan. The picture had changed by 1964, when Baltimore handled the largest tonnages generally, but other ports such as Mobile, New Orleans and Philadelphia were ahead of New York on export of certain iron and steel items. From 1960 to 1964, the Port of New York did not lose ground in terms of tons handled, but it did lose in the sense that it failed to gain the percentage of new tonnage that it would have liked to obtain.

It should be pointed out that most of the increased tonnage in the years 1960 to 1964 was generated by AID. Throughout this period, the United States, through AID, has been supporting the industrial development of India and Pakistan by grants and loans for the procurement of materials in the United States, conditioned on the utilization, at least in part, of American-flag vessels for the transportation of materials to the recipient countries.

There was an increase in exports of steel mill products from all ports in the United States to Pakistan and India between 1960 and 1964. The AID program was the predominant factor in the increases. AID financed between 90 and 100 percent of one large steel company's shipments to India and Pakistan. AID policy does not differentiate between any United States port, nor does it favor any particular port for the loading of AID cargo.

In its attempt to show that the port-restricted discounts were justified, the conference, through the manager of Central Gulf, sought to show that loading costs of steel are relatively higher at New York than at Baltimore, Mobile and New Orleans. The Port Authority objected to introduction in the record of specific cost estimates in the form of stevedoring rates and loading costs, but the testimony was allowed.

The testimony was to the effect that the all-inclusive straight time stevedoring costs per ton of Central Gulf were $4.33 at New Orleans, $2.12 at Mobile, $6.07 at Baltimore, and $12.85 at New York. If overtime and extra labor were included, the all-inclusive costs per ton were $7.04 at New Orleans, $3.63 at Mobile, $6.59 at Baltimore, and $14.36 at New York.

Certain cost experts employed by the Port Authority for this proceeding were offered the particular invoices on which Central Gulf computed its costs for inspection, but they refused to inspect the invoices on the ground that in their view it would be meaningless.

The Port Authority asked that the stevedoring cost data be stricken from the record. The examiner refused, but he stated that objections of the Port Authority would be given consideration insofar as they affect the weight to be given the stevedoring cost data.

Discussion

This proceeding involves two separate areas of consideration. We must consider the conference's "discount" tariff provision in relation to the requirements of sections 14b and 18(b) of the Shipping Act. We must also consider whether the practice of the member lines of the conference, whereby they restrict the applicability of discount rates on

iron and steel items to certain United States ports of loading, is violative of section 16 or 17 of the Shipping Act.

Discount tariff provision

The examiner determined that the discount rates of the individual lines, established pursuant to the conference discount tariff provisions, were not conference rates because they only applied to the traffic of the individual lines. The examiner also determined they were not part of exclusive patronage dual rate contracts because, although they were published in dual form, the individual lines did not have exclusive patronage contracts.

The examiner then concluded that the dual rates of the individual lines and their attempt to retain the exclusive patronage of the shipper signatories to the conference's dual rate contract, by means of the discount tariff provision, were unlawful under section 14b of the act. The examiner further concluded that the discount rates under the tariff discount provision were really open rates with a 30-percent maximum discount. Open rates are not conference rates and do not bind contract signatories.

Because the discount tariff provision has been removed from the tariff, the conference and its member lines were found to no longer be in violation of section 14b.

On this issue, the conference argues that the use of the discount rate system was entirely proper. The conference feels that the discount rates on iron and steel items were regular conference contract and noncontract rates and were so published in the conference tariff just as any other conference contract commodity rates are published. In the conference's view, the discount rates differed from open rates inasmuch as there was in effect both a conference contract and noncontract rate for these commodities. That individual lines could discount up to 30 percent from these conference rates changes nothing in the view of the conference.

Hearing counsel on the other hand argue that the conference discount scheme amounts to a subversion of the intent of section 14b of the act as interpreted in the *Dual Rate Cases*, 8 F.M.C. 16 (1964). Hearing counsel's position is that the discount rates of the individual lines are nothing more than open rates inasmuch as the aim and implementation of both open and discount rates are identical. Being open rates the conference cannot bind contract signatories to exclusive patronage and the conference would have to give 90 days' notice of the return of the rate to the dual rate system (*Dual Rate Cases*, *supra*). Hearing counsel conclude that the use of the discount rate device to avoid the

open rate requirements is a violation of section 14b and the *Dual Rate Cases, supra.*

Our conclusions are basically in agreement with the position of Hearing counsel and the decision of the examiner. However, we feel that further discussion of the matter is warranted with the hope that such discussion might provide ground rules for future conference conduct of this character.

The order of investigation specifically posed the question of whether the conference had suspended the application of the dual rate system on iron and steel items and thereby "opened" rates on these items as a result of its discount tariff provision.

Pursuant to the conference tariff provision, individual lines are free to discount rates on certain iron and steel items up to a maximum of 30 percent. The conference retains both a contract and noncontract rate which constitutes the rate from which the discount is computed.

By means of the discount provision, it is possible that each conference member will have a different rate on the iron and steel items. Such a result is totally inconsistent with the idea of dual rate exclusive patronage contracts as provided for in section 14b of the act. A conference dual rate system contemplates the existence of a contract rate and a noncontract rate which are identical for each member of the conference. The Commission has recognized that rates can be opened by a conference, but when opened contract signatories are not bound by the dual rate contract. *Dual Rate Cases, supra.*

The conference here has attempted to retain the exclusive patronage requirements while departing from the standard dual rate structure. It sought to do so through the device of the "discount" rate with a maximum subject to control by the conference. As hearing counsel and the examiner suggested, however, discount rates as maintained by the conference are no more or less than open rates with a 30-percent maximum discount.

In every respect, except that the discounted rates are posted on both a contract and noncontract basis, the aim and implementation of both open and this conference's discount rates are identical. Open rates are typically instituted to allow conference members to meet outside nonconference competition. The conference has stated such was the purpose of instituting their discount rate provision. The method used by a conference in effectuating discount rates is substantially the same used in effectuating open rates. Each individual member has the option of either discounting steel rates up to the 30-percent maximum or retaining conference rates on steel. When a conference declares rates "open", each individual member line has the option of setting its

rates at whatever level it sees fit, including the preexisting conference rate.

We conclude that the conference's discount rate system is inconsistent with section 14b of the act, is equivalent to instituting open rates, and cannot be employed to retain the exclusive patronage of contract signatories. To conclude otherwise would destroy the concept of open rates as they are presently known inasmuch as any dual rate conference could accomplish the purpose of opening rates while not being subject to release of signatories and 90 days' reinstitution by simply permitting member lines the option of granting discounts subject to a maximum discount.

Some comments on specific exceptions by the conference to the examiner's decision are warranted.

The conference excepts to the examiner's finding that rates established pursuant to the discount tariff provision were not conference rates. The conference argues that they controlled the maximum discount and thereby controlled the rates subjecting them to the dual rate contract. We have already shown that such discount rates could result in a different rate for each individual member. The conference's position is completely inconsistent with this fact.

The conference likewise suggests the examiner erred in labeling the discount rates open rates since they retained the form of contract and noncontract rates. As mentioned above, the conference's discount system, like an open rate system, would permit a different rate for each member. The mere quotation of a rate in dual form neither changes this fact nor establishes a dual rate contract. Furthermore, we have shown how the same considerations that go into establishment of an open rate formed the basis of the conference establishment of its discount provision.

The conference also objects to the examiner's conclusions that the discount rule is unlawful under section 14b or that the filing of dual discount rates is not provided for under section 14b. The conference argues that section 14b refers to *contracts* and *modifications* thereof and does not apply to *tariff* rules or filing of *rates*.

Section 14b dual rate contracts are meaningless when considered apart from the tariff which establishes the dual rates. The statute in fact controls the time period within which rates under the contract may be increased as well as limiting the spread allowed between contract and noncontract rates. Furthermore, if the conference was convinced that section 14b did not affect their discount tariff rule, they could not maintain that the rates established pursuant to that rule were subject to the conference dual rate contract.

Finally, the conference excepts to the examiner's general conclusion that the conference's discount tariff provision quoting contract and noncontract discount rates and presuming to bind contract signatories to exclusive patronage was unlawful under section 14b. The conference argues that although the Commission in the *Dual Rate Cases* discussed open rates, it considered only the conventional open rate procedure when it determined that contract shippers would be released on open commodities. The conference argues that since this discount scheme is not a typical open rate procedure, the *Dual Rate Cases* does not preclude a conclusion permitting the contract shippers to be bound on the discount rates. The conference feels that no violation of section 14b, therefore, can be predicated on the conference's attempt to so bind the contract shippers.

The answer to this argument is that we thoroughly considered the question of dual rate contracts and departures therefrom in the form of open rates in the *Dual Rate Cases*. There we laid down the ground rules to be followed in the establishment and use of open rates by dual rate conferences. We did not there provide for the type of discount system advocated now by the conference. Neither can we now decide to permit the conference's use of their discount system while retaining exclusive patronage contracts over users since to do so would be inconsistent with our reasoning in the *Dual Rates Cases* and section 14b of the act.

The order of investigation also raised the specific question of whether the conference is complying with section 14b(7) of the act which declares that the spread between ordinary rates and contract rates shall in no event exceed 15 percent of the ordinary rates.

The examiner stated that since there were never any dual discount rates lawfully in effect during the period of the discount tariff rule in issue, the question of the 15-percent maximum spread between contract and noncontract rates is academic. He further stated that even if these discount dual rates had been lawful dual rates in other respects, there is no showing of a spread greater than 15 percent between the contract and noncontract rates on any specific iron and steel item.

In respect to the issue of the 15-percent spread, we would like to caution that the conference's discount tariff provision *could* in theory result in a violation of the Act. Assume one conference member takes full advantage of the 30-percent discount provision and another conference member chooses to effect no discount. In such a case the spread between the contract rate of the discounting member and the noncontract rate of the other member would exceed 15 percent. However, as the examiner found, there is no showing in this case of a spread greater

than 15 percent between the contract and noncontract rates on any specific iron and steel item.

Other issues relating to the tariff discount provision were raised by the order of investigation and dealt with by the examiner with no exceptions being taken thereto. We endorse the examiner's findings on these points and briefly paraphrase them here:

1. The record does not show any violation of section 18(b) (2) and (3) which concern the publication of increased rates on due notice and the collection of rates other than those specified in tariffs.

2. The record does not show that the conference has failed to comply with section 14b(2) insofar as it provides that tariff rates under the contract be not increased until they have been in effect at least 90 days and insofar as it requires 90 days' notice on rate increases.

3. There was and is no unlawful section 15 agreement between the individual lines.

4. There has been no agreement in violation of section 205 of the Merchant Marine Act, 1936, to prevent or attempt to prevent any other carrier from serving any port at the same rates which it charges at the nearest port already regularly served by it.

Port-restricted discount rates

The examiner concluded that the differences in discount rates at specific ports were not the proximate cause of any disadvantage, but rather it was the preferences of the shippers for the outports, the location of the steel mills, difference in port facilities, character of cargo, and other factors such as loading costs which were the proximate cause of the disadvantage to the Port of New York. He concluded that the facts herein are inadequate proof of unjust discrimination or of other unlawfulness under sections 16 and 17 of the act, and that no violations of section 16 First and 17 of the act have been shown.

The Port Authority throughout has insisted that the Port of New York has been and is being subjected to unjust discrimination and undue prejudice, and that the competing ports of Baltimore, Philadelphia, New Orleans and Mobile have been unduly preferred by the use of port-restricted discount rates. In general, the Port Authority contends that reduced or discounted rates came first, and that cargoes were induced to follow these reduced rates at particular loading ports such as Baltimore to the detriment of the Port of New York.

The conference and Hearing Counsel have contended that there were other factors besides the ocean rates which attracted steel to the outports, that the cargoes came first to the outports, and that the reduced rates were induced to follow the cargoes.

We are unable, on the present basis of the record, to come to a determination of the section 16 and 17 issues in relation to the practice of restricting discounted rates on iron and steel to certain U.S. ports of loading.

The present record shows that the percentage volume of iron and steel moving through the Port of New York has decreased significantly since 1960. The Port Authority attributes this decrease to the conference member's practice of charging higher ocean rates on iron and steel items loading at the Port of New York than they charge on the same items loading at the Ports of Baltimore, Philadelphia, etc.

The respondents and hearing counsel, on the other hand, have offered several explanations for New York's lower proportion of the iron and steel business. These factors are offered to show that they, rather than the restricted discount rates, put New York in its current unfavorable position.

While the factors of shipper preference, steel mill location, character of cargo, and port facilities tend to show that the iron and steel would have moved away from New York even if there had been no discount, they do not in any way serve to justify the conference member's rate disparities.

Of all the factors considered by the examiner only two, comparative loading costs and carrier competition, can actually be justification for rate disparities.

When the conference adopted its rate policy, it chose to have uniform rates as to commodities from all U.S. ports of loading in the trade area. The conference members continued this policy from its inception until they adopted the subject port-restricted rates on iron and steel. The subject discounts on iron and steel are the only port-restricted rates on any commodity that the conference members have adopted.

Having established a policy of uniform rates from all U.S. ports of loading and continuing such policy for a considerable length of time, the conference members should be required to adequately explain any departure from such basic policy. This the conference has attempted to do. However, as mentioned above, the only factors offered in explanation for such departure, which are actually relevant to or can be offered in support of such departure, are that it was justified to meet competition or that it was justified on the basis of comparative loading costs at the various ports.

This is where the final determination of this case becomes troublesome on the basis of the present record.

In respect to comparative loading costs at the various ports, the record is not conclusive. The conference testimony on this subject indicates that such costs are higher in New York than in the other ports

involved. However, the figures submitted were offered for a limited purpose, i.e. to show general cost relations and not to show any direct relationship between any difference in loading costs and difference in ocean rates at the various ports. Indeed, in view of the various objections to this testimony and the failure to include underlying data in the record, it cannot be concluded with certainty that such costs in New York are higher. More important, it cannot be concluded what sort of relationship exists between the difference in costs and the disparity in rates, and whether such cost differences might justify the disparity.

In reference to the issue of carrier competition and whether the discounts were justified to meet such competition, the evidence is likewise scant. The record shows the existence of nonconference carriers, but nowhere does it show any information as to specific rates of such carriers or whether such rates might justify the conference's restricted discount rates.

In view of the above-mentioned circumstances, we are remanding this proceeding for the purpose of obtaining evidence concerning cost differences incurred by conference carriers at the various ports in question and for the purpose of determining the actual existence of nonconference competition faced by the conference at the various ports in question, including evidence as to the rates of both conference and nonconference lines. Finally, we ask the examiner on remand to determine whether any of the information gained on remand will provide justification of the rate disparities in question.

An appropriate order will be entered.

Vice Chairman Hearn, concurring and dissenting:

I concur in the report of the majority in the finding of a violation of section 14b of the Shipping Act, 1916. I dissent from the decision of the majority to remand the case to obtain more evidence as to violations of sections 16 and 17 of the act. I believe the present record plainly indicates and sufficiently sets forth evidence of such violations.

The record in this case shows beyond doubt that since the initiation by the conference [4] in 1961 of the port-restricted discount, New York's position has deteriorated with respect to the handling of iron and steel exports. In 1961 New York was the country's leading port of export for iron and steel. In 1964 New York ranked second or third among such ports. The percentage of iron and steel moving through New York thus substantially decreased from 1960 to 1964 as a result of the conference quoting a higher rate out of New York.

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[4] The practice has been continued by the conference members under open rates.

Shortly after this proceeding began and, in my opinion, as a result thereof, the conference claimed to have ended the discount system in 1965 and requested the Commission to discontinue the proceeding. The Commission declined to do so, and the record reveals that although the conference's procedures were changed in 1965, the substance of the discount system remained. The port-restricted discounts continued substantially as before, except that they were designated open rates. Thus, the conference and its members have not changed their practices since 1961 but only attempted to further disguise them in 1965. It should be noted here that until 1961 the conference and its members maintained uniform rates as to all commodities out of all United States ports in the trade area, and since 1961 this policy has continued as to all commodities except iron and steel.

There is no dispute as to these facts and they are acknowledged by the majority herein. In my opinion it is equally beyond dispute that the decrease in cargo carryings out of New York was the result of the conference member's practice of charging higher rates out of New York than out of other ports, such as Baltimore, Philadelphia and Mobile, and that the discounts on their face are discriminatory and prejudicial to the Port of New York.

The majority report finds, and I agree, that various factors[5] offered by the respondents in justification of the discounts are irrelevant to the question of violation of sections 16 and 17. Two other factors, however, are accepted by the majority as valid reasons for the discounts, if they can be supported by further evidence. They are comparative ports costs and nonconference competition. To raise these factors as possible justification is to raise a straw man. Even if further evidence in support of these factors could be adduced, the discounts would still be in violation of the Shipping Act. These facts are all here but the majority bypasses them.

The record shows that about 35 other conferences which encountered the same problems in New York as complained of by respondents maintained identical rates on iron and steel from U.S. ranges of ports.[6] New York dominated the ports handling certain iron and steel exports to European destinations in 1964;[7] but in the export of the same iron and steel articles to India and Pakistan, New York could not compete effectively despite the fact that the problems and costs of handling the iron and steel are the same regardless of destination.[8] Also, only the

[5] The factors are shipper preference, steel mill location, character of cargo, port facilities and volume of movement.

[6] Exhibit 9.

[7] Exhibits 17–23, 78, 88.

[8] Transcript, pp. 564, 601.

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American flag members of the respondent conference maintained the port-restricted discount rates. The foreign flag members did not offer discount rates favoring other ports but continued to treat all ports in the range equally.[9]

There cannot, therefore, be any substantial difference in the transportation conditions in regard to export iron and steel moving through New York to India and Pakistan than to such cargo moving through other ports. Thus, it is unjust discrimination in violation of section 17 where, as here, the same carriers charge different rates out of different ports for like cargo bound for a common destination under substantially similar circumstances and conditions.

There is no dispute that New York competes with the other ports for the iron and steel cargo. There is no dispute that New York is one of the leading ports of export for such cargo. There is no dispute that, since the discount rates became effective, the movement of export iron and steel through New York has decreased sharply by being diverted to ports where lesser rates are charged. With these preliminary findings, it is incomprehensible that the majority fails to conclude that the imposition of the port-restricted rates against New York was the cause of the decline in iron and steel exports through New York and a violation of section 16 First.[10] No factor in justification could exist which could countervail the undisputed facts. In fact, on oral argument, the respondents admitted that neither higher costs nor any other reasons compelled the port-restricted discounts.[11]

In accordance with the foregoing, I conclude that the respondents violated sections 16 and 17. No further evidence is required to find such violations since no regulatory purpose is served by remanding for the purpose of developing what is already so clearly spelled out on the record in this case.

[SEAL] (Signed) THOMAS LISI,
Secretary.

[9] Initial Decision, p. 21.
[10] *Surcharge on Shipments from Buffalo, N.Y.*, 7 F.M.C. 458, 461 (1962).
[11] Transcript of Oral Argument, p. 86.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65–34

IN THE MATTER OF DISCOUNTING CONTRACT/NONCONTRACT RATES PURSUANT TO THE PROVISIONS OF ITEM 735, NOTE 2, OF THE INDIA, PAKISTAN, CEYLON & BURMA OUTWARD FREIGHT CONFERENCE TARIFF NO. 10

ORDER

This proceeding having been instituted by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a report containing its findings and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That this proceeding is remanded to the examiner for the purpose of taking further evidence on the matters described in the report.

By the Commission

(SEAL) (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Docket No. 1095

IN THE MATTER OF THE MODIFICATION OF THE SELF-POLICING PROVISIONS OF AGREEMENTS NO. 150 AND 3103

Decided March 19, 1968

Determinations of a Neutral Body which, under the terms of its employment, combines both investigative and adjudicatory functions must be subject to a *de novo* review by an impartial and disinterested panel of arbitrators.

To give effect to the principle that an accused should not be subject to punishment on the basis of secret evidence, arbitrators must be furnished only with such evidence as has been disclosed to the accused line, and which the accused line has had an adequate opportunity to rebut or explain, and base their determinations solely thereon.

A review *de novo* by a panel of arbitrators does not require a new trial but merely a new evaluation of the record already established before the Neutral Body.

John P. Meade for the Trans-Pacific Freight Conference of Japan and the Japan Atlantic and Gulf Freight Conference.

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

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

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

This proceeding is before us on remand from the United States Court of Appeals for the District of Columbia Circuit in *States Marine Lines, Inc.* v. *Federal Maritime Com'n.*, 376 F. 2d 230 (1967). The case was returned to us for the resolution of certain difficulties encountered by the court in reviewing our approval of the self-policing systems established by the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference.[1] The

[1] The Trans-Pacific Freight Conference of Japan (Trans-Pacific), established under Agreement No. 150, serves the trade from Japan, Korea and Okinawa to United States and Canadian Pacific Coast ports, including Alaska and Hawaii. The Japan-Atlantic & Gulf Freight Conference (Japan-Atlantic), established under Agreement 3103, serves the trade from Japan, Korea and Okinawa to Atlantic and Gulf ports of North America. Both conferences are domiciled in Japan. The self-policing provisions are contained in Article 25 of these agreements and are identical in both.

Conferences, States Marine Lines (a member of both conferences) and Hearing Counsel have submitted comments and suggested amendments to the systems in response to our order of August 27, 1967. Replies were filed but, in view of the limited scope of the issues presented and the adequacy of the pleadings, we required no oral argument.

PRIOR PROCEEDINGS

The present posture of this proceeding is the result of a prolonged controversy between the two conferences and States Marine Line. The dispute began in 1958 when, as a result of allegedly widespread malpractices, the Trans-Pacific Freight Conference of Japan, adopted a Neutral Body-type self-policing system which, in its original form, required that any Neutral Body selected be completely free of any affiliation with a conference member. States Marine complained that a fine which had been assessed against it for an alleged breach of the Conference agreement was invalid because of the Conference's failure to observe the strict neutrality requirement of the agreement in the selection of its Neutral Body. In Docket 920—*States-Marine Lines, Inc. v. Trans-Pac. Freight Conf.*, 7 F.M.C. 204 (1962), we found that the strict neutrality requirement of the Conference agreement had not been met and additionally that an attempted amendment to the agreement [2] was invalid because it had not received our approval under section 15 of the Shipping Act, 1916. Our decision was upheld in *Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Commission*, 314 F. 2d 928 (9th Cir., 1963).

Prior to the issuance of our decision in Docket No. 920, both Trans-Pacific and Japan-Atlantic filed modifications to their basic agreements (150–21 and 3103–17, respectively) which provided that a neutral body must disclose its affiliations with any member line, but that such affiliation would not disqualify the neutral body from serving unless the relationship was with an accused line, in which event the neutral body must appoint an unaffiliated agent to conduct the investigation. States Marine protested these modifications and we instituted the present investigation. In our first Report and Order, we approved the modifications (7 F.M.C. 653 (1963)).

States Marine appealed the decision [3] and in its brief to the court placed heavy reliance on the then recent Supreme Court decision in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), which was decided after oral argument and had not been cited to or considered by us.

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[2] Which would have permitted the Neutral Body to serve notwithstanding its connection with a member line if this fact were disclosed.

[3] *States Marine Lines, Inc. v. Federal Maritime Com'n.* Unreported. Remanded to FMC at FMC's request.

We asked the court to remand the case for reconsideration in the light of *Silver* and this unopposed request was granted. Hearings were held before a Hearing Examiner and on March 25, 1966, we issued our second Report and Order approving Agreements No. 150–21 (as modified by 150–29) and 3103–17 (as modified by 3103–26). States Marine again sought judicial review and the present remand resulted.

THE PRESENT NEUTRAL BODY SYSTEMS AND THE COURT'S OPINION

In brief, the self-policing system, as presently set forth in Article 25 of both basic agreements provides for the following procedures. The Neutral Body is selected by a two-thirds vote of the Conference members. When selected, it must disclose any present or future financial interests it may have in any Conference member. Any such interest acts as a general disqualification. The Neutral Body must also disclose all business or professional relationships with members, but such relationships will be disqualifying only in those cases where the client is the accused. The Neutral Body is authorized to receive written complaints of malpractice, to investigate the charges, and to assess and collect fines. In conducting the investigation, the Neutral Body may, without prior notice, call upon the accused and demand to see whatever records or other material the Neutral Body considers relevant. All member lines are obligated to cooperate in the investigation and must produce the requested information. The identity of the complainant is to be kept secret, and any evidence that would tend to reveal the complainant's identity will be withheld from the accused; however, the substance of the withheld evidence must be disclosed so the accused can rebut it. Once the investigation is completed, the Neutral Body notifies the accused whether there are reasonable grounds to suspect malpractice, and the accused is given a specified time to prepare its defense. The accused is then entitled to a hearing before the Neutral Body, and has the right to counsel. The Neutral Body is not restricted by legal rules of evidence or the burden of proof required in criminal or civil cases; rather it will employ rules of common sense—that is, does the information developed persuade the Neutral Body that the malpractice occurred? Fines are assessed in accordance with a schedule setting forth certain maximum penalties, related to the number of times the member has been found guilty of malpractice—$10,000 maximum for a first offense, and so on up to $30,000 for fourth and subsequent offenses. Mitigating circumstances may be taken into account in fixing penalties. Finally, the members agree that the Neutral Body's decision is to be "valid, conclusive and unimpeachable * * *."

States Marine Lines attacked virtually all of the provisions of the

systems, all of which were disposed of by the court except the contention that under the system as presently constituted, an accused could be convicted on the basis of undisclosed evidence, and any relationship existing between the Neutral Body and a member line could influence the Neutral Body's decision. The court's primary concern was that the Neutral Body, because it both investigated and adjudicated the case, would be forced into a position of being privy to evidence some of which it was forbidden to disclose to the accused line but which nevertheless might influence the Neutral Body's decision.

Applying the principles of *Silver*, the court concluded that Congress, in authorizing self-policing for conferences, did not intend to abandon the fundamental principle that the accused should be convicted only under fair procedures. The court felt that something other than the admittedly high ethical standards of the accounting profession[4] was needed to insure fair dealing in all Neutral Body investigations. The court's suggested solution was:

> Rather than urge that the Neutral Body system be scrapped * * * the Government [the Department of Justice] has come forward with a proposal which accepts the Commission's determination that effective self-regulation demands such a system but which at the same time seeks to accommodate the obvious need for some kind of institutional check on Neutral Body discretion. Building on the Conferences' own suggestion that undisclosed evidence be screened out of the ultimate decision-making process, the Government recommends that a Neutral Body's decision to penalize a member be subject to review by a panel of arbitrators who are free of any relationship with Conference members.
>
> Under such a system the Neutral Body would have to demonstrate the accused's guilt by using only the evidence made available to the accused. In addition, we presume, the arbitrators would take into account any rebutting evidence provided by the accused. This system would maintain the complainant's anonymity, yet substantially eliminate the danger of improper conviction on the basis of secret evidence, since the arbitrators would never see or be influenced by nondisclosable information.
>
> Such a proposal does not of course provide all the guarantees of actual confrontation[5] nor does it necessarily resolve all the potential problems that could arise from a Neutral Body's exercise of discretion. Nevertheless, providing an independent check of the disclosed evidence would largely neutralize any substantial abuse of discretion by the Neutral Body, and this, we think, is all that can reasonably be asked. Since the Government's proposal would provide article 25 this needed element of fairness, we accept it as a workable and desirable compromise between the realities of Conference self-regulation and the rights of an accused member. (376 F. 2d 240–41). (Footnote ours).

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[4] In both conferences, an international accounting firm acts as the Neutral Body.

[5] States Marine had argued that fairness required that the identity of the complainant be disclosed but the court rejected this contention.

In summarizing its conclusions and remanding the case for further proceedings, the court held that:

> * * * given the special characteristics of the shipping industry and the conference system the broad discretion granted a Neutral Body must be subject to some form of continuing internal review. That review must provide reasonable assurance that a member will be penalized only on the basis of evidence it has an adequate opportunity to rebut or explain—in other words that the accused will in fact be treated fairly. (376 F. 2d 242) .

THE PARTIES' SUGGESTED AMENDMENTS

States Marine Lines

States Marine would modify Article 25 to require the accused line to pay any fine imposed within 30 days after it receives the adverse report of the Neutral Body unless review by arbitration is demanded. Review would be by a panel of three arbitrators, one to be named by the accused line, one by the Neutral Body, and the third to be selected by the first two. The proceedings would be held in a city to be mutually agreed upon. The Neutral Body and the accused line would be permitted to present such evidence and testimony as they desire to the arbitrators with the proviso that all evidence and testimony must be furnished to all parties who are to be given an opportunity to cross-examine and submit evidence and testimony in rebuttal, either directly or through counsel. The arbitrators would be given full authority (by majority vote) to affirm, set aside or modify any finding or conclusion which they deem erroneous. Moreover, the arbitrators would be allowed to cancel, reduce or increase any fine which they deem improper. A written decision with findings of fact and conclusions is called for.

The decision of the arbitrators would be conclusive except for a limited right of appeal to the Federal Maritime Commission on the sole ground that enforcement of the decision would constitute a violation of the Shipping Act, 1916. Costs of arbitration are to be borne by the Conference. Payment of any fine imposed by the arbitrators must be made within 30 days. Thereafter, if payment has not been made, the Conference may look to the security posted by the line under Article 12. The decisions of the Neutral Body or arbitrators would not constitute admissions or proof of guilt or liability under the law.

The Conferences

The Conferences suggested considerably more detailed amendments, a number of which bear only tangentially upon the issue [6] presented

[6] These proposals are identical to amendments which were filed with the Commission for approval under section 15 on June 30 and July 24, 1967. Publication of these amendments in the Federal Register has been held in abeyance pending resolution of the issues in this remand.

on remand. Basically, they would require the Neutral Body to consider only that evidence which it was actually able to disclose to the accused line in reaching its decision. The decision of the Neutral Body or arbitrators would be final unless an appeal from an adverse decision of the Neutral Body is noted within 10 days. The proceeding would be conducted by a panel of three arbitrators, one selected by the accused line within 15 days and one selected by the Conference by two-thirds vote, and one selected by the Japan Commercial Arbitration Association.

The Neutral Body is required to file its report (decision), together with the evidence (including statements of oral witnesses, if any) plus a certification that all of the evidence relied upon in reaching the decision was shown to the accused line, and that the accused line was given an adequate opportunity to explain or rebut the evidence adverse to it. The Neutral Body is also required to file with the arbitrators any explanation or material which the accused line may have submitted, whether relied upon or not, in reaching the decision. A copy of all of this material is to be furnished to the accused line at the time it is submitted to the arbitrators. The accused line may within 10 days "object" to any of the material thus furnished, but this objection is limited to whether it was shown the evidence so filed and whether it was given an adequate opportunity to explain or rebut it. The matter is then deemed to be submitted for decision. No other communication with the arbitration panel is allowed.

The arbitrators' scope of review is limited to: (1) whether the accused line actually saw the evidence upon which the Neutral Body decided the case; (2) whether the accused line was given an adequate opportunity to explain or rebut; (3) whether the Neutral Body, on the basis of the evidence filed with the arbitrators, could reasonably have reached the result they did on the basis of the standard of "common sense" and "persuasive information" that the breach "probably occurred." The arbitrators are forbidden to substitute their judgment for that of the Neutral Body and may not disturb the level of any fine assessed.

The arbitrators are to reach their decision within 30 days and serve the parties with copies. Fines must be paid within 10 days after receipt of notice of affirmance.

Hearing Counsel

Hearing Counsel would require the Neutral Body to disclose *all* evidence and material developed in the course of its investigation to the accused line, but would limit arbitration to an appellate type of review similar to that proposed by the Conferences. Thus, the arbi-

trators would be required to affirm the determination of the Neutral Body if supported by evidence, even though they might have decided the case differently.

DISCUSSION

Our task on remand is to insure that the self-policing provisions contained in Article 25 of the Conferences' basic agreements call for "some form of continuing internal review" which "* * * must provide reasonable assurance that a member will be penalized only on the basis of evidence it has an adequate opportunity to rebut or explain—in other words, that the accused will in fact be treated fairly."

In offering guidance to us on remand, the court considered the plan offered by the Justice Department a useful model upon which to build. Justice suggests that:

> One means of eliminating the unfairness of the system is to permit an accused member to appeal an adverse decision by the neutral body to a panel of arbiters free from any business relationship with any member line. Under such a system, the neutral body would have to demonstrate the member's guilt to the panel of arbiters by using only evidence which can be revealed without disclosing the complainant's identity. This would help eliminate the danger of improper conviction on the basis of secret evidence because under this proposal the panel of arbiters could never have such evidence before it. Furthermore, since the role of the neutral body would be changed from "judge" to "prosecutor" whenever an accused member chose to appeal to the panel, the potential harm of permitting an undisclosed professional relationship between the neutral body and the complaining member would, in our judgment, be minimized sufficiently for the system to meet the standard of fundamental fairness, especially in view of the admittedly high professional standards of the prospective neutral bodies.

Understandably, the amendments suggested by the Conferences and those proposed by States Marine approach the problem of internal review of the Neutral Body's decision from opposite poles. On the one hand, States Marine, by requiring a full trial *de novo* before the arbitrators, would virtually relegate the role of the Neutral Body to that of investigation only. The Conferences, on the other hand, would limit the role of the arbitrators to that of virtually a rubber-stamp affirmation unless some palpable procedural irregularities could be shown in the Neutral Body's trial of the case. The impracticability of the States Marine proposal is two-fold. It would call for cross-examination of witnesses which the court itself recognized was impractical under any self-policing system which is international in scope and without subpoena power; and it would inordinately prolong any proceedings by requiring a trial *de novo* before the arbitrators. The establishment of "fair procedures" requires neither.

The difficulty with the Conferences' suggestion is that it would

render the arbitrators' review something less than meaningful. It would not remedy the basic concerns of the court with the present systems—that secret evidence or a conflict of interest might influence the decision. In a close case, either one or both of these considerations could well make the difference between a finding of guilt or innocence. Yet, under the Conferences' proposal, the arbitrators would be forced to affirm the decision of the Neutral Body unless it was utterly unsupported by the record furnished to it. This does not constitute an internal review which would effectively curb abuses of discretion by the Neutral Body.

Hearing Counsel's proposal is akin to that of the Conferences except that they would require the Neutral Body to submit all evidence uncovered in the course of the investigation whether relied on by the Neutral Body or not. Under Hearing Counsel's plea, it is unlikely that the name of the complainant could be successfully withheld—a feature upon which the effectiveness of the system is largely dependent. Moreover, this safeguard is somewhat illusory since it would be virtually impossible to determine whether the Neutral Body had in fact furnished the arbitrators *all* of the evidence it had uncovered.

At this point, it would seem clear that the assurance of fair procedures is best achieved by selecting the best from all the various proposals. Thus, while we will not require a trial *de novo* before the arbitrators as States Marine would have us do, neither will we, as the Conferences propose, limit the authority of the arbitrators to substitute their judgment for that of the Neutral Body. We will limit the review of the Neutral Body to the consideration by the arbitrators of the record of the Neutral Body's proceeding, together with pleadings to be submitted by the parties, but at the same time leaving the arbitrators free to reach their own decision, both on the question of guilt and the level of the fine to be assessed.

As for the other features of the various proposals such as time limits for appeal and payment of fines, selection of arbitrators, finality of decisions and liability of the Neutral Body and the arbitrators for their decisions, we have in the main adhered to the Conferences' proposal since these proposals have the approval of the majority of the members and are not contrary to the principles of section 15.

On the basis of the foregoing, we find that Article 25 as modified in Appendix A hereto is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and will not operate to the detriment of the commerce of the United States, and is not contrary to the public interest, or in violation of the Act. Accordingly, we will approve it. An appropriate order will be issued.

Vice Chairman Hearn, *concurring:*

I previously expressed serious reservations as to several aspects of the self-policing system originally approved by the Commission [7] and dissented from the majority opinion at that time. Although my objections are not entirely satisfied, I now concur in the system herein approved. Much of my concern arose then from the lack of complete neutrality in the system. With the establishment of an independent panel of arbitrators, I am confident that whatever shortcomings might still exist will thereby be ameliorated. As the Court of Appeals said: "* * * whether particular procedures are fair depends upon the particular institutional setting involved." [8]

In remanding this case to the Commission, the Court of Appeals said that in consideration of the complexities involved in the conference system:

> * * * the principle becomes obvious that this kind of self-regulatory process must provide specific, realistic guarantees against arbitrary and injurious action.[9]

The court then found that the Neutral Body self-policing system as approved by the Commission was inadequate to the attainment of that objective. The system, the court concluded, must provide assurances against abuse where "practicalities preclude strict neutrality." [10]

In accordance with these statements and further conclusions of the court,[11] the Commission now approves a self-policing system which includes an independent panel of arbitrators. I wholly support this system; and as I have previously stated,[12] I would support only a self-policing system in which the final review is by a body without any relationship to members of the conference. Such a requirement is indispensable for groups exercising economic power and for which economic gain is their *raison d'etre.*

There is another point worthy of emphasis in the Article 25 approved herein. Paragraph (i) provides that the conference shall bear the expenses of the self-policing system. All conference members share equally an obligation to the public which they serve to adhere to the regulations of government and the principle of fair play. The neutral

[7] *Agreement No. 150-21, Trans-Pacific Freight Conf. of Japan and Agreement No. 3103-17, Japan-Atlantic and Gulf Freight Conference,* 9 F.M.C. 355, 386 (1966).

[8] *States Marine Lines, Inc. and Global Bulk Transport Corp.* v. *Federal Maritime Commission,* 376 F. 2d 230, 235 (1967).

[9] *Ibid.,* 236.

[10] *Ibid.,* 237.

[11] See the majority report herein at 11 FMC 438.

[12] 9 F.M.C. 355, 386.

body is both prosecutor and judge, and its discretion in conducting investigations should not be influenced by financial considerations.

On the basis of the foregoing, I fully concur in the decision of my fellow Commissioners.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Docket No. 1095

IN THE MATTER OF THE MODIFICATION OF THE SELF-POLICING PROVISIONS OF AGREEMENTS NO. 150 AND 3103

ORDER

The Commission has this day entered its Report in this proceeding which is hereby made a part hereof by reference, and has found that Article 25 of Agreements No. 150–29 and 3103–26 as set forth in the Appendix to said Report is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, ports or between exporters from the United States and their foreign competitors, nor detrimental to the commerce of the United States, contrary to the public interest, or otherwise violative of the Shipping Act, 1916.

Therefore, it is ordered, That Article 25, Agreements 150–29 and 3103–26 as modified in the Appendix to the aforementioned Report, is hereby approved.

By the Commission:

[SEAL]

(Signed) THOMAS LISI,
Secretary.

APPENDIX

25. *NEUTRAL BODY*

(a) *Appointment and Qualifications of the Neutral Body:*

(1) The Conference shall appoint, upon terms to be fixed by separate contract, an impartial independent person, firm or organization to be designated the Neutral Body which shall be authorized to receive written complaints reporting possible breaches of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice, and to investigate and decide upon such alleged breaches and, if such breaches are found, to assess damages, and in addition, to collect damages assessed, after payment thereof becomes delinquent.

(2) Appointment of the Neutral Body hereafter will be by vote of the Conference membership under Article 19 of the Conference Agreement. The appointment will be made from amongst candidates which are qualified and willing to serve.

Prior to such appointment a candidate will be required to divulge to the Conference any "professional or business relationships or financial interests" (hereafter in this Article simply "interests") which it may have with any of the members, their "employees, agents, subagents or their subsidiaries or affiliates" (hereafter in this Article simply "agents"). The candidate will also be required to agree, in the event of the appointment, to divulge any future proposals it might receive to create such interests, and promise to obtain Conference approval thereof before accepting any such proposal. Such interests so divulged, if any, exclusive of financial interests, will not affect the qualification of the Neutral Body when appointed by the Conference with knowledge thereof, and the members will not raise an objection, based on such grounds, to an investigation or decision made or damages assessed by the Neutral Body or its agents; provided, however, that the Neutral Body will be required before appointment to agree to disqualify itself in the event of a complaint against a member with which it may have such an interest. After disqualifying itself the Neutral Body is authorized to appoint an agent without such interest in the respondent to conduct the particular investigation and handle the complaint on behalf of the Neutral Body and such appointee shall have all of the authority and duties of the Neutral Body for that particular matter up through the date when the appointee reports its decision to the Ethics Committee under this Article 25(f)(4).

(3) The Neutral Body will have the authority and responsibility to engage agents, lawyers and/or experts, including shipping experts, who can assist with its investigation and consideration of complaints and to pay on behalf of the Conference all costs incidental thereto. Such agents or experts appointed by the Neutral Body must not have any interest in the particular member named in the particular complaint, although

they will not be disqualified because they may have an interest, exclusive of a financial interest, with any other member or its agents.

(4) For purposes of this paragraph (a), the words "financial interests" do not include professional or business relationships whereby the Neutral Body or its agents or experts are engaged as independent contractors for professional or business services.

(b) *Jurisdiction of the Neutral Body:*

(1) The Neutral Body shall have jurisdiction to handle, in accordance with the procedures of this Article all written complaints submitted to the Neutral Body by the Conference Chairman or a member alleging breach of the Conference Agreement, Tariff Rates, or Rules and Regulations, involving malpractice or, on its own motion, any breaches of the terms of this Article 25.

(2) "Malpractice" as used in this Article shall mean any direct or indirect favor, benefit or rebate, granted by a member or its agents to a shipper, consignee, buyer, or other cargo interests or any of their agents, or any other act or practice resulting in unfair competitive advantage over other members.

(3) The Neutral Body shall have no authority to investigate any breach involving a malpractice which occurred more than two years before the filing of a written complaint pursuant to Article 25(b)(1), or more than two years before the discovery thereof under Article 25(f)(1).

(c) *Member Lines' Responsibility to Report Breaches and Assist Investigations:*

(1) The members and/or the Conference Chairman shall report promptly to the Neutral Body in a written complaint any and all information of whatsoever kind or nature coming to their knowledge which, in their opinion, indicates a breach of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice or any breach of this Article 25 by a member or its agents, and failure to report such information by any member will be a breach of this Article.

(d) *Investigation:*

(1) The Neutral Body and/or its agents, shall have the power, authority and responsibility to investigate written complaints and in investigating said complaints to call upon a member or its agents at any of their offices during office hours and inspect, copy and/or obtain "correspondence, records, documents, signed written statements or oral information and/or other materials" (hereinafter in this Article "materials"), which materials are deemed by the Neutral Body in its sole discretion to be relevant to the complaint. Upon making such a call the Neutral Body shall have the right to see and copy such materials immediately and without prior screening by the member or its agents.

(2) Correspondingly each of the members shall have the duty and responsibility to supply such materials, and to cooperate in interviews promptly upon demand made in person by the Neutral Body or its agents and without prior screening, whether said materials or personnel are located in the member's own offices or in its agents' offices. Failure of a member or its agents to supply the materials required by the Neutral Body or its agents promptly will constitute a breach of this Agreement by the member, and the member undertakes to thoroughly inform its agents of

the member's liability for their conduct and obtain their commitment to comply with the Conference Agreement, Tariff Rates or Rules and *Regulations. In addition* the members undertake an affirmative duty to cooperate and assist the Neutral Body in obtaining other required information whenever possible.

(3) The records of the Conference will be made available to the Neutral Body on request and the Conference Chairman and staff will render all assistance possible to the Neutral Body during investigations.

(e) *Confidential Information:*

(1) The Neutral Body will under no circumstances disclose the name of the complainant to the respondent or anyone else, including the Neutral Body's agents, unless specifically authorized to do so by the complainant.

(2) The Neutral Body will treat all information received during investigations regardless of the sources, as confidential and will not divulge any such information to anyone, except in reporting breaches found and damages assessed to the Ethics Committee, and then only to the extent that the Neutral Body itself deems appropriate.

(f) *Hearing for the Respondent; Neutral Body Decisions and Announcement Thereof:*

(1) On concluding its investigation, the Neutral Body will consider the information obtained and decide in its absolute discretion whether the facts have been sufficiently established to constitute a breach of the Agreement, Tariff Rates, or Rules and Regulations, involving a malpractice, and if a breach involving a malpractice is found which was not covered by the complaint, such breach may also be reported and damages may be assessed thereon against any member liable.

(2) In deciding whether a breach exists in proceedings under this article, the Neutral Body will not be restricted by legal rules of evidence or the burden of proof required to establish criminality, or even a civil claim. Instead it will employ rules of common sense in determining breaches and assessing damages and the only standard required is that the information developed is persuasive to the Neutral Body itself that the breach occurred.

(3) After the Neutral Body has completed its investigation, it shall advise the respondent either that a breach has not been found or that there are reasonable grounds to believe that a breach occurred. In the latter event, the respondent will be informed at this time of the nature of the alleged breach, and the evidence concerning it which the Neutral Body in its absolute discretion is able to disclose. In so advising the respondent, the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information. In all cases, however, the Neutral Body will inform the repondent of the nature of the alleged breach, bearing in mind basic precepts of fair play. Within fifteen (15) days, or within such reasonable time thereafter as the Neutral Body may in its sole discretion grant, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or attorney, and offer to the Neutral Body such explations and/or rebutting evidence as it may deem proper and desirable. At such hearing, the Neutral Body shall consider only the evidence

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which it was able actually to disclose to the respondent, together with such explanations and/or rebutting evidence the respondent may have offered, and make its decision thereon in accordance with the standards set forth under Article 25(f)(2) hereof.

(4) On the basis of its decision, the respondent shall either be advised that a breach has not been found or, should a breach be determined to have been committed, assessed liquidated damages. In assessing said damages, the members recognize that breaches of the Conference Agreement, Tariff Rates or Rules and Regulations cause substantial damages, not only in lost freight but in consequent instability of the Conference rate structure. The members further recognize that the damages caused are cumulative with the number of breaches, but the members further recognize that it is difficult to assess such damages precisely. Therefore the Neutral Body is authorized to assess liquidated damages in accordance with the following schedule:

(*a*) First breach: maximum of Ten Thousand Dollars ($10,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

(*b*) Second breach: maximum of Fifteen Thousand Dollars ($15,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

(*c*) Third breach: maximum of Twenty Thousand Dollars ($20,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

(*d*) Fourth breach and subsequent breaches: maximum of Thirty Thousand Dollars ($30,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

Notwithstanding the difficulty in assessing such damages precisely, in determining the amount of liquidated damages to be assessed, the Neutral Body shall consider such mitigating circumstances as it may deem relevant.

After its decision the Neutral Body will then report to the Ethics Committee the decision and the amount of the damage assessed, if any. In addition the Neutral Body may report evidence or information discovered during its investigation, but the extent of such further reporting, if any, shall be subject to absolute discretion of the Neutral Body, and in no event will the Neutral Body report the name of the complainant without consent, or report confidential information.

(5) The Ethics Committee will notify the members through the Chairman, of the decision and damages, if any, and will also at the same time instruct the Chairman to notify the respondent of the decision, and in case of a breach the respondent will be furnished with the Neutral Body report and a Conference debit note covering the liquidated damages assessed.

(g) *Decisions of the Neutral Body:*

(1) The decisions of the Neutral Body shall be final and conclusive unless within thirty (30) days after the accused line receives the Neutral Body's report, it shall demand review by arbitration in accordance with the procedures set forth in paragraph (h) of this Article.

(2) Any fine imposed by the Neutral Body shall be paid to the Conference within thirty (30) days after the accused line receives the report of the Neutral Body unless review by arbitration is sought under paragraph (h) of this Article.

(h) *Review by Arbitration:*

(1) Notice of Intent to Seek Arbitration. Upon receiving actual notice of an adverse determination by the Neutral Body, the respondent shall have thirty (30) days within which to notify the Conference Chairman in writing of its intent to seek review of the Neutral Body's determination by arbitration. Failure to give such timely notice shall constitute a waiver of the right to review.

(2) Location of Arbitration. All parties hereto agree to arbitration in Japan by a panel free of any professional, business or financial relationship with any of them. Upon agreement of the parties, arbitration may be held in any other place.

(3) Selection of Arbitrators. Within fifteen (15) days after serving its notice of intent to seek review by arbitration, the respondent shall submit to the Chairman the name of one arbitrator, and within five (5) days thereafter, the Conference shall select one arbitrator by a two-thirds vote of all members present and entitled to vote (excluding respondent) with prompt notice to respondent of the selection made. The two arbitrators so named shall, within ten (10) days, select a third arbitrator except that if they are unable to agree upon the selection of a third arbitrator within said period, then and in that event, the Chairman shall immediately file the names and addresses of the first two arbitrators with the Japan Commercial Arbitration Association which shall promptly appoint the third arbitrator, who may be a national of any country.

(4) Arbitration Procedures. When the designation of the panel of arbitrators has been completed, it shall notify the respondent, the Conference Chairman and the Neutral Body of its composition. Within three (3) days after such notification, the Neutral Body shall file with the panel its report, together with all evidence or data which it relied upon (including statements of oral witnesses, if any) in its determination that a breach had occurred; its certification that all of the evidence and data relied upon in reaching its decision was shown to respondent, and that respondent was given an adequate opportunity to explain or rebut such evidence and data, during the hearing process; and any evidence, explanation or material the respondent may have submitted during the hearing process whether relied upon or not in reaching its decision. A copy of this material shall be served upon respondent at the same time it is filed with the arbitration panel. The material thus furnished shall constitute the record on review.

Within ten (10) days after receipt of the Neutral Body's Report and certified record, the respondent may file in writing its objections (if any) to the certification, and its exceptions and brief in opposition to the Neutral Body's Report. Within ten (10) days after respondent's submission, the Neutral Body may file its reply which is to be confined to matters raised or argued by respondent. In the event that respondent files nothing, the matter will be considered solely on the basis of the report and certified record as furnished by the Neutral Body.

(5) Arbitrators' Scope of Review. The arbitrators, by majority vote, may affirm the Neutral Body's determinations or set aside or modify any finding they deem erroneous, and may cancel, reduce or increase any fine which they deem improper (subject to the maxima specified in Article 25(f)(4) hereof). Their decision shall be in writing setting forth their findings of fact and conclusions and shall be made within 30 days after the matter is submitted. A copy thereof shall be served on respondent, the Neutral Body and the Ethics Committee.

(6) Finality of Arbitrators' Decision. The decisions of the arbitrators shall be final, binding and conclusive subject only to an appeal to the Federal Maritime Commission on the ground that the enforcement of the arbitration award constitutes a violation of the Shipping Act, 1916.

(7) Payment of Fines After Arbitration. Any fine imposed by the arbitrators shall be paid to the Conference within thirty (30) days after receipt of a debit note from the Chairman, following service of the arbitrators' decision in accordance with subparagraph (5). In default of a payment of a fine by the due date, the Conference may resort to the security posted by the line under Article 12 and the line shall be deemed delinquent under Article 28. It is understood between the members that decisions of the Neutral Body and/or the arbitrators are not an admission or proof of guilt or liability under law.

(i) *Payment of Fees and Expenses:*

The payment of the fees and the necessary expenses of the Neutral Body and the arbitrators incurred in the performance of their duties under this Article shall be borne by the Conference.

(j) *Legal Proceedings Involving Self-Policing Activity:*

The members agree that they will neither jointly nor severally bring any legal action whatsoever against the Neutral Body or its agents or the arbitrators for damages allegedly arising out of their decisions or for any act or omission occurring in the discharge of their functions under this Article. In addition, each member agrees to hold the other members of the Conference, the Neutral Body, and its agents and the arbitrators harmless from any claims which may be brought by its agents or employees against another member, the Conference, the Neutral Body or its agents, or the arbitrators for damages allegedly arising out of the acts, omissions or functions of the Neutral Body or the arbitrators.

FEDERAL MARITIME COMMISSION

Docket No. 66–63

UNITED STATES BORAX & CHEMICAL CORPORATION

v.

PACIFIC COAST EUROPEAN CONFERENCE ET AL.

Docket No. 67–27

PACIFIC COAST EUROPEAN CONFERENCE ET AL.

v.

UNITED STATES BORAX & CHEMICAL CORPORATION

Decided March 29, 1968

The dual rate contract between Pacific Coast European Conference and United States Borax & Chemical Corporation, which was not amended to include provisions permitted or required by the Commission, became unlawful and unenforceable on April 4, 1964.

In charging United States Borax & Chemical Corporation a higher rate than charged other shippers of borax and borax products for similar services between April 4, 1964 and January 1, 1967, without the benefit of a valid dual rate contract. the Pacific Coast European Conference and its member lines violated section 14b, section 16 First, and section 17 of the Shipping Act, 1916.

In denying United States Borax & Chemical Corporation the use of a dual rate contract after January 1, 1967, the Pacific Coast European Conference and its member lines violated section 14b of the Shipping Act, 1916.

United States Borax & Chemical Corporation awarded reparation with interest against the member lines of Pacific Coast European Conference.

The complaint of Pacific Coast European Conference and member lines against United States Borax & Chemical Corporation dismissed because not filed within two years after the cause of action accrued.

Lauren M. Wright and *Edwin A. McDonald, Jr., for* United States Borax & Chemical Corporation.

Leonard G. James, *F. Conger Fawcett*, and *Herbert Schepps* for Pacific Coast European Conference and member lines.

Donald J. Brunner, *Samuel B. Nemirow*, and *Arthur A. Park, Jr.*, Hearing Counsel.

REPORT

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

This case was initiated by the complaint of United States Borax & Chemical Corporation (Borax), filed on November 21, 1966, in Docket No. 66–63, against the Pacific Coast European Conference (Conference) and its member lines.[1] That complaint requested the Commission to issue an order requiring the Conference to cease and desist from charging rates for the transportation of borax and borax products, which are allegedly unduly and unreasonably preferential, prejudicial, and disadvantageous in violation of section 16 of the Shipping Act, 1916, unjustly discriminatory and prejudicial in violation of section 17 of the Act, and illegal and excessive in violation of section 14b of the Act. As a result of being subjected to the above unlawful rates, Borax seeks reparation in the amount of $90,872.80, "* * * together with such additional amounts as * * * [it] may be damaged by respondents continuing to assess illegal and excessive rates * * *."

In Docket No. 67–27, the Conference, by cross-complaint filed April 10, 1967, alleges that Borax either breached its Conference dual rate contract and is liable for liquidated damages for such breach or received transportation at less than the applicable rate in violation of sections 16 and 18(b) of the Act for which the Commission should order the payment of undercharges. Since the issues in this proceeding arose out of the same factual situation, and were thus interrelated with those in Docket No. 66–63, the two proceedings were consolidated for hearing and decision by the Chief Examiner on April 12, 1967. Hearing Counsel have intervened and filed briefs.

Examiner Herbert K. Greer, in his Initial Decision served September 26, 1967, concluded that the Conference had violated sections 16, First and 17 of the Shipping Act, 1916, and awarded reparation to Borax for such violations. The Conference's cross-complaint against Borax was dismissed. Exceptions and replies to the Examiner's decision have been filed. Oral argument was neither requested nor heard.

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[1] The member lines of the Pacific Coast European Conference are: American Export Isbrandtsen Lines, d'Amico Mediterranean Pacific Line, East Asiatic Line, French Line, Furness Line, Hamburg-American Line, Hanseatic-Vaasa Line, Interocean Line, Italian Line, Italnavi Line (not after September 3, 1965), North German Lloyd, Fred Olsen Line, Splosna Provba, States Marine Lines, Holland-American Line, Johnson Line, Royal Mail Lines Limited, Zim Israel Navigation Co. Limited, Italpacific Line Incorporated.

FACTS

On March 10, 1961, Borax and the Conference entered into a Shippers' Rate Agreement (dual rate contract) whereby Borax agreed to ship all of its products, transported between ports served by the Conference, via Conference vessels in return for the application of rates of 15% lower than the rates charged non-contract shippers. This agreement did not contain a "charter exclusion clause" which would permit Borax to ship its cargoes on vessels chartered by it without forfeiting its right to contract rates for other shipments made on Conference vessels.

Subsequently, on October 3, 1961, Congress enacted Public Law 87–346, 75 Stat. 762, which, *inter alia*, added a new section 14b to the Shipping Act, 1916. This section 14b authorized the Commission to permit the use of dual rate contracts under certain circumstances but imposed a number of specific requirements [14b(1)–14b(8)] which all such contracts must meet. In addition, section 14b(9) required that dual rate agreements shall contain "* * * such other provisions not inconsistent * * * [with section 14b] as the Commission shall require or permit."

In order to accomplish the transition from the old, unregulated contracts to the new, regulated contracts, section 3 of Public Law 87–346 provided for interim validity of existing dual rate contracts, and required the conferences to revise their contracts to comply with the provisions of section 14b and to file the revised contracts for approval within six months after enactment of the 1961 amendment [i.e. by April 3, 1962] after which their use was lawful until approved by the Commission or until April 3, 1963, whichever occurred sooner. Public Law 88–5, 77 Stat. 5, extended this period of interim validity to April 3, 1964.

On March 21, 1962, the Commission published an interpretative ruling on section 3 of Public Law 87–346 which provided that a merchant could continue as a contract shipper subsequent to April 3, 1962, by advising the Conference that:

> * * * he agrees to be bound by said contract rate agreement amended to the extent necessary to comply with the provisions of section 14b of the Shipping Act, 1916; Provided, That the conference has filed with the Federal Maritime Commission a proposed form of contract pursuant to section 3 of Public Law 87–346.

In accordance with the directives of the ruling quoted above, the Conference filed with the Commission a proposed form of contract which included the eight mandatory provisions. On March 29, 1962, Borax accepted the dual rate contract as amended and *until April 4,*

1964, such contract represented the relationship between the parties. As a charter exclusion clause was not made mandatory by law, but was only later to be prescribed under the "other provisions" clause of section 14b(9), such a clause was not included in this contract.

In April 1963, the Commission entered an "Order of Investigation and Hearing" respecting the dual rate contracts of several conferences including the Pacific Coast European Conference. The Conference dual rate contract was made the subject of Docket No. 1007—*Pacific Coast European Conference Exclusive Patronage (Dual Rate) Contract*, and hearings before an examiner were held upon the proposed contract. Subsequently, on petition of various shippers and shipper associations, certain issues were severed from most of the proceedings, including Docket No. 1007, *supra*, and consolidated for hearing before a panel of five examiners in Docket No. 1111—*Dual Rate Contracts, 1963—Adjudication of Major Issues.*

On December 3, 1963, the panel of examiners rendered its decision in Docket No. 1111. Shortly thereafter, on December 5, 1963, the Examiner, in his Initial Decision in Docket No. 1007, approved the Conference's contract, if modified in certain respects not pertinent here, and the approval was made subject to "* * * the decision of the Commission in * * * Docket No. 1111, and [to] the inclusion of such other provisions as the Commission requires or permits."

On March 18, 1964, the Commission, recognizing the administrative burdens involved in executing contracts between conferences and shippers due to the limited time which would remain after its final review and decision in Docket No. 1111, issued its "Interpretation and Statement of Policy". It was provided therein that if a carrier or conference decides to use a dual rate contract subsequent to April 3, 1964, "* * * its agreement form must be approved or modified by the Commission," and pending submission and approval of such new agreements:

> * * * carriers may accept from shippers and consignees who desire to continue under the new agreement a writing stating merely that the shipper or consignee wishes to be bound by the new agreement and that he will execute a copy of the new agreement form upon one being tendered by the carriers. Shippers and consignees so indicating to the carrier or conference must be accorded contract rates.

On March 27, 1964, the Commission issued its Report in Docket No. 1111, (hereinafter referred to as *The Dual Rate Cases*),[2] and at the same time, approved the contract of the Conference in Docket No. 1007, subject to certain modifications and provided that the

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[2] 8 F.M.C. 16.

attached form of order should become effective April 4, 1964, "* * * to the exclusion of any other terms and provisions." The form of contract attached to the order contained a charter exclusion clause which the Commission, pursuant to the "other provisions" clause (section 14b(9)), required to be included in all dual rate contracts.

Pursuant to the Commission's aforementioned "Interpretation and Statement of Policy" of March 18, 1964, Borax, on April 2, 1964, advised the Conference that it desired to be bound on and after April 4, 1964, by the form of dual rate contract as the same may be amended to conform to the decision and order of the Commission dated March 27, 1964, and requested the continuance of contract rates on its shipments via Conference vessels.[3] The Conference, however, did not accept the contract provisions prescribed by the Commission but rather notified its contract shippers on May 8, 1964, that an appeal of the Commission's decision in Docket No. 1111, ordering it to cancel existing rate agreements, had been filed with the United States Court of Appeals.[4]

From April 4, 1964 until November 16, 1964, Borax shipped via Conference vessels at "contract rates". On November 12, 1964, Borax was informed by the Conference that all Borax shipments on or after November 16, 1964, would be assessed non-contract rates. The Conference predicated its refusal to accord Borax contract rates upon the fact that Borax had breached the terms of its "existing" contract by making shipments of its product on the non-conference vessel MV *Johann Schulte*, which had been chartered to Borax for a period in excess of six months.[5]

After November 16, 1964, Borax was unable to find non-conference vessels (chartered vessels not considered) to carry its shipments over the routes served by the Conference although it had made reasonable attempts to find such vessels. Therefore, Borax continued to ship via the Conference paying the excess amount over contract rates under protest.

American Potash (Ampot) and Stauffer Chemical Company (Stauffer) have, at material times, competed with Borax in the European market. European customers have, at times, shifted from one supplier to the other then came back to the original supplier and have

[3] Borax further agreed to execute a copy of such a dual rate agreement and to consider it effective from April 4, 1964.

[4] The Conference motion for a stay of the operation of the Commission's order in Docket No. 1007 pending appeal was denied.

[5] On October 5, 1964, the Conference had advised Borax that such shipment was considered an evasion of the dual rate contract and demanded liquidated damages in the amount of $17,955.04 which amount was to be paid within 30 days, and if not paid, Borax's right to ship via Conference vessels at contract rates would be suspended.

also purchased a part of their requirements from all three suppliers, there being an effective competition between the suppliers. From April 4, 1964, to the present time, the Conference has carried shipments of borax and borax products for Ampot and Stauffer at the lower contract rates. There is testimony to show that, subsequent to April 4, 1964, Borax increased its European trade but it would probably have lost European customers after November 16, 1964, had it not absorbed the increased cost of transportation.

On January 1, 1967, the Conference put into effect a Commission approved form of dual rate contract meeting all the requirements of section 14b of the Act and criteria established by the Commission in its decision in *The Dual Rate Cases, supra.* The Conference has made this approved form of contract available to its contract shippers, including Ampot and Stauffer, but has refused to make it available to Borax until the "* * * liquidated damages due the Conference for breach of the existing contract by U.S. Borax in 1964 * * *" are paid.[6]

Discussion and Conclusions

Borax, in its complaint, alleges that the dual rate contract between the parties prior to April 4, 1964, became unlawful after that date pursuant to Public Law 87–346; that since the lower "contract" rates remained in the Conference tariff and were not themselves rendered illegal after April 3, 1964, they became the rates lawfully applicable to all shipments of borax and borax products in question; that by reason of it being charged the higher "non-contract" rate while its competitors continued to ship at the lower "contract" rate, Complainant was subjected to the payment of rates for the transportation of borax and borax products which were when exacted and are presently unduly prejudicial in violation of section 16, First, of the Act, unjustly discriminatory in violation of section 17 of the Act, and illegal and excessive in violation of section 14b of the Act. As a result of all the foregoing, Complainant seeks an order requiring the Conference to cease and desist from these alleged violations of the Shipping Act, 1916, and to establish and put in force "contract rates" vis-a-vis Borax, and pay reparation to it in the amount of $90,872.80.

The Conference, on the other hand, seeks relief on alternative propositions. First, the complaint in Docket No. 67–27 alleges that the Conference's contract with Borax was in effect on April 4, 1964, and continued to bind the parties after that date. On the basis of this allegation, the Conference seeks to recover liquidated damages under the terms of

[6] Letter to Borax from Conference Chairman dated December 27, 1966.

that contract in the amount $17,955.04, contending that since the contract did not contain a charter exclusion clause, Borax was in violation thereof in shipping via a chartered vessel. In the alternative, and should it be determined that no lawful contract existed between the parties, the Conference prays for an award of undercharges in the amount of $130,070.19, taking the position that if no lawful dual rate contract was effective between the parties, the lawful rate was the higher non-contract rate, and having carried Borax's shipments from April 4 to November 16, 1964, at the lower contract rate, it should be reimbursed in the amount of the difference between the lawful rates and the rates applied.

In his Initial Decision, the Examiner, after denying the Conference's motion to stay this proceeding pending arbitration, found and concluded that: (1) subsequent to April 3, 1964, no dual rate contract lawful or enforceable under the Shipping Act, 1916, existed between the Conference and Borax; (2) the lower contract rate was the lawfully applicable rate to all of Borax's shipments in question; and (3) the Conference and its member lines, by virtue of their having charged Borax transportation rates higher than those charged Borax's competitors on the same commodities, have violated sections 16, First, and 17 of the Shipping Act, 1916. Borax was awarded reparation *without interest*, for shipments of record on Conference vessels in the amount of $90,872.80:

> * * * and additional amounts to be computed as the difference between the "non-contract" rate charged to and paid by Borax and the lower "contract" rate, on subsequent shipments made by Borax via conference vessels to be determined pursuant to rule 15(b) of the Commission's Rules of Practice and Procedure.[7]

Finally, the Examiner considered the Conference's complaint against Borax and recommended its dismissal on the grounds that (1) it was filed more than two years after the cause of action accrued and barred under section 22 of the Act; (2) the Conference failed to prove that Borax had violated section 16 of the Act, as alleged; and (3) the rate charged and collected by the Conference on shipments made by Borax

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[7] Rule 15(b) of the Commission's Rules of Practice and Procedure provides:

(b) Reparation statements (46 CFR 502.252). When the Commission finds that reparation is due, but that the amount cannot be ascertained upon the record before it, the complainant shall immediately prepare a statement in accordance with the approved reparation statement in Appendix II(4), showing details of the shipments on which reparation is claimed. This statement shall not include any shipments not covered by the findings of the Commission. Complainant shall forward the statement, together with the paid freight bills on the shipments, or true copies thereof, to the carrier or other person who collected the charges for checking and certification as to accuracy. Statements so prepared and certified shall be filed with the Commission for consideration in determining the amount of reparation due. Disputes concerning the accuracy of amounts may be assigned for conference by the Commission, or in its discretion referred for further hearing.

via Conference vessels from April 4, 1964 to November 16, 1964, was the lawfully applicable rate. This proceeding is now before us on exceptions to the Initial Decision.

The Borax's exceptions to the Initial Decision are limited to but one objection; namely, the Examiner's denial of interest on damages. For reasons set forth herein, we are of the opinion that Borax is entitled to interest as part of its reparation.

Respondents take exception to each and every other finding and conclusion of the Examiner. For the most part, however, these exceptions present but a recapitulation of contentions already advanced to the Examiner. Except to the extent modified herein, we agree with the Examiner's findings and conclusions on these issues.[8]

I. *Contractual Relationship Between Borax and the Conference*

Respondents assert that the Examiner committed an error when he concluded that subsequent to April 3, 1964, no contract lawful or enforceable under the Shipping Act, 1916, existed between the parties. Respondents' contention is that section 3 of P.L. 87-346 cannot be interpreted "* * * to render all existing contracts invalid and 'nonexistent' at the stroke of midnight on April 3, 1964." While this is precisely the effect of section 3,[9] Respondents are concerning themselves with an irrelevancy. It was not section 3 itself which rendered Respondents' existing contract unlawful but our cancellation of it which was the inescapable result of our order in Docket No. 1007, 8 FMC 16, 267. That order approved and prescribed a form of a dual rate contract and made that contract the *only* contract that could be employed by the Conference after April 3, 1964. Thus, it was not section 3 which rendered Respondents' old contract unlawful, it was our

[8] Exceptions and proposed findings not specifically discussed in this Report nor reflected in our findings have been considered and found not justified by the facts, or not related to material issues in this proceeding.

[9] Section 3 of Public Law 87-346, as amended by Public Law 88-5, provides that:

Notwithstanding the provisions of sections 14, 14b, and 15, Shipping Act, 1916, as amended by this Act, all existing agreements which are lawful under the Shipping Act, 1916, immediately prior to enactment of this Act, shall remain lawful unless disapproved, cancelled, or modified by the Commission pursuant to the provisions of the Shipping Act, 1916, as amended by this Act: *Provided, however,* that all such existing agreements which are rendered unlawful by the provisions of such Act as hereby amended must be amended to comply with the provisions of such Act as hereby amended, and if such amendments are filed for approval within six months after the enactment of this Act, such agreements so amended shall be lawful for a further period but not beyond April 3, 1964. Within such period the Commission shall approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act.

The effect of section 3 of Public Law 87-346 was merely to give the carriers a period of time in which to amend their contracts and file them with the Commission, and to the Commission a period of time to review these contracts and finally determine the contract terms to be permitted. Contracts which had not been expressly approved within the definite date fixed by section 3 could not be continued.

approval of the new contract.[10] Respondents' approach to the question of just what, if any, contractual relationship existed between the parties here would seem dictated by the precise circumstances giving rise to the present dispute—the shipments by Borax on a chartered vessel. Respondents' only hope of prevailing here is to establish the proposition that if their contract was amended to comply with the first eight numbered requirements of section 14b, they were free to continue using their existing contract—which did not, of course, contain a charter exclusion clause. The successful establishment of this proposition is in turn dependent upon assigning our order of March 27 to some administrative limbo wherein it would languish without any force or effect. For if our order controls the resolution of the question of the contractual relationship, any such relationship between the parties would have as one of its elements the charter exclusion clause. Indeed, Respondents' attack on our inclusion of the clause in their contract would seem to indicate that they are not unaware of this.[11] However, this exercise of respondents, while ingenious, remains irrelevant since in fact and law, no contractual relationship of any kind existed between the parties after April 3, 1964. This absence of any contractual relationship was brought about by respondents themselves when they chose not to accept and use the contract we had approved for them. The path they chose was continued use of the old contract and judicial review of orders in Dockets Nos. 1007 and 1111. It is true that respondents sought a stay of the operation of our order in Docket No. 1007 pending appeal, but this was denied. It is also true that the court in *Pacific Coast European Conference* v. *United States*, 350 F. 2d 197 (9th Cir. 1965), *cert. denied* 382 U.S. 958 (1965), agreed with Respondents that during the course of the proceedings in *The Dual Rate Cases*, we had reverted to a rulemaking proceeding without complying with the requirements of section 4(b) of the Administrative Procedure Act, and remanded the proceeding to us. But that remand concerned only two provisions not material

[10] Section 14b expressly provides that:

* * * Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification * * *

[11] As for this somewhat belated attack, we agree with the Examiner who quite correctly concluded in his Initial Decision, at page 14:

Inasmuch as the parties did not execute a contract with a charter exclusion clause and as Borax could not rely on the Interpretation and Statements of Policy of March 18, 1964, as constituting a contractual relationship with the conference which included such a clause, the issue of the lawfulness of a charter exclusion clause is not material to a determination of whether either party is entitled to reparation. It is noted, however, that the conference has accepted a charter exclusion clause in the dual rate contract which it made effective on January 1, 1967.

herein and significantly, the court itself recognized that the Conference's *existing* forms of dual rate contracts were no longer lawfully in effect when it stated:

> The remedy, however, is not through judicial action to restore to the conferences their own forms of contract, but rather to restore to the conferences their opportunity to participate. 350 F. 2d 203.

Respondents' contention that their rights under their outstanding contracts constituted property rights protected by the 5th Amendment, and that Congress through enactment of section 14b and the Commission by imposing a mandatory agreement have deprived them of the right freely to contract about their business affairs, has been specifically litigated before the court in *Pacific Coast European Conference* v. *United States*, *supra*. The court, in rejecting this argument, advised that "* * * although in contract form what the Congress and the Commission have imposed upon the conferences is simply regulation."

Finally, Respondents argue that:

> * * * the Commission cannot reasonably interpret Section 3 of P.L. 87–346 to render the contracts of this Conference invalid on April 3, 1964, and those of other conferences valid for 180 days.

To Respondents, this is the result of our "Interpretation and Statement of Policy" of March 18, 1964, and July 2, 1964, hereinafter referred to as the Statements, which they contend "* * * arbitrarily extended the validity of existing contracts of some obedient conferences." Respondents, by distorting the clear meaning, purpose and effect of these statements seek to create an issue where none can genuinely exist.

The Statement of March 18, 1964, was promulgated "in recognition of the administrative burden imposed by the necessity of executing new agreement forms following Commission approval and/or modification of the new agreement," and merely allowed carriers and conferences to accord contract rates to shippers who agreed to be bound by the new agreement when it was tendered to them. The second Statement of June 26, 1964, merely allowed carriers and conferences who were according contract rates to shippers pursuant to the prior interpretative ruling to continue doing so until September 1, 1964.

Respondents advance the erroneous proposition that the Statements cancelled their contracts but allowed others to continue in effect. They, of course, had no such impact. The Statements in no way altered the fact that unapproved dual rate contracts would not be effective beyond April 3, 1964. The fact of the matter is that section 3 of P.L. 87–346 set a time limit on the legality of existing contracts. Pursuant to the provisions of section 3, existing contracts expired on April 4, 1964,

unless these contracts were disapproved, cancelled or modified prior to that date.

The Statements did not, as Respondents clearly imply, extend the validity of existing dual rate contracts; rather they merely granted carriers or conferences of carriers the right to accept notices from shippers and consignees that they agree to be bound by the "new agreement" once approved. Only in this manner, could the shipper be accorded contract rates until such time as the carriers or conferences executed such new agreement in conformity with the Commission's decision in *The Dual Rate Cases.* As Hearing Counsel have so succinctly stated:

> The Commission was not bound to issue these interpretations. It was done for the benefit of carriers to ease the administrative burden of executing new contract forms. No carrier or conference was forced to follow the suggested procedure.

Respondents' were equally free to adopt the procedures proposed and they have simply misconceived the effect of the Statements on them. There is no merit in their contentions.

II. *The motion to stay the proceedings pending arbitration*

Before we touch upon other aspects of this proceeding, it would be well at this juncture to consider the Examiner's denial of Respondents' motion to stay the proceedings pending arbitration.[12] In denying the Conference's motion, the Examiner stated:

> The *existing* contract between the parties provided for arbitration and it having been found that such contract is unlawful and not enforceable in a proceeding brought under the provisions of the Act, it is not determinative of the motion unless, as the conference contends, "the validity of the contract itself is a proper question for arbitration" and that the question should be submitted to arbitrators for decision prior to the Commission's decision in this proceeding. A decision by a board of arbitration would not be conclusive of the question of the validity of the *existing* contract. In *Swift & Company* v. *Federal Maritime Commission*, 306 F. 2d 277, 282 (1962), the Court held:
>
> No private arbitration could negate the Board's statutory power to determine the validity of the dual rate agreement.
>
> A stay of these proceedings pending submission of the question of the validity of the *existing* contract would serve no purpose except that of delay.

Respondents, in their exceptions, reargue the same contentions already advanced before the Examiner and rejected by him. We think the Examiner quite properly disposed of these issues, and we concur

[12] The Examiner denied the Respondents' earlier "Motion to Dismiss or Stay", made prior to the Prehearing Conference, without prejudice to Respondents' renewing it after all the evidence was in.

in his conclusions. His determination that Respondents cannot rely on the arbitration clause of an unlawful and unenforceable contract is fully supported by the authorities. In *Goldall Trading & Ship. Co. Etc.* v. *Caribbean Ship. Co.*, 56 F. Supp. 31, 32 (S.D. N.Y. 1944), the court held that before it could compel arbitration under a contract, it must:

> * * * first determine whether the contract in which the arbitration agreement is contained is valid. The reason for this is clear; if the contract is void, then the arbitration clause falls along with the remainder of the contract. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 2 Cir., 126 F. 2d 978.[13]

III. *The legally applicable rate subsequent to April 3, 1964*

A dual rate system, approved by the Commission under section 14b of the Shipping Act, 1916, is somewhat unique in transportation law in that it permits a carrier or group of carriers to publish and file two different but lawful rates applicable to the same transportation service. Absent a valid dual rate contract, however, there exists "* * * no lawful authority for a tariff provision, the effect of which is to establish two rates for the same transportation service * * *." *C. H. Algert Co.* v. *D. & R. G. R. R. Co.*, 20 I.C.C. 93, 94 (1911). It is firmly established to the contrary that generally "* * * there may be but *one* lawful rate for a particular service." (Emphasis added). *Marshfield Milling Co. Inc.*, v. *Chicago & N. W. Ry. Co.*, 216 I.C.C. 236, 239 (1936); Cf. *Boise Commercial Club* v. *Adams Express Co.*, 17 I.C.C. 115 (1909); *C. H. Algert Co.* v. *D. & R. G. R. R. Co.*, *supra.*

At all times relevant to this proceeding, the Conference has published and filed with the Commission two rates applicable to shipments of borax and borax products, a "non-contract" and a "contract" rate.[14] We have heretofore determined, however, that between April 4, 1964 and January 1, 1967, the Conference had no valid and enforceable dual rate system. Accordingly, consistent with established principles, there could be but one lawfully applicable rate to any one particular commodity; it therefore now becomes necessary for us to determine which of the two rates appearing in the Conference's tariff was the lawfully applicable rate to shipments of borax and borax products made between April 4, 1964 and January 1, 1967.[15] The resolution of this

[13] Likewise, it has also been held that when part of a contract is illegal and in violation of a statute, the entire contract is illegal. *Regan* v. *Lenkowsky*, 137 F. Supp. 133 (D. N.Y. 1956), and that parties cannot agree in an invalid contract to arbitrate the validity of the contract. *Wrap-Vertiser Corp.* v. *Plotnick*, 143 N.E. 2d 366.

[14] At all material times, the "contract" rate has always been 15% below the "non-contract" rate.

[15] Although the effect of section 3 of P.L. 87-346, as amended by P.L. 88-5, was to render unlawful the granting of lower "contract" rates pursuant to *existing* dual rate contracts after April 3, 1964, without prior Commission approval, the lower rates themselves were not rendered *ipso facto* unlawful and they remained on file with the Commission.

question is an essential element not only of Borax's complaint but also, as shall be developed later, of the Conference's claim against Borax, as well.

Borax's claim for reparation is dependent upon the conclusion that of the two rates contained in the Conference's tariff, the lower or "contract" rate was the only lawfully applicable rate to its shipments during the period in question. The Conference, on the other hand, asserts that the legally applicable rate was the higher or "non-contract" rate and claims reparation for the period during which Borax was granted the "contract" rate.

The Examiner, applying the legal principle advanced in *United States* v. *Gulf Ref. Co.*, 268 U.S. 542, 546 (1925) that "* * * where two * * * tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rates" concluded that the lower rate was the legally applicable rate on the shipments of borax and borax products in question. Respondents except to the Examiner's conclusion on the grounds that there can be "* * * no ambiguity in the meaning of tariff terms 'contract' and 'non-contract' rates" and where "* * * there is no ambiguity, there is no need for construction." They submit, therefore, that the doctrine relied on by the Examiner is inapplicable under the present circumstances.

The conference's position is clearly dependent upon a valid dual rate contract in effect at the time of Borax's shipments. The terms "contract" and "non-contract" rates could only have clear meaning when considered within the context of a viable dual rate system. In the absence of a valid dual rate contract, this distinction ceased to exist and there was immediately raised the question of which of the two rates should apply—in a word, an ambiguity was created.[16] Accordingly, we think it clear that the Examiner correctly disposed of this contention.

While we agree with the Examiner, there is yet another and perhaps equally important reason for rejecting the Conference's contentions as to the lawfully applicable rate. The exaction of the higher non-contract rate from Borax was predicated upon an asserted breach of a contract which was unlawful. Thus, were we to accept the higher non-contract rate as the applicable rate here, we would, in every practical effect, be allowing the Conference to enforce an unlawful contract. Moreover, acceptance of the Conference argument would result in

[16] Certainly, a shipper could not be required to assume, as Respondents have intimated, that the "non-contract" rate, being the higher of the two rates, formed the basis for the lower "contract" rate and accordingly was the applicable rate under the circumstances. Indeed, quite to the contrary, it has been our experience that in virtually every instance where a carrier or conference inaugurates a dual rate system, it merely establishes its existing rate as the contract rate and files a new "non-contract" rate 15 percent higher.

our sanctioning unjust discrimination in violation of the Shipping Act since Borax's competitors were granted the lower "contract" rate for the same transportation service. We will not construe the statute to produce such an anomalous result.

Respondents, in their Opening Brief, even challenged "* * * the Commission's authority to determine unilaterally, which transportation rate or rates on borax * * *" were the lawfully applicable rate or rates.[17] The Examiner, recognizing this argument for what it was, summarily disposed of it as follows:

> The question was not fully briefed and will not be discussed in detail. It is sufficient to repeat that the Commission's authority to determine the right to reparation emanates from the Act. In enacting the Shipping Act, 1916, Congress exercised its constitutional authority to regulate the foreign commerce of the United States. (See *Board of Trustees* v. *U.S.*, 289 U.S. 48 (1933)). Congress has placed with the Commission the duty and authority to administer the Act which, among other prohibitions. condemns discriminatory practices in the foreign commerce of the United States. The Commission will not recognize an indirect challenge to this duty and authority and must determine the matter of reparation in accordance with the provisions of the Act.

Since we are in full agreement with the Examiner's rulings on this point, it is unnecessary to discuss them in any further detail. We should just like to point out that the Examiner's discussion herein is wholly consistent with the opinion of the court in *Compagnie Generale Trans-Atlantique* v. *American Tobacco Co.*, 31 F. 2d 663, 665 (1929), *cert. den.* 280 U.S. 555 (1929), wherein it was stated that "A steamship company engaged in foreign commerce, with ships entering the United States ports in such commerce, is within the obligation of the Shipping Act, * * *."

IV. *Violations of the Shipping Act, 1916*

Section 14b[18]—The record in this proceeding establishes violations by Respondents of two separate provisions of section 14b. In the first place, the Conference's continued operations under an unapproved dual rate contract between April 4, 1964 and January 1, 1967, was clearly violative of that portion of section 14b, which specifically provides that "* * * any contract * * * not permitted by the Commission shall be unlawful * * *" and that "* * * *before permission is*

[17] We note that Respondents, in effect, are challenging the Commission's authority to decide an issue which they themselves have raised in their complaint against Borax.

[18] The Examiner did not make any findings with regards to alleged violations of section 14b. However, an agency, in making a final decision upon review of a hearing officer's initial decision, is not limited to those sections of the Act upon which the Examiner chose to base his decision or which, for that matter, the Complainant specifically and formally referred to in the complaint. "But the allegations of the complaint in matters of fact were sufficient to authorize the Commission to consider the case under . . . [an other] provision as well. . . ." *Chicago, R. I. & P. Ry.* v. *U. S.*, 274 U.S. 29, 37 (1927).

granted or after permission is withdrawn, *it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract* * * *." (Emphasis added).

Another condition that attaches to a dual rate contract is that such contract be "* * * available to all shippers and consignees on equal terms and conditions * * *." Yet, since January 1, 1967, the effective date of the Conference's approved dual rate contract, Respondents have steadfastly denied Borax the use of such a contract. The reason given by the Conference for its continued refusal to accord Borax contract rates is that Borax has not paid the liquidated damages allegedly due under the terms of the existing contract. Since the existing contract, however, became unlawful on April 4, 1964, it obviously is not determinative of the rights of the parties after that date. For, as the court declared in *Hartman* v. *Lubar*, 133 F. 2d 44, 45 (1942), "The general rule is that an illegal contract, made in violation of a statutory prohibition designed for * * * regulatory purposes, is void and confers no right upon the wrongdoer." Borax was not required to comply with an unlawful contract in order to obtain contract rates.[19] By being a shipper in the trade served by the Conference and willing to execute a dual rate contract giving "* * * all or any fixed portion of * * * [its] patronage * * *" to the Conference, Borax has fulfilled all the requisite legal conditions imposed on a shipper seeking contract rates. Therefore, Respondents' refusal to execute a contract with Borax after January 1, 1967, was clearly contrary to the "equal terms and conditions" provision of section 14b.

Sections 16, First and 17—The Examiner's discussion in this regard is as follows:

> Prior to the enactment of section 14b, dual rate arrangements were challenged as discriminatory practices as well as anticompetitive devices.[20] * * * Section 14b, regardless of the provisions of the Act prohibiting discrimination and prejudice, permits the charging of different rates for similar services but only if a dual rate contract is utilized which, together with provisions made mandatory therein, includes provisions permitted or required by the Commission. The conference applied different rates for similar services, utilizing a contract not permitted by the Commission. Consequently, the conference is not exempt from the provisions of the Act prohibiting discrimination, prejudice, or disadvantage. The determination of whether the conference violated sections 16, First and 17 of the Act, depends upon whether the record supports a finding that the discrimination, prejudice, and disadvantage to Borax in being required to pay higher rates than its competitors for similar services, was undue, unjust or

[19] The rule is well established that a shipper cannot be required to execute or be a party to an unlawful contract in order to obtain contract rates. *Swift & Company* v. *Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir. 1962).

[20] *Swayne & Hoyt, Ltd.* v. *U.S.*, 300 U.S. 297 (1937), and cases cited in *The Dual Rate Cases, supra*, at pages 22 and 23.

unreasonable. *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, *supra.*

The Examiner, after finding that the difference in rates assessed Borax vis-a-vis its competitors was unsupported in the record, concluded that the Conference's practice amounted to:

> * * * a discrimination against Borax and a preference to its competitors based upon the agreement of the competitors to abide by an unlawful contract and the refusal of Borax to do so. In a proceeding to be resolved under the terms of the Act, preference and discrimination based upon a contract unlawful under the Act is undue, unjust and unreasonable in violation of sections 16, First, and 17.

We concur fully in the Examiner's discussion. Although the inexorable logic of the Examiner's position most probably needs no authority to sustain it, we should like to direct attention to the similarity between the situation here and the one that existed in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41 (1922). In that case, the complainants, as Borax did here, charged that the exaction of higher rates from them than from those shippers who agreed to give the Respondent their exclusive patronage was not only unduly and unreasonably prejudicial but also unjustly discriminatory. Our predecessor there concluded that the use of a dual rate contract was unlawful and:

> * * * that the exaction of higher rates from the complainants than from other shippers for like service under the circumstances involved * * * subjected the complainants to undue and unreasonable prejudice and disadvantage and constituted unjust discrimination between shippers, in violation of sections 16 and 17 of the Act. [1 U.S.S.B. 48].

Although the *Eden* case was decided long before the advent of section 14b to the Shipping Act, 1916, which specifically authorized the use of dual rate contracts, nevertheless, the principle expressed therein, is still controlling; shippers receiving similar services should be charged the same rates and, absent a lawful dual rate contract, a differential in rates is violative of sections 16 and 17 of the Act.

V. *Reparation*

The duty of the Commission in regard to awarding reparation or damages is embraced in section 22 of the Act, which provides, in pertinent part, that the Commission "* * * may direct the payment, on or before a day named, of full reparation to complainant for the injury caused by [a] * * * violation [of the Act]." As a result of the aforementioned violations of the Act and "by way of reparation for the unlawful charges hereinabove described," Borax requests the Commission to order Respondents to pay to it "* * * the sum of $90,872.80, together with such additional amounts as complainant may be dam-

aged by Respondents continuing to assess illegal and excessive rates * * *." Based on his finding that the charges assessed Borax were unduly prejudicial and unjustly discriminatory in violation of sections 16 and 17, the Examiner awarded reparation to Borax in exactly the amount claimed, without interest. Respondents now urge us to set aside the Examiner's award of reparation, arguing that Borax did not suffer any injury compensable by reparation under section 22 of the Act. Basically, their position is that since the Examiner grounded his award of reparation on violations of sections 16 and 17 of the Act:

> The burden of proof was upon U.S. Borax to prove actual damage and the precise amount. Borax has failed to prove any damages. All that Borax proved was that its shipments were assessed non-contract rates while others were assessed contract rates * * *.

Without deciding the validity of Respondents' claim that the instant record will not support an award of reparation based on a finding of discrimination, we find that what Borax admittedly did demonstrate—that "* * * its shipments were assessed non-contract rates while others were assessed contract rates * * *" is sufficient to support an award of reparation based on the established violations of section 14b.

The record is abundantly clear that since November 16, 1964, respondents have been assessing and collecting from Complainant, freight charges for shipments of borax and borax products which have been, and presently are in excess of those to which they were legally entitled. Between November 16, 1964 and January 1, 1967, pursuant to an unlawful dual rate contract, the Conference exacted from Borax rates some 15% higher than the legally applicable rate. During this period of time, Respondents admittedly were charging Borax the so-called "non-contract" rate, whereas, as we have heretofore determined, the lower "contract" rate was the only rate that could lawfully be applied to all shipments of borax and borax products in the trade. Furthermore, subsequent to January 1, 1967, and up to the present, as a result of it being unlawfully denied the use of a lawful dual rate contract, Borax has been required to pay transporation rates 15% higher than it would have paid, had not the approved contract been unlawfully withheld. It is quite obvious that both before and after January 1, 1967, the rates exacted from Borax were excessive in and of themselves, independent of the rates that were assessed other shippers in the trade. And as Justice Cardozo, speaking for the majority in *I.C.C.* v. *Unted States*, 289 U.S. 385, 390 (1933), declared in this regard:

> * * * When the rate exacted of a shipper is excessive * * * in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the

overcharge without other evidence of loss. "The carrier ought not to be allowed to retain his illegal profit and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum." *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, *supra.* [245 US 531, 534 (1918)].

The mere collection of the excessive rates, without more, constituted violations of section 14b of the Act. As a consequence thereof, Borax sustained, in each instance, a loss measured by the differential between two rates, the rate actually applied and the rate that should have been applied. We have been provided no valid reason why, under the circumstances, the measure of damages for the purpose of awarding reparation should not also be based on the difference between the two rates.

Respondents, pointing out the factual similarity between the present case and *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, *supra*, cite that decision as support for its proposition that "* * * a mere 'pecuniary loss to Borax' cannot be treated as 'damages' under Section 22 * * *." They refer specifically to that portion of our predecessors' opinion where it was stated:

We think it is clear that proof of unlawful discrimination within the meaning of the act, by showing the charging of different rates from shippers receiving the same service, does not, as a matter of course, establish the fact of injury and the amount of damage to which the complainants may be entitled by way of reparation.

The inapplicability of the cited passage is evident when it is realized that our award of reparation herein is *not* based on any "proof of unlawful discrimination within the meaning of the Act," but rather on a showing that Borax was assessed and paid an excessive rate.

The doctrine pronounced by the U.S. Shipping Board in the *Eden* case and relied on by the Respondents herein had its genesis in *Penna. R. R. Co.* v. *International Coal Co.*, 230 U.S. 184 (1913). There, the court explained that in cases arising out of unlawful discrimination, the "right to recover" reparation for injury incurred was "* * * limited to the pecuniary loss suffered and proved * * *." The opinion of the court, however, must not be extended to cover situations not intended.[21] In *ICC* v. *United States*, *supra*, the court was careful to limit the scope of its application to situations where "* * * discrimination and that alone is the gist of the offense." Although discrimination is a byproduct of the implementation of an unlawful dual rate contract or

[21] The Supreme Court itself realized the flexibility of the present rule on damages when it stated in *ICC* v. *United States*, 289 U.S. 385 (1933):

One has only to read the opinions in *Pennsylvania R. Co.* v. *International Coal Co., supra*, and the cases that have followed it, to see how much the rule of damages is beset by delicate distinctions, how pre-eminently in applying it there is a call upon the judge to think and act judicially, to use judgment and discretion * * *

the denial of a lawful contract, nevertheless "the gist of the offense" here is clearly analogous to an overcharge—a charge over that which should have lawfully applied. It follows, therefore, that any reparation granted should be based on principles applicable to overcharges.

Respondent also make the argument that matters of equity must be considered and that equities here involved will not permit an award of reparation to Borax. We are of the opinion that the Examiner correctly disposed of this contention when he stated:

> * * * no equitable considerations appear which would warrant a denial of reparation. The fact that the conference carried Borax's shipments from April 4 to November 16, 1964, at the same rates applied to other shipments of borax and borax products would not warrant reduction or denial of reparation for subsequent discrimination and prejudice. The record will not support a finding that Borax accepted the benefits of the *existing* contract and should be required to accept the obligations imposed therein. Borax accepted the contract rates on the assumption that compliance with the Commission's Interpretations and Statements of Policy of March 18, 1964, entitled it to those rates, not because of the *existing* contract. It would not be equitable to credit the conference, thus charge Borax, any portion of the charges made at contract rates from April 4 to November 16, 1964, as during that period other shippers received the contract rates for similar services and any credit or charge would, in effect, be permitting discrimination. Moreover, as hereinafter discussed, Borax paid only the lawful rate on such shipments. As there was no lawful contract which prevented Borax from shipping via a chartered vessel, the fact that it did so was not an evasion of an obligation.

On the basis of the foregoing, we find and conclude, as the Examiner did, though not necessarily for the same reasons, that Borax is entitled to reparation from the Conference and its member lines,[22] in the amount of $90,872.80, and such additional amounts, on subsequent shipments, to be computed on the basis of the rate actually collected and the rate which we have determined herein to have been lawfully applicable. These additional amounts shall be determined pursuant to Rule 15(b) of the Commission's Rules of Practice and Procedure.[23]

Interest on the charges unlawfully exacted by the Conference was denied by the Examiner on the grounds that Borax's complaint did "* * * not specifically pray for interest * * *." In its only exception to the Initial Decision, Complainant characterizes this failure to award interest as "error as a matter of law" and urges the Commission to reverse the Examiner on this point. We find considerable merit in Borax's contentions.

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[22] Reparation awarded to be paid by the individual members as set forth in Exhibit B to the complaint and in the statements filed pursuant to Rule 15(b) of the Commission's Rules.

[23] See footnote 7, page 457.

While Borax did not expressly pray for interest in its complaint, it certainly cannot be said to have *waived* the collection thereof. A shipper, who is injured as a result of the assessment of an unlawful rate, may *specifically* elect to waive his right to interest by agreement or stipulation [24] or he may *effectively* waive interest by failure to make a timely request for it.[25] Manifestly, Borax did not enter into any agreement with Respondents to waive the interest on any amount of reparation that might be awarded. Nor, can it be seriously argued that Complainant's appeal for interest was unseasonable. Although Borax's complaint admittedly did not specifically request that interest be awarded, it did, as Complainant points out, "* * * pray for damages and also for 'Such other sum as the Commission may determine to be proper as an award of reparation'."

Although, absent a waiver, the allowance of interest remains a matter within the Commission's discretion [26] and may be denied where principles of equity and justice demand, the generally accepted practice governing the allowance of interest on liquidated sums, as expressed by the court in *L. & N.R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 239 (1925), is:

> . . . to recognize as an element of the damages loss of interest on charges unlawfully exacted; and, in ordering reparation . . . [to] include as a part of the damages such interest from the date of the payment.[27]

The rationale behind the court's opinion is that when a shipper has been charged an unlawful rate on his shipments, he is entitled to recover the overcharge as of the date it was collected and should be allowed interest from that date, not as interest strictly, but to give the shipper, on the date of his recovery, an amount equivalent to the amount of his damages at the time suffered, lapse of time being an element of damages. In this connection, see: *Gimisel Bros.* v. *Barrett*, 218 Fed. 880 (1914).

In view of all the foregoing, the Commission's award of reparation in this proceeding for the exaction of inapplicable rates will carry interest at the rate of six percent from the date they were wrongly collected by Respondents.[28]

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[24] See: *Rickert, Wessanen & Laan, Inc.* v. *Illinois Central R. Co.*, 306 I.C.C. 281 (1959); *Bartlett* v. *Missouri Pac. R. Co.*, 310 I.C.C. 755 (1960).

[25] *Clinton* v. *Joshua Hendy Corp.*, 264 F. 2d 329 (1959).

[26] *Louisville & N.R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 295 Fed. 53 (CA 5th, 1923), *George Allison & Co.* v. *Interstate Commerce Com'n.*, 107 F. 2d 180 (D.C. Cir. 1939).

[27] Or as it was explained in the court's earlier opinion in *Arkadelphia Co.* v. *St. Louis S. W. Ry Co.*, 249 U.S. 134, 147 (1919):

The damage was complete when the overcharges were made, and as they were wrongfully made and without consent of the shippers, interest ran from that date on general principles.

[28] It has been and is the Commission's general practice to allow interest at the rate of six percent in orders for payment of reparation. *Isbrandtsen Co., Inc.* v. *States Marine*, 6 F.M.B. 422 (1961).

VI. *The Conference's cross-complaint against Borax*

In Docket No. 67-27, the Conference seeks to recover from Borax liquidated damages alleged to be due under the terms of the existing dual rate contract for a shipment of borax made on the non-Conference vessel MV *Johann Schulte*, on October 4, 1964. In the alternative, and "* * * in the event the Commission determines that * * * there was no contract in force and effect after April 3, 1964 * * *," the Conference claims reparation from Borax for alleged violations of sections 16 and 18(b). The basis of Respondents' claim is that if the Commission finds that the existing contract became unlawful after April 3, 1964, Borax was thereafter not entitled to ship via Conference vessels at the contract rates, and having been charged the contract rates from April 4 to November 16, 1964, should be required to pay to the Conference the amount of the undercharges.

The Commission's jurisdiction to award reparation is set forth in section 22 of the Shipping Act, 1916, which provides, *inter alia*, that the Commission:

> * * * if the complaint is filed *within two years after the cause of action accrued*, may direct the payment, on or before the day named, of full reparation to the complainant for the injury caused by * * * [any] violation [of the Act].

Manifestly, any cause of action that the Conference might have against Borax based on the facts in this case would have had to accrue on or before November 16, 1964. Since the complaint in Docket No. 67-27 was not filed until April 10, 1967, some two and a half years after any cause of action could have accrued, it is obvious that Respondents' claim is barred by the express provisions of section 22. See *Aleutian Homes, Inc.* v. *Coastwise Line*, 5 F.M.B. 602, 612 (1959).

Respondents, however, in an attempt to confer jurisdiction on the Commission to hear their cross-complaint, argue that the "* * * applicable statute of limitations is not section 22 of the Shipping Act but the proper state statute of limitations covering suits on contract." According to Respondents, the "proper statute of limitations" is the California statute which allows four years after the cause of action accrues. The answer to this contention is, of course, obvious. As we stated earlier, the Commission's authority to award damages for a violation of the Shipping Act, 1916, emanates *solely* from that Act and under the plain terms of the Act, we are without authority to award reparation or damages when a complaint is filed more than two years after the cause of action accrued. It is well settled that if Congress explicitly puts a limit upon time for enforcing a right which it creates, the congressional statute of limitations is definitive. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). As the Supreme Court so succinctly ex-

plained in *Telegraphers* v. *Ry. Express Agency*, 321 U.S. 343, 348–349 (1943):

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Even were not their claim so barred by section 22 of the Act, Respondents would not fare any better on the merits of the action. With regards to the alleged breach of contract by Borax which occurred subsequent to April 3, 1964, the Examiner concluded that:

> As it has been determined that the *existing* contract became unlawful after April 3, 1964, and that the Commission will not consider the provisions of a contract unlawful under the Act as determinative of rights of the parties in a proceeding concerning the Commission's authority to award damages, further discussion of this claim is deemed unnecessary.

Respondents' alternative arguments, based on alleged section 16 and section 18(b) violations, were dismissed by the Examiner as follows:

> Section 18(b) of the Act is addressed to common carriers by water in foreign commerce and the conference has offered no enlightenment on the question of how a shipper could violate this section. Nor has the conference made clear in what manner the shipper, Borax, has violated section 16 of the Act, which insofar as it applies to shippers, provides:
>
> That it shall be unlawful for any shipper, consignor * * * or other person * * * knowingly and wilfully, [sic] directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.
>
> Shipments by Borax from April 4 to November 16, 1964, were carried by conference vessels at rates above found to be the lawfully applicable rates, but aside from that fact, to hold that Borax obtained the lower contract rates by an unfair or unjust device would be a strained interpretation of the facts of record. Borax complied with the Commission's Interpretations and Statements of Policy of March 18, 1964, and advised the conference in writing that it desired to continue to ship at contract rates and would execute a contract in the form approved by the Commission. To be considered is the fact that the conference advised Borax that contract rates would be accorded only under the terms of the *existing* contract, however, Borax interpreted the Interpretations and Statements of Policy to mean that the conference "must" continue to accord contract rates to a shipper complying with the Rule. Although the interpretation was incorrect, it was not without foundation, and Borax acted in good faith. There is no basis for a finding that Borax knowingly and wilfully [sic] obtained the lower contract rates by any unjust or unfair device or means within the purview of the statute. It is found and concluded that Borax was not in violation of the Act.

Since we are in full agreement with the Examiner that, apart from the jurisdictional limitation, Respondents' complaint is wholly without merit and must be dismissed, we adopt as our own those portions of the Initial Decision referred to above.[29]

ULTIMATE CONCLUSIONS

On the basis of all the foregoing, we find and conclude that:

1. No lawful or enforceable contract under the provisions of the Shipping Act, 1916, existed between the parties subsequent to April 4, 1964.

2. The lower of the two rates on file for the transportation of borax and borax products was the legally applicable rate to all shipments made by Borax between April 4, 1964 and January 1, 1967.

3. Between November 16, 1964 and January 1, 1967, the Conference, and its member lines, violated sections 14b, 16 First, and 17 of the Act, by charging Borax a higher rate than charged other shippers of the same product for similar services although it had no valid dual rate contract in effect in the trade.

4. The Conference, and its member lines violated section 14b of the Act by denying Borax the use of its approved dual rate contract after January 1, 1967.

5. Reparation, to be paid by the individual members of the Conference, is awarded to Borax in the amount of $90,872.80, and such additional amounts to be computed on the basis of the difference between the rate actually assessed and the rate herein determined to be legally applicable, on subsequent shipments made by Borax on Conference vessels. This reparation award will carry interest at the rate of six percent.

6. The Conference's cross-complaint against Borax in Docket No. 67–27 is dismissed because not filed within two years after any cause of action could have accrued and for failure to state a claim for which relief can be granted.

7. The Conference's motion to stay these proceedings pending arbitration was properly dismissed.

An appropriate order will be entered.

(SEAL) (Signed) THOMAS LISI,
Secretary.

[29] While it is our opinion that the Examiner correctly disposed of those issues relating to the alleged violations by Borax of section 16 and section 18(b) of the Act, we take no position with regards to Hearing Counsel's suggestion that, even had such violations been found, the Commission, under the provisions of section 22 of the Act, would be without authority to grant reparation to the Conference. In view of the fact that this issue was not briefed by the other parties to the present proceeding and, further, that our decision here rests on other independent grounds, we need not at this time consider whether section 22 does or does not authorize the Commission to award damages or reparation to a carrier against a shipper.

FEDERAL MARITIME COMMISSION

No. 66–63

UNITED STATES BORAX & CHEMICAL CORPORATION

v.

PACIFIC COAST EUROPEAN CONFERENCE ET AL.

No. 67–27

PACIFIC COAST EUROPEAN CONFERENCE ET AL.

v.

UNITED STATES BORAX & CHEMICAL CORPORATION

ORDER

Full investigation of the matters and things involved in these consolidated proceedings has been had, and the Commission has this date made and entered its report stating its findings and conclusions which report is hereby referred to and made a part hereof. The Commission found in said report, *inter alia:*

1. That the Pacific Coast European Conference (Conference) and its member lines violated section 14b, section 16 First, and section 17 of the Shipping Act, 1916, in charging United States Borax and Chemical Corporation (Borax) a higher rate than charged to the shippers of borax and borax products for similar services, between April 4, 1964 and January 1, 1967, without the benefit of a valid dual rate contract;
2. That the Conference and its member lines, in denying Borax the use of a dual rate contract after January 1, 1967, violated section 14b of the Shipping Act, 1916;
3. That, as a result of these violations, Borax is entitled to reparation with interest from the member lines of the Conference;
4. That the Conference's complaint against Borax is time-barred under section 22 of the Shipping Act, 1916.

Therefore, It is ordered,

1. That the Conference and its member lines hereafter cease and desist from their refusal to grant Borax the use of their approved dual rate contract;

2. That the member lines of the Conference pay to Borax reparation, with interest at six percent, in the amount of $90,872.80 and such additional amounts on subsequent shipments to be computed on the basis of the rate actually collected and the rate which we have determined in our report in these proceedings to have been lawfully applicable;

3. That such additional amounts shall be determined pursuant to Rule 15(b) of the Commission's Rules of Practice and Procedure;

4. That the Conference's complaint in Docket No. 67-27 be, and hereby is, dismissed.

By the Commission.

(SEAL) (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 68–8

DISPOSITION OF CONTAINER MARINE LINES THROUGH INTERMODAL CONTAINER FREIGHT TARIFFS NOS. 1 AND 2, FMC NOS. 10 AND 11

Decided April 18, 1968

Tariffs of Container Marine Lines (CML) providing for a through transportation service comprised of port-to-port transportation between United States and United Kingdom and inland transportation in United Kingdom acceptable for filing under section 18(b), Shipping Act, 1916, if they: (1) clearly indicate ports or ranges of ports between which water transportation will be performed; (2) break out the charge for such water portion of the transportation; (3) identify inland points to and from which service is provided; and (4) include a specimen bill of lading all the articles of which provide for common carrier liability for the through movement consistent with the holding out in the remainder of the filing.

Proposed filing presently defective with respect to (4) and will be accepted when specimen bill of lading providing for common carrier liability throughout which in turn is consistent with holding out in remainder of filing is received.

Alleged conflict between port-to-port portion of rates and port-to-port rates in tariffs of conferences of which CML is a member and dual-rate contracts of the conferences nonexistent inasmuch as intermodal service provided by CML is not within scope of conference agreements or approved conference dual-rate contracts.

Richard W. Kurrus and *James M. Jacobi* for respondent Container Marine Lines.

Burton H. White and *Elliot B. Nixon* for interveners Anchor Line, Belgian Line, Bristol City Line, Cunard Steamship Co., Furness Warren Lines, Manchester Lines, Sea-Land Service, Inc., United States Lines, Inc. (member lines of North Atlantic United Kingdom Freight Conference other than Container Marine Lines).

Ronald A. Capone, *Robert Henri Binder* and *Stuart S. Dye*, Kirlin, Campbell & Keating for member lines of North Atlantic Westbound Freight Association, other than Container Marine Lines and Atlantic Container Line, interveners.

George F. Galland, *Amy Scupi* and *Robert N. Levin*, Galland, Kharasch, Calkins & Lippman for intervener Atlantic Container Line, Ltd.

L. A. Parish and *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corp., intervener.

Martin A. Weissert and *Terry G. Fewell* for North American Van Lines, Inc., intervener.

Gregory M. Rebman for United States Van Lines, Inc., intervener.

Homer S. Carpenter and *Richard R. Sigmon* for Household Goods Carriers' Bureau, intervener.

Herbert B. Ruskin for United Cargo Corp., intervener.

Clarence William Vandegrift for Universal Carloading & Distributing Co., Inc., intervener.

Alan F. Wohlstetter, Denning & Wohlstetter, for Household Goods Forwarders Association of America, Inc., intervener.

Blair P. Wakefield for Virginia State Ports Authority, intervener.

Philip G. Kraemer for Maryland Port Authority, intervener.

Curtis L. Wagner, Jr., and *Carlton E. Crotty* for the Department of Defense, intervener.

Peter S. Craig and *Elroy H. Wolff* for Department of Transportation, intervener.

Donald J. Brunner and *Norman D. Kline*, Hearing Counsel.

REPORT

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

This proceeding was instituted by the Commission by order served February 1, 1968, to determine whether tariffs filed by Container Marine Lines (CML) naming rates for transportation from and to interior points, including port-to-port transportation, should be accepted or rejected by the Commission. Because the question of the tariff filing did not present any disputed issues of fact which necessitated an evidentiary hearing and a prompt determination was required, the proceeding was limited to the submission of affidavits, memoranda, and oral argument. Numerous parties intervened and submitted documents including the member lines of the two conferences of which CML is a member (North Atlantic Westbound Freight Association (NAWFA) and the North Atlantic United Kingdom Freight Conference (NAUKFC)), two State port authorities, the Department of Defense and vessel operating and nonvessel

operating common carriers by water (NVO's). We heard oral argument on April 2, 1968.

The CML Through Intermodal Contaner Freight Tariffs

CML is a division of American Export Isbrandtsen Lines, Inc., a common carrier by water operating in the foreign commerce of the United States. On January 3, 1968, CML filed with the Commission a publication designated "Through Intermodal Container Freight Tariff No. 1," which established "Container Rates and Conditions from Points in the United Kingdom via the Port of Felixstowe to Points in the United States via the Port of New York." A second publication filed January 8, 1968, was designated "Through Intermodal Container Freight Tariff No. 2," and established similar rates in the opposite direction. Each of these tariffs originally scheduled to become effective February 7 and February 15, respectively, was postponed for 30 days. Both tariffs would have established single-factor intermodal container rates between the inland points as mentioned. Each provided for a cargo n.o.s. rate of $500 per ton on 2,240 pounds or 40 cubic feet, applicable to door-to-door movement if the container is loaded by the shipper at his inland point of origin and unloaded by the consignee at his inland point of destination, and a $250 cargo n.o.s. rate applicable to westbound door-to-terminal and eastbound terminal-to-door shipments. These $250 rates, unlike the $500 rates, did not include inland transportation in the United States.

CML withdrew these publications and replaced them with revised filings bearing F.M.C. Nos. 10 and 11 on February 23, 1968, which are now scheduled to become effective May 6, 1968. A revised bill of lading has also been submitted. These revised filings provide for single-factor intermodal container rates between the ports in the U.S. North Atlantic Eastport, Maine, to Hampton Roads Range and points in the United Kingdom via the Port of Felixstowe. Inland transportation in the United Kingdom between the Felixstowe terminal, on the one hand, and point of origin, where containers are loaded by the shippers, and point of destination, where containers are unloaded by consignees, on the other hand, is included in all rates. The rates do not include any inland transportation in the United States. With respect to the treatment of cargo within the United States, shippers and consignees have an option. Two rates are to be listed for each commodity in the tariffs, one called "door-to-pier," which applies when cargo is received by the carrier at the U.S. port terminal and the carrier loads the cargo into or unloads the cargo from its containers, and the other called "door-to-door," which applies when cargo is tendered to the carrier

at its U.S. port terminal in carrier's containers or made available to consignee at the carrier's port terminal for unloading by consignee at inland point of destination. In the case of the so-called "door-to-door" rates, a 5-percent discount is to be allowed on the ocean portion of the through rates. The tariffs contain two specific commodity rates. Eastbound, there is a rate on tractor parts from New York to Tannochside, Scotland, of $36.90 W per ton of 2,240 pounds door-to-pier and $35.30 door-to-door subject to a per container minimum weight of 17.5 WT and the port-to-port portion of the rate included in the charge is stated to be $32. Westbound, there is a rate on wines and spirits bottled, in wooden cases or fibreboard cartons from Dumbarton, Scotland, to New York of $37.75 door-to-pier and $36.11 door-to-door (40 cubic feet).[1] This rate is subject to a per container minimum of 20 measurement tons, and the port-to-port portion of the rate included is said to be $32.75.

The tariffs also include cargo n.o.s. rates of $250 W/M door-to-pier and $246.46 doort-o-door eastbound (port-to-port portion $70.75 W/M) and $250 W/M door-to-pier and $247.31 door-to-door westbound (port-to-port portion $53.70 W/M).

CML has issued a bill of lading on the face of which it appears to assume common carrier liability for the entire through movement, although the bill of lading offers problems which are discussed below.

Positions of the Parties

All of the *vessel operating common carrier interveners* and all but one of the *NVO's*[2] in this proceeding which have filed papers contended that CML's original proposed tariffs should be rejected.

In response to the objections of these parties, CML submitted its revised tariffs and bill of lading which:

1. Broke out port-to-port portions of the through rates;
2. Named specific commodity rates and charges;
3. Covered no inland U.S. movement;
4. Named specific inland U.K. points; and
5. Appeared to assume common carrier liability between inland U.K. point and U.S. port.*

There are, however, several objections to the proposed operation which CML did not attempt to meet with its second set of tariffs and

[1] Although the inland point of origin for the westbound movement was not originally identified in the proposed tariff, this omission has been corrected.

[2] Household Goods Forwarders Association of America, Inc., urged the Commission to accept the tariff on the basis that the publicity achieved by the publication with a single regulatory agency of the through rate would protect shippers from discrimination.

*See discussion below.

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subsequent submissions. The members of the conferences argue that to the extent CML is engaged in providing transportation between the United States and foreign ports within the scope of conference agreements of which it is a member, it must charge the rates set forth in the conference tariffs on file with the Commission and the failure to do so will result in a violation of section 18(b) (3) of the Shipping Act, 1916 (the Act), which requires that only the properly filed tariff rate be charged and various provisions of Commission General Order 13 prohibiting duplicative or contradictory tariff filings.

Several specific discrepancies are pointed out between the port-to-port portion of CML's through rate and the corresponding conference tariff provisions covering water transportation between the same ports. For example, absorptions by water carriers are specifically outlawed by the conference (NAWFA) tariff and to the extent CML may absorb inland costs, NAWFA alleges that it violates not only 18(b) (3) but also 18(b) (1) because its tariff does not specifically provide for such absorptions. Further examples of discrepancies between the tariffs of the conferences and CML's tariffs are: wine and spirits are computed on a different revenue basis, no shipper allowance is allowed on wines and spirits in the conferences' tariffs, CML's tariffs do not include heavy lift charges unlike the conference tariffs, and CML's tariffs do not contain, as do the conference tariffs, brokerage and container demurrage rules. Moreover, NAWFA additionally maintains that CML's tariffs would breach NAWFA's dual-rate contracts in violation of the Commission's order of approval if cargo of NAWFA's dual-rate signatory merchants were carried by CML at the port-to-port portion of its rate inasmuch as this rate level differs from the conference port-to-port contract rate because of these discrepancies.

The revised bill of lading filed by CML, while purporting on its face to assume common carrier liability for the whole of the movement covered by the revised tariffs, nevertheless contains several clauses on the back thereof which appear to be inconsistent with this responsibility. Portions of paragraphs 1, 3, 4, 6, 7, 8, 11, 13, and 18 appear to enable CML to limit its liability to just the water portion of its movement.

Additional arguments are made by the conference lines that the NOS rates are unlawfully high and unjustly prejudicial to British exporters from all places other than Dumbarton, Scotland.

The NVO's which had originally opposed CML's tariffs had done so mainly because of an alleged conflict with the ICC which would have been caused by the inclusion of inland U.S. transportation. With the revision of the tariffs, these carriers' objections now seem to be

confined largely to possible discriminations caused by the application of the rates to and from only certain inland points and the possibility of unreasonably high n.o.s. rates.

The Department of Defense supports the concept embodied in CML's amended tariffs as the initial step in the direction of providing a single through transportation service for shippers. *The Virginia State Ports Authority* and the *Maryland Port Authority* express concern over problems of preference and prejudice as between shippers or ports caused by the application of CML's tariffs.

Hearing Counsel. while recognizing the difficulties with and the deficiencies in CML's tariffs and bill of lading noted in the filings of the carriers, argue that the Commission should accept them upon condition that certain changes are made. Specifically, they would require:

1. If modification of the conference agreements is not possible to permit CML's rates as now filed, withdrawal of CML from the conferences in accordance with the terms and conditions of the Commission's General Order 9 and the conference agreements.

2. Modification of the bill of lading to eliminate sections which appear to be inconsistent with CML's common carrier liability with respect to its inland U.K. movement as specified in its tariff and on the face of the bill of lading itself.

3. The updating of the free time and demurrage rules contained in CML's tariff to conform with the rules to be issued in the Commission's Docket No. 65–14 when such rules become effective.

These actions, Hearing Counsel maintain, will remove all of the problems with CML's filings which are properly within the scope of this proceeding. The decision of a carrier to limit services with respect to shippers or ports, or to make inland absorptions is not improper as a matter of law; nor are n.o.s. rates unlawful per se. Questions of preference and prejudice and the unreasonably high level of the n.o.s. rates are questions of fact not determinable in the proceeding, which is designed to determine only whether or not CML may lawfully file its proposed tariffs.

CML maintains that its tariffs are not contradictory to those of the conferences or violative of section 18(b) or General Order 13 because they involve a service not covered by the conference agreements. For the same reason, it claims that it may charge any water rate specified in its tariffs to either dual rate contract signatories or nondual rate contract signatories, whether it is the same as or different from the conference contract rate. Moreover, to allow the conference agreements to be expanded to apply to inland as well as ocean transportation would, it contends, be contrary to the public interest if it

had the effect of preventing CML from performing a through service.

Lastly, CML contends that the action of the members of NAWFA other than CML in filing papers in this proceeding in the name of the conference constitutes an unapproved section 15 agreement inasmuch as CML did not authorize the filing and the conference agreement requires unanimous vote on such conference action.

Discussion and Conclusions

In waterborne transportation today the primary factor relied upon by a shipper when selecting a carrier, after an evaluation of the transportation available, is the service provided by the carriers in the trade. Conversely, to insure a successful operation a carrier must acquire as much cargo as he can profitably carry by providing transportation services in accordance with the needs of the shipper. Where there is conference service and the rate level is no longer a determining factor for the shipper in making his choice, the conference members must compete with each other in promoting better service. The conferences as herein involved cannot be satisfied merely to provide stability of rates and regularity of service. The conferences, as the dominant commercial units in this trade, in our opinion, should be at the forefront in stimulating and encouraging improvements in transportation. They cannot impede additional transportation service becoming available to shippers, whether offered by an outsider or one of their own members, especially when it involves an advancement in the state of the art.

Such disputes as here involved are better handled through the managerial decisionmaking processes of conferences and carriers. Conferences and carriers have an obligation to conduct themselves in a manner commensurate with their responsibilities as transporters of the foreign waterborne commerce of the United States. There is no doubt that conferences are beneficial to the maritime industry and that conferences well serve their own ends. There comes a point, however, when self-interest must yield to the public interest, and carriers and conferences must conduct their business decisional processes accordingly.

The fact is, nonetheless, that the Commission must resolve this case and settle the matter of CML's tariff filings. In doing so the Commission need be ever mindful of its responsibilities as a body to which Congress has delegated certain responsibilities. The exercise of that delegated authority was intended by Congress, and must be interpreted by us, to be performed in the most judicious manner in our quasi-judicial capacity and in our best discretion. The admin-

istration of the Commission's duties requires flexibility of action and purpose when necessary and possible.

The determination of the issues in this proceeding will have far-reaching importance. Traditional methods of transporting cargo are rapidly being replaced by the growth of new techniques and transportation systems. The Federal Maritime Commission has not been unmindful of these developments and has sought to facilitate, wherever possible, the implementation of improved shipping systems. In the Order of Investigation in this proceeding the Commission stated that it "does not wish to discourage the inauguration of any transportation services which might be of great benefit to shippers." It is in accordance with that injunction that the Commission must arrive at its decision herein.

In its present posture, this proceeding presents substantially fewer issues than it did when it was instituted. The submissions of the parties and the subsequent revisions by CML of its tariffs and bill of lading have removed most of the original problems. Firstly, CML has broken out the ocean portion of its rates. We hold that this "breaking out" is the proper course of action and find that the provision of section 18 (b) (1) requiring the filing of "all the rates and charges of [common carriers by water in foreign commerce] [3] for transportation to and from United States ports and foreign ports * * *" dictates that such break-out be made. The provision of section 18(b) (1) requiring that "tariffs shall plainly show the places between which freight will be carried" further makes mandatory the clear indication of the ports or ranges of ports between which water transportation will be performed.

While we are inclined to agree with those interveners which have maintained that the word "places" in section 18(b) (1) is not intended to include inland points because the jurisdiction of the Commission is only port-to-port (including services in terminal areas provided for in sections 18(a) and 18(b)), we are convinced that inland points to and from which transportation is provided by a carrier subject to our regulatory statutes must be identified. This is the case, not because we can assert jurisdiction over the reasonableness of the level of the charges assessed by CML for the services performed by the inland line haul carriers, but because the statute (section 18(b) (1)) requires that "tariffs * * * shall * * * state separately * * * any rules or regulations which in anywise change, affect, or determine any part or the aggregate of [the carrier's] rates, or charges * * *." The identity of

[3] A common carrier by water in foreign commerce is defined by the first section of the Shipping Act, 1916, 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 inland points is certainly a critical factor in CML's tariff regulation providing for inland transportation. The Commission must insure that it retains effective regulatory jurisdiction over those activities which are within the scope of its authority, and the failure to disclose the inland points to and from which the carrier's service applies and thus indicate the purported charge for the inland movement would make it impossible for the Commission to determine whether or not the ocean portion of a rate is one which a carrier lawfully may charge.[4] Moreover, the failure to disclose inland transportation points would enable the carrier to treat similarly situated shippers differently in possible violation of sections 16 and 17 of the Shipping Act, 1916, and without the Commission's knowledge.[5]

The inland points in the United Kingdom for the specific commodity rates have been identified in CML's revised tariff filing. No specific inland points have been indicated for the application of the n.o.s. rates, however, and CML has stated that the level of these rates is "unrealistic" and that they will be "reduced on short notice for the purpose of effecting specific commodity rates." The validity of n.o.s. rates not intended for use but utilized as a device to effectuate rate reductions on short notice [6] raises a problem outside the scope of this proceeding which is directed solely to the sufficiency of CML's tariff under sections 18(b) (1) and (3) of the Shipping Act, 1916. Moreover, any questions relating to the level of CML's n.o.s. rates or specific commodity rates or the possibility of their unlawfully preferential or discriminatory effect are of necessity questions of fact which cannot be resolved in a proceeding of this type.

There are, as noted above, several clauses on the back of CML's proposed bill of lading which are inconsistent with the carrier's through responsibility with respect to the total movement between U.S. port and inland point in the United Kingdom. The principle that tariffs (and the bills of lading filed with them) be clear and unambiguous [7] requires that revisions be made in those paragraphs (1, 3, 4, 6, 7, 8, 13, and 18) which appear to enable CML to limit its liability to just the water por-

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[4] For example, no realistic determination could be made as to whether an ocean rate is "so unreasonably high or low as to be detrimental to the commerce of the United States" and thus subject to disapproval under section 18(b)(5) of the Shipping Act, 1916.

[5] Cf. *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 447, 449 (1935), discussing the need for publication of all privileges, absorptions or discounts in a carrier's tariff to prevent unlawful preferences and discriminations, and statements in *Grace Line, Inc.* v. *Federal Maritime Board*, 280 F. 2d 790 (2d Cir. 1960) affirming *Banana Distributors, Inc.* v. *Grace Line, Inc.*, 5 F.M.B. 615 (1959), suggesting that any services provided by a common carrier must be offered on an equal and fair basis to all similarly situated shippers.

[6] Section 18(b)(2) requires 30 days' advance notice (absent special permission) prior to the effective date only of changes which result in increased costs to the shipper; decreases may become effective upon publication and filing.

[7] See, e.g., *In the Matter of Intercoastal Charters*, 2 U.S.M.C. 154, 156, 157 (1939).

tion of the movement. Those paragraphs must be conformed to the carrier's intent as expressed on the face of the bill of lading and in the tariffs themselves to accept common carrier responsibility for the through movement.

These technical deficiences in CML's bill of lading can easily be cured. CML acknowledges their existence and is apparently willing to eliminate them prior to the tariffs' going into effect. As noted by CML also, the Commission's staff is authorized to reject the tariffs until such deficiencies are remedied.[8]

There remain for resolution only those problems caused by the alleged conflict between the port-to-port portion of CML's rates and the port-to-port rates in the tariffs of the conferences of which CML is a member. CML admits that as long as it operates as a common carrier by water between ocean ports, it must separately publish the ocean portion of the through rates. It further admits it must charge the conferences' rates for its port-to-port as distinct from its intermodal service. Inasmuch as the conference agreements involved herein cover all rates and charges for a port-to-port transportation service, it logically follows that as long as CML remains a member of the conferences, it must charge the conference rates for its solely port-to-port service. These rates are the rates "on file with the Commission and duly published and in effect at the time" within the meaning of section 18 (b)(3) of the Shipping Act, 1916.[9]

However, the organic conference agreements pursuant to which NAUKFC and NAWFA are authorized to operate plainly are intended to apply only to cargo shipped under tariffs which are applicable to a port-to-port service. The NAUKFC agreement states in its introductory paragraph that it covers "transportation of goods *by sea from* United States North Atlantic *Ports* in the Eastport, Maine/

[8] The free time and demurrage rules contained in CML's tariff must of course conform with the rules to be issued in the Commission's Docket No. 65–14 when such rules become effective.

[9] Counsel for CML made some statements in oral argument which suggested that there is some doubt in his mind as to whether one performing through services between inland points (including a water movement) in the foreign commerce of the United States and not offering a separate port-to-port service would have to file a break-out corresponding to the charge for the port-to-port portion of its service. There is no such corresponding doubt in our minds. Neither the first section nor section 18(b) of the Act stipulates that the common carrier by water in foreign commerce subject to the jurisdiction of this Commission and which must file tariffs with us can evade regulation by offering more than a port-to-port service. The definition of such carriers in the first section applies to all "engaged in the transportation by water of passengers or property between the United States * * * and a foreign country", and 18(b) requires that they file tariffs indicating "all the rates and charges * * * for transportation to and from United States ports and foreign ports." These sections do not say that when one offers more than such transportation it need not file anything with us. Such a result would not only be contrary to the plain language of the statute but would defeat the Congressional intent that we exercise our authority to protect the public against unlawful discriminations and preferences and to disapprove rates detrimental to our commerce.

Hampton Roads range *to ports* in the United Kingdom and Eire * * *" (emphasis supplied), and the NAWFA agreement limits the trade over which it applies to movements "from Great Britain and Northern Ireland and Erie to the North Atlantic and South Atlantic ports of the United States of America." Both agreements, moreover, limit their membership to those persons operating vessels or evidencing ability and a good faith intention to institute and maintain "*a regular service between the ports* within the scope of this agreement * * *" (emphasis supplied). Both agreements restrict their application to the "trade covered by this agreement." The NAWFA agreement further specifically characterizes the lines operating within the scope of the agreement as "operating *from* [a] port." (article 10) (emphasis supplied).

The inescapable conclusion to be drawn from a consistent reading of these provisions can only be that the member lines of the two agreements are subject to their terms (1) only to the extent they operate a service involving the ports within the scope of the agreements, and (2) only to the extent the service they operate is a regular service between these ports, beginning and terminating at a port.

The same observations are of course true with respect to the dual-rate agreements of the member lines of the conferences inasmuch as they specifically limit their application to vessels operating in the trade. Furthermore, any attempt to broaden the scope of the dual-rate agreements beyond the operations authorized by the conference agreements would of course be a nullity in the absence of an appropriate modification of the conference agreements with approval by this Commission.

The case of *Swift & Co., et al.*, v. *Gulf and South Atl. Havana Conf.*, 6 F.M.B. 215 (1961), aff'd in relevant part sub. nom. *Swift & Company* v. *Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir. 1962), provides a comprehensive case study of the problems involved in determining the scope of a conference agreement and the effect of attempting to broaden the scope of a dual-rate agreement beyond the authorization provided for in the conference agreement. Analysis of that case supports our determination with respect to the conference and dual-rate agreements here under consideration and leads inevitably to the conclusion that the through sea and land transportation service which will be provided by CML is outside the scope of these agreements. Thus, the conferences as now constituted are prohibited from applying these agreements to such CML operation because such application would amount to the effectuation of unapproved agreements in violation of section 14b and 15 of the Shipping Act, 1916.

In the *Swift* case, the conference operating in the trade from Gulf and South Atlantic ports to Cuba attempted to apply its dual-rate agreements to through shipments by Swift, a dual-rate contract signatory, from St. Louis down the Mississippi River to New Orleans by barge towed by a river tug and then on to Havana after transferring an ocean-going tug to the barge.[10] The dual-rate agreement there involved applied to all goods "shipped directly or indirectly from Gulf and South Atlantic ports of the United States" to Cuba. The conference had argued that the word "indirectly" covered cargo originating at any inland port as long as it passed through a Gulf port named in its agreement. This interpretation was rejected by the Federal Maritime Board, and the Court of Appeals later affirmed the Board (then Federal Maritime Commission) in its holding that the attempt to apply the dual-rate agreement to a through-water movement from St. Louis to Cuba via New Orleans constituted a "modification" of the dual-rate agreement unauthorized by, and hence unlawful under, section 15.[11] Nor was the conference in a better position legally to control cargo moving on through routes from St. Louis after it specifically modified the dual-rate agreement to include cargo moving from inland ports or places and flowing through any Gulf or South Atlantic port because its basic conference agreement did not name St. Louis as a port or place subject to the conference agreement and further contained a clause limiting the scope of the agreements to the ports and territories named therein. As the Board observed, "the scope of any freighting agreement is necessarily limited by the agreements between common carriers by water, or other persons subject to the Act, which are filed and approved as required by the first sentence of Sec. 15 of the Act." (6 F.M.B. 215, at 223).

The Board considered the arrangements whereby the conference attempted to control cargo "originating at any inland port or place" which had not been approved by the Board and which required approval before they could be effectuated and found them unlawful under various provisions of the Shipping Act. They subjected to undue and unreasonable prejudice or disadvantage (1) shippers, by preventing them from using economical transportation alternatives; and (2) river port cities, by preventing them from obtaining cargo, and were unjustly discriminatory and unfair to these ports and shippers by fore-

[10] Swift had formerly shipped cargo to Cuba by transporting it by rail to Florida and from there to Cuba via the ships of one of the conference's member lines.

[11] "We think that the Board acted reasonably in finding that the conference interpretation and its effectuation constituted a 'modification' and was the kind of agreement condemned by Section 15, unless approved by the Board." *Swift & Company* v. *Federal Maritime Commission, supra,* at 281.

closing transportation alternatives such as through movements. The Board observed generally:

The interests and needs of shippers in foreign commerce should dominate where competing methods and new techniques of water transportation are involved. An arrangement would seem to operate to the detriment of the commerce of the United States or be unfair as between shippers and exporters from the United States and their foreign competitors which prevents the former from having a free choice among competing methods of transportation for cost advantages. Anything which impedes such free choice among constantly changing alternatives provided by technical changes in traffic and transportation methods is a detriment to commerce in the long run. (6 F.M.B. at 226)

The conference agreements of the two conferences of which CML is a member in the United Kingdom-United States trade, like the conference agreement in the *Swift* case, limit their application to the trade as defined by the range of ports included therein. They, therefore, cannot apply to through transportation from "inland port or place" anymore than the agreements in the *Swift* case did. In fact, a stronger case exists here for not so applying the agreements because St. Louis is at least a port and the conference agreement in the *Swift* case applied to ports, while the places in the United Kingdom to and from which the through transportation moves are inland points, and not ports. As noted above, the Board said in *Swift* that the unauthorized restriction applied to cargo "originating at any inland port or *place*." (emphasis supplied) (6 F.M.B. 215. at 234).

The approved dual-rate contracts here involved limit their application to the trade as defined by the conference agreements.[12] Even if the conferences attempted to broaden their scope, however, such broadened interpretations would constitute a modification of the conference agreements and would require approval by the Commission, as noted in the *Swift* case, before they could be effectuated.

The "new technique of water transportation" involved in the *Swift* case was, like the one here, a through movement from an inland location, and the Board wanted to preserve the shipper's ability to choose to utilize this form of shipment rather than a combination of separate inland and port-to-port movements, pointing out possible cost advantages. It is important to note, moreover, that the transportation system to which the shipper's right was preserved in *Swift* was a traditional, if not old fashioned, system, i.e., a tug and barge operation, rather than the modern self-propelled conference carrier serv-

[12] Approval of dual-rate contracts is now granted or denied pursuant to section 14b, which was enacted, after the events which were the subject of the *Swift* case (effective Oct. 3, 1961), to apply specifically to dual-rate contracts rather than pursuant to the more general section 15 authority which had applied at the time of the decision in *Swift*.

ice. Thus this Commission now has a stronger reason than its predecessor for preserving the shipper's right to avail himself of competing services where, as here, a modern container service is involved in the through movement. In fact the Federal Maritime Commission can and must play an important role in encouraging improved services for shippers. As was said in the Order of Investigation, the Commission does not intend to create or permit impediments to the improvement of shipping services. Enlightened regulation is the key to effective regulation; no regulatory agency can permit regulation to be outstripped by new techniques in the industry. Progressive regulation is required in the interest of encouraging the modernization of shipping services. Outmoded principles and rules will surely stifle advancements in all fields, and especially transportation where developments have followed so quickly upon each other.

The Supreme Court has recently espoused this idea in a case involving the Interstate Commerce Commission:

> * * * flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and fair and prudent administraition, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday. *American Trucking Assns., Inc.*, v. *Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967).

It is indisputable, therefore, that the Federal Maritime Commission must assume a flexible posture and must view broadly, when necessary, its regulatory purposes and governing laws and rules.

The language quoted from the *Swift* case also suggests the difficulty in attempting to extend the obligations of conference agreements and dual rate contracts to inland transportation. The further inland such conference arrangements are extended the greater the danger of unlawful prejudice or discrimination against persons or localities not provided a direct conference service. For example, such persons or localities may be foreclosed from utilizing transportation services which do provide such direct service.

The danger from such extensions may be mitigated somewhat by the adoption by the conference carriers of through liability from and to inland points which may result in savings to the shipper; but the shipper nevertheless may still be faced with the foreclosure of alternate methods of transportation if he elects to be bound by dual-rate contracts.

We do not mean to imply that the conferences could not obtain our approval to extend their operations inland. In fact we assume that the

conferences have the expertise to develop modern shipper services in the interest of improving transportation systems. Problems of discrimination and prejudice are always matters of fact which can be solved only upon the presentation of sufficient evidence. Moreover, the lawfulness of the conference arrangements is not in issue here. We merely wish to indicate as an aid to the conferences some of the problems which may be involved should they desire to expand the scope of their present operations. We are of course not in any way prejudging any arrangements which may be presented to us for our approval.[13]

To summarize, then, upon the filing of a tariff in accordance with this decision, (1) to the extent CML will transport cargo in a through movement between inland points and ocean ports it will engage in activities beyond the scope of the approved conference agreements and dual rate contracts and thus not subject to their provisions; [14] (2) as a corollary of (1), CML will not be free to utilize a system of dual or contract-noncontract rates for any portion of its through movements as distinguished from its port-to-port movements unless it obtains authorization, apart from that which now covers its port-to-port activities as a conference member, to institute a dual-rate system. Such system would be required to be submitted for our approval and approved by us before it could lawfully be effectuated by CML, and our observations with respect to the factual problems involved in such approval would of course be applicable to CML as well as the conferences; [15] (3) to the extent CML will engage in a port-to-port, rather

[13] The fact that some of the matters included within the scope of such expanded agreements (e.g., reasonableness of the level of the rates charged by the water carriers for the inland portion of the transportation) may be outside the jurisdiction of the agency would not prevent approval of such agreements providing they were otherwise lawful. Cf. *Common Carriers by Water—Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245, 257 (1961); *Approved Scope of Trades Covered by Agreement 7840*, 10 F.M.C. 9 (1966).

[14] Likewise, the provisions of CML's tariff are not "duplicating" or "conflicting" within the meaning of our General Order 13 inasmuch as they do not refer to or cover the same service as that for which rates are published in the conferences' tariffs.

[15] One of the contentions of the conferences is that CML may under its through intermodal tariff absorb inland transportation costs in violation of the conference agreements. The answer to this contention is that because CML's service does not fall within the scope of the conference agreements, there can be no violations thereof. However, assuming *arguendo*, that it did, CML's activities insofar as they resulted in a decrease in the effective amount paid for ocean transportation would not constitute absorptions of inland transportation costs within the meaning of the conference tariff rules prohibiting absorptions. NAWFA's rule states that conference members "will not be responsible directly or indirectly for any expenses incurred in the inland movement of containers, by whatever means, beyond vessels loading or discharging terminals * * *" (a similar rule is contained in NAUKFC's tariff). CML is not, however, making itself "responsible for expenses" for inland transportation. That would be the case if it paid the shipper for all or a part of the expenses a shipper incurred in transporting his property inland, or if it acted as shipper's agent for such transportation and reimbursed the shipper for all or a part of his expenses for such movement. CML, on the other hand, is itself providing the transportation; it publishes a through rate and all shippers must pay this rate—there are no "absorptions" involved.

than a through movement, CML will still be subject to all of its conference obligations (including those under its dual rate contracts); and (4) to the extent the conferences attempt to apply their arrangements to cargo involved in other than port-to-port movements, their conduct is unlawful as unauthorized by their presently approved arrangements (of course the conferences may wish to amend their arrangements accordingly).

One last general observation flows from what we have said with respect to the scope of the conference arrangements involved herein, and it follows logically from the conclusion that CML's through movements are beyond the scope of the conference arrangements. If such activities by CML are not covered by the conference arrangements, *a fortiori* through movements from and to inland points by any carriers (including NVO's) not members of the conference would also not be included within such conference arrangements. Dual-rate contract signatories would be free to transport cargo by nonconference carriers, but only to the extent such carriers provide a through service with through liability as distinguished from port-to-port service within the scope of the conference arrangements.

One might be tempted to maintain that, even if the through service of CML is not included within the scope of the conference activities, insofar as the water portion of CML's rates is concerned, the charge should be the same as the port-to-port rates in the conference tariffs inasmuch as the same transportation is involved. The simple answer to this contention, however, is that the same transportation is not involved. The Interstate Commerce Commission has long held that rates between inland points published in conjunction with water transportation in our export or import trade need not be the same as local rates between the same inland points.[16] The lawfulness of such a difference in rates, the ICC holds, must be determined by considering whether the circumstances and conditions controlling the import and export rates are the same as or different from those surrounding the domestic rates, including the circumstances affecting the movement of foreign commerce before reaching the United States. *Tex. & Pac.*

It is of course essential that CML accept responsibility for the total transportation under a through bill of lading, for, if it did not it would be performing merely a port-to-port service with additional arrangements made as agent for the shipper. The consequence of this is that its service would be subject to the conference tariff, and any allowances it may make to the shipper for inland transportation would be absorptions in violation of the conference's tariff rule. The conferences themselves acknowledge that there is nothing in the conference agreements or rules which would prohibit a member from assuming "responsibility" as distinguished from "expenses" for the movement beyond ocean ports, and the reason why this is so is plain—such activities are, as we have seen, outside the scope of the approved conference arrangements.

[16] We have no reason to believe that British law or practice is different from ours in this respect.

Railway v. *Interstate Com. Com.*, 162 U.S. 197 (1896); *Texas & Pacific Ry Co.* v. *U.S.*, 289 U.S. 627 (1933). Likewise, the question of whether the ocean portion of a through rate is unjustly discriminatory or unreasonably prejudicial because it differs from a conference port-to-port rate is a question of fact to be determined after a thorough consideration of all the circumstances and conditions, including the circumstances affecting the inland transportation.

We cannot say that the minor discrepanices between the rate for the water portion of CML's through rate and the rate it is bound as a conference member to assess for its port-to-port service are on their face so discriminatory or prejudicial as to be unlawful per se.[17]

CONCLUSION

Tariffs of CML providing for a through transportation service including inland transportation in the United Kingdom and port-to-port transportation between United States and United Kingdom are acceptable for filing under section 18(b) of the Act if they: (1) clearly indicate ports or ranges of ports between which water transportation will be performed; (2) break out the charge for such water portion of the transportation; (3) identify inland points to and from which service is provided; and (4) include a specimen bill of lading all the articles of which provide for common carrier liability for the through movement consistent with the holding out in the remainder of the filing.

CML's proposed tariff is at present unacceptable for filing because of the inconsistencies in the bill of lading incorporated therein with respect to CML's liability. The tariff is therefore rejected unless prior to its intended effective date CML files amendments curative of these defects.

[17] CML's contention that the filing of papers in this proceeding by the members of NAWFA other than CML in the conference name constitutes an unapproved section 15 agreement inasmuch as CML did not authorize the filing and the conference agreement requires unanimous vote is completely without merit. Such an interpretation of the conference agreement would have the effect of thwarting a conference from bringing an action against one of its members for any violation of the Shipping Act if the allegedly wrongdoing member did not consent. Such an effect would plainly be contrary to the public interest and we have not and could not approve any agreement authorizing such an effect. As noted by the Court of Appeals for the District of Columbia Circuit in affirming our decision with respect to our findings as to which agreements had been approved in the *Swift* case, since an agreement subject to our jurisdiction "is not simply a private contract between private parties, the intent of the parties is only one relevant factor, and the Board not only can, but must weigh such consideration as the effect of the interpretation on commerce and the public. Moreover, the agreement exist[s] legally only because approved by the Board. The Board must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval." *Swift & Company* v. *Federal Maritime Commission*, *supra*, at 281.

COMMISSIONER JAMES F. FANSEEN, dissenting:

I would reject the tariffs filed by Container Marine Lines. The majority has accepted the tariff filing provided certain conditions are fulfilled by CML. One of these conditions for acceptance is that CML break out the charge for the water portion of the transportation.

Assuming that CML meets all of these conditions, however, the tariff remains unlawful.

Our General Order 13 (46 CFR § 536.2(c)) provides that:

> No carrier or conference shall publish and file any tariff or modification thereto which duplicates or conflicts with any other tariff on file with the Commission to which such carrier is a party whether filed by such carrier or by an authorized agent.

The broken-out charge (or the port-to-port rate) for CML's water portion of the transportation represents a conflict with the conference tariff.[18] This conflict clearly violates General Order 13 and is enough in itself to warrant rejection of the CML tariff.

The conference agreement requires that carriers, as a condition precedent to admission to the conference and to gaining its advantages, agree to abide by the conference rules and regulations. Since we have given our sanction to these rules by approving the conference agreement, we must enforce the rules in a proceeding before this Commission.

The tariffs of CML conflict with its commitments to the conference agreement. Affidavits have been submitted by members of the conferences herein involved which set forth a number of instances of conflict.

With CML having violated the conference agreement, additional grounds for rejection of the tariffs are also present.

I think further defects could be cited, but the foregoing are more than sufficient for rejection of the CML tariffs.

CML's proposed intermodal tariff might well be a needed innovation in the transportation industry. However, the CML filing is not acceptable under the presently existing regulatory statutes.

To the extent that the present law is inadequate to the process of evolution in the shipping industry, the regulatory rules must be changed to fit current needs. As long as the present law stands, however, it must be abided by the rules enforced.

[SEAL] (Signed) THOMAS LISI,
Secretary.

[18] For instance, see NAWFA's tariff (F.M.C. No. 26).

FEDERAL MARITIME COMMISSION

DOCKET NO. 66-65

BALLMILL LUMBER & SALES CORP.

v.

THE PORT OF NEW YORK AUTHORITY, WEYERHAEUSER CO., ATLANTIC TERMINALS, INC., AND MAHER LUMBER TERMINAL CORP.

Decided April 24, 1968

The lease between the Port of New York Authority and Weyerhaeuser Co. in connection with the handling of lumber at Port Newark results in undue and unreasonable preference and advantage to Weyerhaeuser and undue and unreasonable prejudice and disadvantage to complainant, in violation of section 16 First of the Act, and constitutes an unjust and unreasonable regulation and practice, in violation of section 17 of the Act.

That portion of the tariff of Maher Lumber Terminal Corp. which provides a volume discount for the handling of lumber at Port Newark, N.J. subjects complainant to undue and unreasonable disadvantage, in violation of section 16 First of the Shipping Act, 1916, and constitutes an unjust and unreasonable regulation and practice, in violation of section 17 of the Act.

No violation by Weyerhaeuser or Atlantic Terminals, Inc., of either section 16 First or section 17 of the Act has been shown in connection with the handling of lumber at Port Newark.

It has not been shown that complaintant has suffered pecuniary damages which are the proximate result of the violations herein found to exist, and the request for reparation is denied.

The complaint is dismissed.

Baldvin Einarson for complainant.

James M. Henderson, *Arthur T. Winn, Jr.*, *Samuel H. Moerman*, *J. Raymond Clark*, *Sidney Goldstein*, and *Francis A. Mulhern* for respondent the Port of New York Authority.

William Warner and *Erma Knef* for respondents Weyerhaeuser Co. and Atlantic Terminals, Inc.

John Mason and *Gerald A. Malia* for respondent Maher Lumber Terminal Corp.

REPORT

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

This proceeding was instituted by a complaint filed by Ballmill Lumber and Sales Corp. (Ballmill) on December 2, 1966, against

the Port of New York Authority (Port Authority), Weyerhaeuser Co. (Weyerhaeuser), Atlantic Terminals Inc. (Atlantic), and Maher Lumber Terminal Corp. (Maher). The complaint charged violations of sections 16 and 17 of the Shipping Act, 1916, and requested reparation in the amount of $1 million.

Hearings were held before Examiner C. W. Robinson, who issued his initial decision November 28, 1967. Exceptions and replies have been filed. Oral argument was heard by the Commission on February 14, 1968.

FACTS

Complainant, Ballmill, is a wholesaler of Pacific coast forest products. Ballmill's lumber business is located at Port Newark, N.J. Ballmill leases waterfront property at Port Newark from the Port Authority for use in its lumber business.

At the time of the hearing in this proceeding, there were four wholesale lumber dealers with leases for space at Port Newark. Ten other lumber wholesale dealers operated out of Port Newark, but they did not lease space from the Port Authority.

The controversy in this proceeding concerns the use of terminal property and terminal services at Port Newark and stems partly from the leasing arrangements between the lumber wholesalers and the Port Authority, which is charged with the administration of Port Newark.

Pursuant to its lease with the Port Authority, Ballmill pays a fixed rental for certain waterfront property which is used in the operation of its lumber business. The first such lease was entered into on December 1, 1950. A provision in the lease required Ballmill to use the Port Authority or its agent or its approved contractor for all backhandling of lumber received by water transportation by Ballmill at the marine terminal.[1] This is the controversial provision of the lease.

When the Port Authority took over the administration of Port Newark in 1948, it made the decision that no new lease would issue which gave the lessee the privilege of performing the backhandling. All lessees were to use the services of the Port Authority, its agent, or designated independent contractor. For this reason, the above-mentioned provision was included in the Ballmill lease.

However, when Weyerhaeuser (the largest lumber wholesaler at Port Newark) negotiated a new lease with the Port Authority in 1953, it was successful in retaining the right to backhandle its own

[1] Backhandling is the delivery of lumber from ship's tackle to a place of rest on the tenant's premises or to a place of rest on the public terminal in the case of nontenants or of those tenants using the public terminal.

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lumber. Weyerhaeuser, pursuant to its earlier lease, has been operating a public terminal at Port Newark through its wholly owned subsidiary, Atlantic. Atlantic not only performed terminal services for its parent, Weyerhaeuser, but for other receivers of lumber and for water carriers. Under its renewed lease in 1953, Weyerhaeuser retained the right to operate its public terminal through Atlantic. No other tenant or lessee of the Port Authority was successful in acquiring a similar lease provision.

In addition to the question of preferential leasing arrangements, the proceeding also involves a controversy over rates and services offered by the two public lumber terminals and their effect on the various lumber wholesalers.

As mentioned above, Ballmill and all other lessees except Weyerhaeuser are required to use the services of the Port Authority, its agent, or designated independent contractor. Maher is the present operator of the Port Authority terminal, and it is Maher's services which the lessees are required to use. Other lumber wholesalers who do not have leases (nontenants) also use Maher's services.

The only other public terminal operator at Port Newark besides Maher is Atlantic, the subsidiary of Weyerhaeuser. Atlantic's services are used by Weyerhaeuser and other lumber wholesalers who do not have leases with the Port Authority.

Maher contracted with the Port Authority for the privilege of operating its public lumber terminal at Port Newark in 1963. The size and location of the terminal are subject to change by the Port Authority without notice. The location of the present terminal is immediately adjacent to the transit area at berths 34 and 36.

Originally, Maher's terminal was directly across the street from Ballmill's leased area, then it was moved several blocks away, and at the time of the hearing, it was about 1.8 miles from Ballmill. These shifts were made by the Port Authority in accordance with the right to do so reserved in its contract with Maher.

Maher pays to the Port Authority a charge of $1.25 per 1,000 bd. ft. for lumber backhandled each month and collects for and pays to the Port Authority wharfage charges assessed by the latter under its tariff on file with the Commission. Maher has on file with the Commission a tariff for the services it performs. The services for tenants are different from those for nontenants, as will be elaborated.

Ballmill's lumber handled by Maher usually is discharged at berths 34 and 36.[2] It is already strapped in bundles and unloaded in lots by

[2] Ballmill has not been interested in relocating its leased area to be closer to the discharge point.

the stevedore and placed on the dock, in accordance with Maher's tariff. The stevedore is neither employed by nor controlled by Maher. Forklift trucks of Maher carry the bundles to the transit area behind the berths. There the bundles are stacked six or seven high and picked up by lorries and hauled to Ballmill's premises, where they are dropped in designated areas.

The final step is taken by Ballmill's own forklift trucks, which move the lumber to areas assigned to particular sizes and types; this may be as far away as 400 yards.

The lumber of nontenants who use Maher's terminal is picked up by forklift trucks at the end of ship's tackle, by lot, and taken to the transit area and deposited where instructed. If the lumber is not removed at the end of free time, it is taken by forklift trucks to Maher's area adjacent to the transit area, becoming a part of the nontenant's inventory.

Maher provides free time of 7 days, but this is not applicable to lumber handled to open areas leased from the Port Authority (such as Ballmill's premises).

Maher also provides storage and truck loading services which are used by the nontenant lumber dealers. Ballmill has never used these services since Ballmill has its own leased premises for storage purposes and has its own equipment and personnel, which it uses to load trucks which remove lumber from its premises.

Atlantic furnishes various terminal services to receivers of lumber and to water carriers, at rates published in its own tariff on file with the Commission. Ballmill has used these facilities, but only when the lumber mill loaded small quantities on a ship to be discharged at Atlantic's terminal or when lumber in transit was purchased by Ballmill from a competitor. A Port Authority representative, in a trip to the Pacific Northwest, endeavored to correct this situation inasmuch as Ballmill is required by its lease to use Maher.

When unloaded at Atlantic's terminal, Ballmill's bundles are picked up by straddle trucks at the end of ship's tackle and taken direct to Ballmill's premises across the street. The straddle truck carries to the proper area two bundles of the same size and grade of lumber. Thereafter, Ballmill's forklift trucks position them in proper piles.

The controversy about rates for the various services stems partly from the fact that Ballmill is forced to use Maher, while many of its competitors can use either Maher or Atlantic, and partly from the fact that because of its lease, Ballmill cannot practically avail itself of Maher's storage and truck loading services.

Ballmill renewed its lease with the Port Authority in 1960 for 10 more years. Its decision to renew was based on its determination that

at then current rates, it would be cheaper to rent its premises and use only Maher's backhandling services rather than to use all of Maher's services of backhandling storage and truckloading.

From 1960 to 1962, Maher's rates remained constant. However, Atlantic's rates, available to nontenants and Weyerhaeuser, were lower. Nontenants took advantage of the lower rates at Atlantic. Ballmill was bound by the terms of its lease and could not. By 1962, only a small volume of nontenant lumber passed through Maher's terminal.

Ballmill asked for lower rates from Maher to enable him to compete with competitors who could use Atlantic's lower rates. Ballmill's protestations had little effect until in 1965 Maher secured a reduction from $1.25 to $1.00 per 1,000 bd. ft. of its required payment to the Port Authority for lumber it backhandled. This was followed by a new Maher tariff effective December 6, 1965. The new tariff did little to appease Ballmill, however.

Maher's charges for backhandling from shipside to terminal were reduced from $3.30 to $3.15/1,000 net board feet. The rate of $2.80 applicable to backhandling to leased areas (Ballmill's rate) was not changed.

Maher's new tariff also contained a volume discount provision which is the basis for much of Ballmill's complaint in this proceeding. The discount provision is applicable to the combined "services of backhandling to the terminal, truckloading, and wharf usage." [3] The ap-

[3] Maher's discount provision reads as follows:

VOLUME DISCOUNT

The following volume discount is applicable to the services of backhandling to the Terminal, truckloading and wharf usage, as such terms are described in this tariff. To be eligible for volume discount the consignee must move more than three million board feet pursuant to this tariff within twelve consecutive months, commencing no earlier than Jan. 1, 1966. In calculating the number of board feet moved pursuant to this rule, lumber movements under Paragraph 1(B) shall be included insofar as the total does not exceed fifty percent of the consignee's total lumber movement for the year. The discount shall apply only to the volume that moved to Terminal under Paragraph 1(A). Lumber which qualified for volume discount under the service provided for herein above shall also be accorded a volume discount on the storage charges set forth in Paragraph 6.

	Backhandling, truckloading and wharf usage per 1,000 b.m.f. net*	Storage per month per 1,000 b m.f., gross
Up to 3 million board measure feet net	None	None
Over 3 to 6 million board measure feet net	$0.30	$0.20
Over 6 to 10 million board measure feet net	.40	.25
Over 10 to 15 million board measure feet net	.50	.30
Over 15 to 20 million board measure feet net	.70	.35
Over 20 to 25 million board measure feet net	.90	.40
Over 25 to 30 million board measure feet net	1.10	.45
30 million board measure feet net	1.30	.50

*B.m.f =board measure foot, 1 inch thick by 12 inches wide.

plied discount rate would be based on the total volume of lumber which moved through the terminal by a particular dealer, both to the public yard and to the leased area, but this discount was not applicable to the portion that moved to the leased area. Lumber moved through the leased area could not be included if it exceeds 50 percent of the consignee's total movement for the year. In other words, if the total movement was 17 million b.m.f. of which nine went to the public yard, the discount on the 9 million feet only would be in the 15 to 20 million b.m.f. rate but there would be no discount at all on the 8 million b.m.f. that went into the leased area. If 8 million of the 17 million moved through the public yard and 9 million to the leased area, the discount was figured at the 6 to 10 million b.m.f. rate on the 8 million with no discount at all on the 9 million b.m.f. moving to the leased area. This meant that Ballmill could not practically avail itself of the volume discount unless it chose to use the package of services and to use the public terminal rather than its own leased premises. No discount was offered on the single service of backhandling.

On January 1, 1967, Maher's backhandling rate, to apply both to the terminal and to leased areas, was increased to $3.30/1,000 net board feet. The package discount provision was retained.

Atlantic reduced its rates following the steps taken by Maher. As of the time of the hearing, Atlantic's rates for backhandling to truck delivery area and to storage were: up to 5,000 feet, $2.85 per 1,000 feet; from 5,001 to 10,000 feet, $2.55; and over 10,001 feet, $2.20. For backhandling and transportation, without interruption, to designated terminal areas other than its own, the rates are: up to 10,000 feet, $2.50 within ½ mile and $4.50 for over ½ mile; for $10,000 and over, $2.25 and $4.25 respectively.

Facts relevant to the question of the Port Authority's control over Maher and its rates and to the question of reparation as well as other relevant facts will appear in the "discussion" portion of this report.

Discussion

Ballmill's complaint alleges violations of sections 16 and 17 of the Act by the Port Authority and the other respondents. Ballmill requests an award of reparation in the amount of $1 million.

Four areas of controversy arise from Ballmill's complaint:

1. Whether the lease between the Port Authority and Weyerhaeuser results in undue and unreasonable prejudice and disadvantage to Ballmill, in violation of section 16 First of the Act, and constitutes and unjust and unreasonable regulation and practice, in violation of section 17 of the Act;

2. Whether that portion of Maher's tariff pertaining to discount rates applicable to the handling of lumber at Port Newark subjects Ballmill to undue and unreasonable disadvantage, in violation of section 16 First of the Act, and constitutes an unjust and unreasonable regulation and practice, in violation of section 17 of the Act. A determination of the second question will involve a consideration of what control the Port Authority exercised over Maher's rate policies at Port Newark;

3. Whether Weyerhaeuser or Atlantic have violated sections 16 First or 17 of the Act; and

4. Whether Ballmill is entitled to an award of reparation as a result of any of the above-alleged violations.

Weyerhaeuser Lease

The Examiner concluded that the action of the Port Authority in permitting Weyerheauser to backhandle lumber for itself and for other receivers of lumber at Port Newark while requiring other tenants to use the public terminal (Maher), is an undue and unreasonable preference and advantage to Weyerhaeuser and an undue and unreasonable prejudice and disadvantage to other tenant-receivers of lumber, including, of course, Ballmill, and constitutes an unjust and unreasonable regulation and practice, in violation of section 16 First and 17, respectively, of the Act. The Examiner's conclusion is based on his finding that Weyerhaeuser is placed in a favored position competitively as a result of its lease with the Port Authority. We agree with the Examiner.

In excepting to the Examiner's conclusion, the Port Authority argues that the difference in treatment of the two lumber dealers is necessitated and justified by differences in characteristics of the two lumber dealers and by various circumstances and conditions existing at Port Newark. It is contended by the authority that the difference in the leases negotiated by Ballmill and by Weyerhaeuser does not give Weyerhaeuser any competitive advantage over Ballmill, because the service of backhandling, which Weyerhaeuser is permitted to perform through its subsidiary, and which Ballmill is not permitted to perform, is of relatively little importance in the overall scheme of lumber operations. Accordingly, any difference in backhandling services should not be accepted as proof that Weyerhaeuser's superior financial or competitive position is caused by the comparative leases concerning backhandling.

Therefore, the Port Authority argues, Ballmill has not shown that any difference in treatment in backhandling actually operates to the real disadvantage of complainant. It is the authority's position that

for Ballmill to prevail on this point, it is essential for Ballmill to reveal the specific effect of the difference in treatment on the flow of the traffic concerned and on the marketing of the commodities involved, and to disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or commodities. Furthermore, a pertinent inquiry is whether the alleged prejudice is the proximate cause of the disadvantage. Citing *Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936). The authority contends that Weyerhaeuser and Ballmill are not similarly situated and therefore do not require similar services, and further that each of the leases is reasonably adapted to the respective requirements of Ballmill and Weyerhaeuser and therefore the difference in treatment does not result in any violations of the Shipping Act.

Finally, the Port Authority suggests that the Examiner failed to recognize other considerations underlying the Port Authority-Weyerhaeuser negotiations which place the resulting lease in an entirely different light such as the long-established equities which had accrued to Weyerhaeuser during original long term lease as a result of the heavy investment made by it. This refers to the fact that in 1953, when negotiations ensued with Weyerhaeuser for renewal of its lease, Atlantic had been at Port Newark for 22 years and was performing backhandling and other services incidental to the storage and distribution of lumber. At that time, Atlantic was handling about 140 million board feet of lumber per year, or about 50 percent of the total moving through Port Newark. The Port Authority feels that Weyerhaeuser, through its subsidiary Atlantic, had such a heavy investment and had built up such a decisive equity that it would be unreasonable to deny them of their right to perform backhandling and to operate the Atlantic terminal. It is pointed out that Weyerhaeuser was ready to leave Port Newark if it did not retain these rights. Weyerhaeuser had negotiated with Port Elizabeth for terminal facilities there.

These contentions afford no ground for rejecting the Examiner's conclusion with which we agree.

The Port Authority would play down the importance of backhandling in relation to any competitive advantage Weyerhaeuser holds over Ballmill. While we feel the difference in backhandling treatment does give Weyerhaeuser a competitive advantage, we do not suggest that Weyerhaeuser's dominant position in the lumber business results only from that difference in treatment. Weyerhaeuser was No. 1 even before the difference in backhandling treatment was instituted. We do think it clear, however, that Weyerhaeuser gains an additional ad-

vantage over Ballmill and the other tenants at Port Newark by virtue of its freedom to perform its own services. Indeed, Weyerhaeuser was also free to use the services of Maher should it choose to do so. Ballmill and the other tenants had no such freedom or choice—they could neither perform their own backhandling, nor use the services of Atlantic. They were forced to use Maher's services.

At various times during the period of the lease, it would have been financially advantageous for Ballmill to avail itself of Atlantic's backhandling rates. This is clear from the record inasmuch as Ballmill frequently complained to the Port Authority and to Maher that its competitors were getting a better deal at Atlantic. Between 1960 and 1964, Atlantic's backhandling rates were lower than the rates Ballmill was paying to Maher. As a result, most of the nontenant lumber dealers moved their lumber through Atlantic. Weyerhaeuser did likewise. Ballmill could not. Since January 1, 1967, it would again be more advantageous for Ballmill to use Atlantic.

In addition to the right to perform its own backhandling, Weyerhaeuser retained the right to operate its public terminal (Atlantic). No other tenant at Port Newark was given a similar right. Through its Atlantic operation, Weyerhaeuser was able to gain a substantial advantage over the other tenants, both in terms of profits and in terms of large scale lumber operations. While it is not at all clear that Ballmill or other tenants would have the necessary resources or even the desire to operate a public terminal, the denial of such a right by the terms of their lease coupled with the grant of such a right to Weyerhaeuser results in undue preference and prejudice and is an unreasonable practice within the meaning of the Act.

In reaching this conclusion, we have considered the situation with which the Port Authority was faced in its 1953 negotiations with Weyerhaeuser. They had been successful in retaining control over the backhandling operations at Port Newark in negotiating leases with Ballmill and other tenants, but Weyerhaeuser presented a different set of circumstances. Weyerhaeuser wanted to retain its long established and sizable operation at Port Newark in the name of its subsidiary Atlantic and was able to influence the Port Authority to retreat from its policy of trying to regain full control over all the backhandling at Port Newark.

No blame attaches to Weyerhaeuser or the Port Authority solely because of the bargain they struck. However, when the Port Authority decided to retreat from its policy of retaining control in the case of Weyerhaeuser, it became incumbent upon them to treat its other ten-

ants in a similar fashion. This it failed to do and as a result the Port Authority is found to have unjustly preferred Weyerhaeuser over its other tenants at Port Newark.

The Port Authority argues that a difference in operations between Weyerhaeuser and Ballmill justifies the difference in treatment and that Ballmill and Weyerhaeuser are not competitive and therefore do not require similar treatment. Both Weyerhaeuser and Ballmill are dealers of Pacific coast lumber. The record demonstrates that they compete at Port Newark for the same customers but Ballmill's efforts to compete are hindered and prejudiced by the differences in its lease vis-a-vis Weyerhaeuser. Additionally, we find that Ballmill's present disadvantage is the proximate result of the prejudicial arrangement. Any differences between the operations of Ballmill and Weyerhaeuser are largely a result of the special privileges gained by Weyerhaeuser and cannot therefore be offered as justification for recovering such special privileges.

Additionally, the authority's leasing practice is unreasonable under section 17 inasmuch as it unfairly disadvantages Ballmill and other tenants.

Maher's Rates

The Examiner concluded that, as now constructed, Maher's tariff subjects Ballmill to undue and unreasonable disadvantage, in violation of section 16 First of the Act, and furthermore that the regulations and practices complained of are unjust and unreasonable in violation of section 17 of the Act. These conclusions are based on the fact that Maher's volume discount rates are not practically available to Ballmill or other tenants while they are available to nontenants. The disadvantage was considered significant because of the highly competitive nature of the lumber business where differences in cost often determine the ability to make sales. While the Examiner recognized some differences in circumstances between Ballmill and regular users (nontenants) of the terminal, he did not feel such differences justified the difference in treatment flowing from the discount rate provisions.

The discount rate provision applies only to the complete package of truckloading, wharfage, and backhandling. Since Ballmill performs its own truckloading and uses its own premises for storage, it does not qualify for the discount. Accordingly, Ballmill receives no discount on the single service of backhandling and this it considers prejudices in its efforts to compete for business. Maher counters this with the assertion that the discount provision is available to all who wish to use the package of services and because it is thus available to

all the tariff provision, is not unduly preferential, prejudicial, or unreasonable.

Here again, we agree with the Examiner. Maher, however, urges that the Examiner failed to take into account the fact that prior to January 1, 1967, Ballmill enjoyed a rate advantage which because of changed circumstances was no longer justified. Maher points out that until December 1965, Ballmill enjoyed a $0.50 per m.b.f.[4] more favorable backhandling rate than did users of the public terminal, and that from December 1965 to January 1967, Ballmill enjoyed a $0.35 per m.b.f. more favorable rate. Also Maher points to the fact that Ballmill's leased premises were moved from a point adjacent to the public terminal to a point 1.8 miles away. To Maher, it is only reasonable to conclude that because of the change in location of Ballmill's leased premises, Ballmill's rate advantage was no longer justified and accordingly, it was removed in January 1967. While the greater distance to Ballmill's premises might justify removal of Ballmill's former rate level advantage or, as the Examiner suggested, might justify a higher rate for Ballmill related to the greater distance traveled, the discount here in issue is not related in any way to distance. Maher ignores the actual objectionable feature of Maher's tariff, i.e., that it provides a *volume* discount for some users of Maher's backhandling service while it fails to provide a similar *volume* discount for other users. It is irrelevant to the question of the propriety of volume discounts whether a difference in rates might be justified because one customer uses the public terminal and another customer uses a leased area 1.8 miles away from the public terminal. Each customer is entitled to similar treatment in respect to whether a discount based on volume of lumber backhandled is to be granted.

Maher further argues that the basic rate paid by Ballmill for backhandling involves neither a disadvantage nor unreasonable treatment even though Ballmill may at some point pay more for backhandling to its facilities than users of the public terminal pay for backhandling at the terminal. Again Maher urges that different characteristics warrant such a higher charge to Ballmill. As we have already said, Maher might be justified in charging Ballmill a higher rate than it charges users of the public terminal if the difference is related to differences in backhandling characteristics. Here again, it is only necessary to point out that this discount system is not geared to differences in backhandling characteristics—in this case the distance the lumber is hauled. The "characteristics" of the backhandling service for each

[4] Thousand board feet.

lumber dealer using Maher's services are identical. We wish to make it clear that we are not saying that the idea of a volume discount is objectionable per se. We see nothing wrong with such a technique if it is to apply equally to all users of the service.

Maher also suggests that since Ballmill is not a user of the public terminal, Maher owes Ballmill no duty as to services performed at that terminal, and also that Maher was compelled for competitive reasons to induce lumber dealers to use the public terminal.

Here, it is sufficient to say that having held itself out to perform the single service of backhandling, Maher must perform that service in a nondiscriminatory and reasonable manner. Moreover, the record does not show that for Maher to provide Ballmill and other lessees a similar volume discount on the single service of backhandling would in any way affect Maher's ability to compete for lumber dealers at the terminal.

Maher also suggests that the justification for the volume discount scale rests on the premise that as to fixed plant, including the permanent labor force and equipment, the greater the volume the lower the unit cost. Maher states that since the same equipment is used at the public terminal for backhandling and truckloading and since its operation at the terminal is in a relatively compact physical area, and since the combined services are spread out over the free time period, a package discount based on volume is feasible at its public terminal. Maher feels, however, that characteristics of backhandling to Ballmill's leased premises do not support a volume discount inasmuch as in their opinion to carry 10 loads of lumber will run to 10 times the cost of transporting one load and so on.

This is but another variation on Maher's "different characteristics" argument and need not be further dealt with except to add that even were Ballmill's premises immediately adjacent to those of Maher, they would still not be entitled to the discount.

Finally, Maher suggests that the Examiner should have found that Ballmill's loss of sales to competitors, if any such loss occurred, was not proximately caused by Maher's tariff structure. Maher's argument is that Ballmill's competitors are not enabled, by reason of tariff conditions, to sell lumber on better or more favorable terms than Ballmill for the reason that Ballmill's competitors are offered no facility by Maher that is not equally available to Ballmill. In other words, Maher claims its tariff is equally available to Ballmill. Thus, Maher alleges that any loss of sales suffered by Ballmill is not proximately caused by Maher's tariff.

Maher has offered these arguments in an attempt to explain that the Examiner missed the point when he said:

> Complainant is engaged in a highly competitive business, where significant differences in cost often determine the ability to make sales. It is no answer merely to say that complainant *can* or *could* put itself in a more favorable business climate by using all of Maher's services and thus availing itself of the discount rates provided for those tenants and nontenants who do so. This would mean that complainant would have to forego the use of its leased premises, its equipment, and its personnel, even though its rent to the Port Authority would continue.

We feel that the Examiner was right on point. Having been effectively precluded from availing itself of Maher's volume discount rates, Ballmill is placed in a disadvantageous cost position in relation to its competitors and, as the Examiner recognized, this could be rather damaging in a business where significant differences in cost often determine ability to make sales.

For the reasons advanced in the preceding discussion, we find that Maher's volume discount rate provision results in undue preference to users of the public terminal and undue prejudice to Ballmill and other lessees of property at Port Newark in violation of section 16 First of the Act, and also results in an unreasonable practice under section 17 of the Act.

On this same point, Ballmill alleges that the Port Authority is also in violation of the Act inasmuch as the Port Authority controlled the actions of Maher in establishing rates applicable at Port Newark.

The Examiner has concluded that at least from September 30, 1963, Maher was not the agent of the Port Authority in its dealings with lumber receivers at the public lumber terminal, and that the rates for services performed were those of Maher only and not of the Port Authority.

The Examiner accurately stated the following facts which relate to the issue of control over Maher by the Port Authority: (1) after the takeover of Port Newark from the City of Newark by the Port Authority in 1948, the rates for backhandling were prescribed by the Port Authority itself but assessed and collected by its agents; (2) in 1958, the Port Authority contracted with Lehigh Warehouse and Terminal Co. (Lehigh) for the latter to operate the public lumber terminal, and Lehigh issued its own tariff, whereupon the Port Authority resigned as a member of North Atlantic Marine Terminal Lumber Conference and membership therein was obtained by Lehigh and its successors. Maher is the present successor; (3) the Port Authority, by letter of September 5, 1958, advised everyone on its tariff

mailing list, including Ballmill, that the current Port Authority tariff schedule for the handling and storage of lumber would be replaced by a schedule of Lehigh, but that assignment of berths to vessels remained with the Port Authority; (4) the contractor-form of operation has continued from 1958 to the time of the hearing; (5) the contract with Lehigh had required Lehigh to assess fair, reasonable, and nondiscriminatory rates; (6) Maher's contract originally provided that services were to be fair, equal, and without discrimination, that there must be reasonable rules and regulations under the direction of the Port Authority, and that there be fair, reasonable, and nondiscriminatory rates for all services; (7) the Maher contract was amended to remove all control by the Port Authority over the rules, regulations, and rates of Maher; and (8) Ballmill's leases with the Port Authority have required all backhandling services to be performed by the Port Authority or its agent, or by an independent contractor approved by the Port Authority, "at reasonable rates *to be fixed by the Port Authority*." (Italics supplied.)

Ballmill has excepted to the Examiner's conclusion regarding the question of control and in so doing seeks to show that documents between Ballmill and the Port Authority, the interoffice correspondence of the Port Authority and testimony as to meetings between Ballmill and Port Authority indicate that Port Authority participated in matters dealing with setting and control of Maher's rates. Ballmill further argues that the contracts between the Port Authority and Maher indicate that Maher was the agent of the Port Authority in respect to rules, regulations, and rates. Ballmill then suggests that a principal-agent relationship exists notwithstanding a denial by the principal and whether the parties understood it to be agency or not; and further that the fact of agency may be established by proof of circumstances, apparent relations, and the conduct of the parties.

Ballmill's position, upon the extraction of self-serving statements, rests upon the facts that the Port Authority (1) controls the physical location of the public lumber terminal; (2) has a contractual right to terminate their agreement with Maher; and (3) has extracted from Maher a contractual undertaking to do what the Shipping Act, 1916, in any event compels Maher to do, i.e., to offer their services on a fair and equal basis without unjust discrimination to all persons entitled thereto.

None of these things, either singly or when combined, evidence that the Port Authority has the contractual right to control, or in fact controls, the setting of rates for services performed by Maher in backhandling lumber either to the public terminal or to leased areas or for other services of Maher.

The contention that the Port Authority was in every way asserting overall control over lumber handling practices at Port Newark is contrary to fact, and contradicated by Ballmill's own actions. The Port Authority did not control rates at the public lumber terminal. Ballmill was unequivocally informed that it did not. Ballmill consistently went to Maher with its complaints about rates, and went to the Port Authority for relief in other matters only after failing to obtain changes in Maher's rates.

The Examiner's conclusion was well founded, proper and supported by the evidence and testimony of record, namely, that the Port Authority did not control the rates established and maintained by Maher and, further, that Ballmill did not rely upon such control and, in fact, took actions which clearly revealed that he believed the rates were established by Maher.

Weyerhaeuser and Atlantic

The Examiner found no violation by either Atlantic or Weyerhaeuser. Atlantic's tariff was found to apply equally to all receivers, including Weyerhaeuser and therefore was not violative of the Act. While Weyerhaeuser was found to have *received* an unduly advantageous position as a result of its lease with the Port Authority, the Examiner recognized that it is no violation to be on the receiving end of such a preference or advantage.

We agree with the Examiner's conclusions. There is absolutely no showing that Atlantic preferred any users of its services. Its parent Weyerhaeuser was charged the same rates as other users. We are not disturbed by the fact that Atlantic paid more rent to Weyerhaeuser than Weyerhaeuser paid to the Port Authority for its lease. Weyerhaeuser is entitled to receive the profits from its wholly owned subsidiary. The fact that Weyerhaeuser's ability to operate Atlantic has been granted by a preferential lease clause is not relevant to a determination of any violations by Atlantic.

Neither is Weyerhaeuser in violation. The fact that Weyerhaeuser applied some pressure to the Port Authority to obtain its preferential lease is not relevant. The Port Authority is the party that granted the preference and the Act specifically provides that it shall be unlawful to *make* or *give* a preference or prejudice. The Act says nothing about being a recipient of such preference or prejudice.

Reparation

The Examiner concludes that the violations of Maher and the Port Authority are not of sufficient significance to warrant an award of reparation. The Examiner suggests that the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does

not afford a basis for reparation and that to justify an award of reparation, any damage must be the proximate result of violations of the statute. Furthermore, he suggests that the awarding of reparation is a matter of discretion by the Commission.

On the specifics of Ballmill's claim, the Examiner states that in the present proceeding a series of estimates, conjectures, speculations, and assumptions are put forward as a base for alleged damage, and there is no real and tangible proof that any pecuniary losses which Ballmill may have suffered are the proximate result of the violations. Accordingly, the Examiner recommends against the award of reparation. The basis of Ballmill's reparation claim of $1 million is summarized below.

Ballmill suggests that because of Maher's and the Port Authority's violations of the Shipping Act, Ballmill has been damaged in that it has been forced to give up a substantial portion of its profit margins because of unjust and discriminatory cost reductions in favor of its nontenant competitors, and excess costs and expenses particularly in comparison to Weyerhaeuser, as well as lost sales and profits.

When Ballmill signed its lease in 1959, its cost of terminal operation was $4.39/b.m.f. and its nontenant competitors at the public lumber terminal had costs of $7.54. This was a differential of $3.15. Considering the rapid development of Port Newark as a container port and the consequent increase in the value of space, and the nationwide trend toward rising prices, Ballmill had every reason to expect that this differential would increase by 15 percent (instead of decreasing). In that event, the $7.54 total of costs for the nontenant would have been $8.67, and even if Ballmill's costs for 1965 were the same as for 1966, or $4.71, the differential would have been $3.96. Multiplied by Ballmill's volume for 1965 (Ex. 80 net volume of 25,382 m.b.f., or 34,300,000 bd. ft. gross), Ballmill figures its damages in 1965 to be $135,828. Based on 1966 volume, Ballmill figures its damages in 1966 to be $123,658.

Ballmill also lost profits based on lost sales because nontenants, with cost advantages, were able to underbid Ballmill and capture the business. Ballmill says it could confidently expect to have received 20 to 25 percent of the volume at Port Newark, but even if only 17 percent of the volume in 1965 and 1966 had been Ballmill's, the following would have been true. In 1965, net volume was 220,612,000 bd. ft. at Port Newark. Seventeen percent would have been 37,504,040 bd. ft. and, subtracting actual volume of 25,882,000 bd. ft., lost sales are computed to be 12,122,000 bd. ft. net, or 16,381,000 bd. ft. gross measurement (74 percent). Similarly, in 1966, net volume was 223,003,000 bd. ft. Seventeen

percent would have been 37,910,510 bd. ft., and subtracting actual volume of 22,976,000 bd. ft. gives a difference of 14,934,000 bd. ft. net, or 20,181,000 bd. ft. gross measurement which represents total lost sales.

Furthermore, based on sales of $3,882,530 and volume of 35,506,884 bd. ft. gross measurement in 1966, Ballmill's sales price was $96.43 b.m.f. Lost sales in dollars for 1965 on 16,381,000 bd. ft. were thus $1,579,619, and for 1966 on 20,181,000 bd. ft. were $1,946,053. Applying the profit margin of 11.3 percent, lost profits in 1965 amounted to $178,496.94. Even assuming overhead was increased by 10 percent (warehouse operating charges of $103,914, selling and administrative expenses, $225,323), lost profits were $145,573.94. For 1966, gross profit of 11.3 percent on lost sales of $1,946,053 amounted to $219,903.98, and even assuming overhead increased by 10 percent (warehouse, $96,411, selling and administrative, $216,931), lost profits amounted to $188,570.93.

Finally, loss in market value of the business as a prospect for sale, merger, or acquisition because of reduced earnings and the end to its pattern of steady growth should be considered. Ballmill says it was approached with such an offer, but when the interested firm, Boise-Cascade, examined the profit and loss and balance statements of Ballmill, negotiations were terminated. Ballmill suggests that it stands to reason that when a company with a net worth of $1,200,000 has profits of 2 percent, it is not a candidate for sale or merger and that based on this record, the just compensation for this diminution in market value is $406,371.

From all of the above, Ballmill feels it should be awarded damages of $1 million.

As the Examiner correctly pointed out the awarding of reparation is a matter of discretion by the Commission. Section 22 of the Act states that we "may" direct the payment of reparation. The language is permissive and hence the mere fact of a violation of the statute does not necessitate the grant of a reparation award. *Consolo* v. *Federal Maritime Comm'n.*, 383 U.S. 607, 621 (1966).

In the instant proceeding, we feel that a reparation award is unwarranted. We have recognized that Ballmill has been disadvantaged by means of the leases of the Port Authority and the discount rates of Maher. However, we are not convinced that the nature of the violations is such as would warrant the requested reparation award. Furthermore, we are not satisfied that the damages alleged by Ballmill are real or whether the alleged damages are sufficiently related to the violations of the Act.

We have previously stated in *Waterman* v. *Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 253 (1950) that:

> * * * to award damages alleged to have been incurred by reason of unjust discrimination, there must be that degree of certainty and satisfactory conviction in the mind and judgment of the Board as would be deemed necessary under the well-established principles of law in such cases as a basis for judgment in court.

Ballmill's argument relating to loss of cost advantage relies on the assumption that its 1959 favorable cost differential would increase by 15 percent. There appears to be no real basis for this assumption. The reasons offered to support the assumption (i.e., rapid development of Port Newark and consequent increase in value of space and the nationwide trend toward rising prices), could just as well be offered by Maher or the Port Authority to support the proposition that nontenants could expect to better their position by 15 percent.

We recognize that Ballmill's 1959 cost advantage has decreased, but it is not totally clear from the record as to what extent this decrease is due to the objectionable aspect of Maher's tariff, namely the preferential volume discount, or as to what extent the decrease is due to Maher's changes in backhandling rates which have not been found to be in violation of the Act, or to what extent it is due to Ballmill's increased operating costs at its leased area, or even to what extent it is due to Maher's decreased truckloading rate, applicable to nontenants.

We should also point out that Ballmill requests reparation for the year 1965 while the objectionable aspect of the tariff, which is claimed to have resulted in higher costs to Ballmill for 1965, was instituted on December 6, 1965, hardly in time to affect the cost differential for that year.

Ballmill's second point is that it lost profits based on lost sales. Ballmill speculates that it could have expected to receive 20 to 25 percent of the volume at Port Newark but then settles on a 17 percent figure to be used to determine its lost profits. To show how speculative even the 17 percent figure is, we need only point out that in 1959, when Ballmill had the favorable cost advantage, its percent of lumber volume at Port Newark was 8.1 percent. How Ballmill determined it would have received 17 percent in 1965 or 1966 is not explained. Also, once again in figuring lost profits, Ballmill has used the year 1965 while the discount rate provision which allegedly caused the lost profits was not instituted until December of that year.

Finally, Ballmill claims a loss of $406,371 for diminution in market value for failure to sell or merge its company. Nowhere does Ballmill explain how it arrives at such a figure and neither is the connection

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between failure to sell or merge and the violations in question adequately established.

We conclude that reparation is not warranted in this proceeding.

[SEAL] (Signed) THOMAS LISI,
Secretary.

ORDER

This proceeding was initiated by complaint of Ballmill Lumber & Sales Corp. The Commission has fully considered the matter and has this date made and entered of record a report containing its findings and conclusions thereon, which report is hereby referred to and made a part hereof.

It is ordered, That respondents be, and they are hereby, notified and required to cease and desist from engaging in the violations of section 16 First and section 17 of the Shipping Act, 1916 (46 U.S.C. 815, 816), herein found to have been committed by respondents; and

It is further ordered, That Respondent Maher Lumber Terminal Corp. be, and hereby is, required within 30 days after the date of service of this order to modify the provisions of its tariff in a manner consistent with our Report herein, and that respondent Port of New York Authority be, and hereby is, required within 30 days after the date of service of this order to notify the Commission of the manner in which it is complying with our decision herein with respect to the Port Authority's leasing arrangements with lumber wholesalers at Port Newark.

It is further ordered, That the complaint in Docket No. 66–65 is hereby dismissed.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 67-26

U.S. GREAT LAKES/SOUTH AND EAST AFRICA RATE AGREEMENT EXCLUSIVE PATRONAGE (DUAL RATE) SYSTEM

Decided May 9, 1968

Proposed dual-rate contract of the U.S. Great Lakes/South and East Africa Rate Agreement found not to be detrimental to the commerce of the United States, contrary to the public interest or unjustly discriminatory or unfair as between shippers, exporters, or ports, or between exporters from the United States and their foreign competitors, within the meaning of section 14b of the Shipping Act, 1916, as amended.

Proposed spread of 15 percent between contract rates and noncontract or ordinary rates found to be reasonable in all circumstances.

Application by U.S. Great Lakes/South and East Africa Rate Agreement for permission to institute dual rate system, granted.

Elmer C. Maddy and *Baldvin Einarson* for respondents.

John Paul Kennedy and *A. A. Diamond*, for Seaport of Chicago Traffic Development Council, intervener.

Daniel K. Schlorf and *Warren A. Jackman* for Federal Commerce & Navigation Co., intervener.

Donald J. Brunner and *Arthur A. Park, Jr.*, Hearing Counsel.

REPORT

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

By Order of Investigation and Hearing served April 10, 1967, the Commission instituted this proceeding to determine (1) whether the proposed dual-rate contract system of the U.S. Great Lakes/South and East Africa Rate Agreement meets the requirements of section 14b of Shipping Act, 1916, or if it will be detrimental to the commerce of the United States, contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, or ports, or between exporters from the United States and their foreign competitors, in violation of section 14b; (2) whether the application of the

Conference to institute the proposed system should be granted; and if so, (3) whether the proposed spread of 15 percent between contract and noncontract rates is reasonable under the circumstances. Seaport of Chicago Traffic Development Council and Federal Commerce and Navigation, Ltd., intervened. Examiner Benjamin A. Theeman issued an initial decision on January 8, 1968, to which exceptions and replies have been filed. We heard oral argument on March 6, 1968.

Facts

The U.S. Great Lakes/South and East Africa Rate Agreement (hereinafter referred to as the Conference) was approved by the Commission on November 30, 1965. Its membership includes Christensen Canadian African Lines (Christensen), Farrell Lines, Inc. (Farrell), Moore-McCormack Lines, Inc. (Mormac), and South African Marine Corp., Ltd. (S. A. Marine).

Farrell and Mormac are American flag lines that received operating differential subsidies from the Maritime Administration (MA) and operate in the Great Lakes trade on a privilege basis. To date, however, no minimum sailing requirement has been imposed on these lines by MA. During 1966 and 1967, Farrell curtailed its services because three of its vessels were on charter to the Military Sea Transportation Service (MSTS). The future expansion of Farrell's service in this trade depends on the release of these three vessels from MSTS obligations.

Christensen, a service of A/S Thor Dahl of Sandefjord, Norway, is tied to an overall transportation program involving commitments to Canadian ports.[1] However, as the majority of the commodities moving in this trade constitutes U.S. Government relief cargo which must first be offered to American ships, Christensen's vessels are poorly loaded in the Lakes and St. Lawrence River. Tallow, consigned by Universal Transport Corp., is the largest single commodity moved by Christensen.

S. A. Marine is the national carrier of the Union of South Africa. The stated policy of S. A. Marine is that as "the national flag of South Africa, it will follow the trade between the United States and South Africa wherever it exists." S. A. Marine expected that since the September 1967 sailing was the maiden effort, the vessel would be loaded only to one-fifth or one-sixth of its capacity. Nevertheless, the 1968 sailing will be made and the line will remain a member of the Conference.

[1] These commitments are expected to continue even after the institution of a dual-rate contract system should it be approved.

The Great Lakes season extends from sometime in April through the latter part of November, a period of some 7 months. The Conference offered five sailings from Great Lakes ports during the 1966 navigation season and as of July 11, 1967, the Conference had 14 sailings scheduled for 1967: Farrell had one sailing scheduled for July; Mormac, with two sailings in different stages of completion, had four ships scheduled for four sailings; Christensen, in accord with its printed schedules, had eight sailings scheduled, three of which had already been made; S. A. Marine's first sailing was scheduled for September 1967. For 1968, the Conference planned sailings as follows: Farrell, one sailing; Mormac, using the four ships used in 1967, four or six sailings; Christensen, a repeat of eight sailings; S. A. Marine, at least one sailing. There is no indication in the record that the Conference lines did not complete their scheduled sailings in 1967 or that they will not complete those scheduled for 1968.

Nippon Yusen Kaisha (NYK), a Japanese flag line, is the only steamship line competing with the Conference in the trade to South and East Africa.[2] NYK, who pioneered this trade with a sailing in November 1965,[3] completed eight sailings in 1966.[4] Although it expected to carry more cargo in 1967, it only scheduled seven sailings for that year, three of which had been completed as of July 1967. There is no reason to believe that NYK did not complete all of its scheduled sailings.

The Conference lines and NYK have been actively competing for cargo in this trade by solicitation of Great Lakes shippers either through the mails, by personal call of their respective Great Lakes agents, or by advertising in trade journals. The scheduled sailings of the competing lines are generally out of the same Great Lakes ports and any of the lines will go to a nonscheduled port if cargo is available. Twice NYK has been invited to join the Conference, but to date no conclusion has been reached.

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[2] NYK has no service from the U.S. East Coast to South and East Africa. Therefore, NYK does not stop at North Atlantic ports upon leaving the St. Lawrence Seaway but sails directly for Africa.

[3] In 1965, to save the cost of inland transportation from Detroit to the East Coast on automotive parts and KD (knocked down) automobiles, Chrysler Corporation approached the South and East Africa Homebound Conference serving South Africa out of the U.S. Atlantic and Gulf Coasts and requested a service out of the Great Lakes at a rate approximating the East Coast rate; the Conference showed no interest. Farrell, Mormac, and S. A. Marine were members of the Homebound Conference. At that time, after dealing unsuccessfully, with other East Coast carriers, Chrysler entered into an agreement with NYK on a yearly basis for the desired service and rate. NYK agreed to charge Chrysler at Detroit the same rate as is assessed from the East Coast to South and East Africa and to guarantee the rate on an annual basis. The rate was thus subject to negotiations at the end of the year.

[4] In 1966, the eighth sailing was an extra chartered vessel used for cargo for which there was no space on a regular sailing.

During the 1966 season, the Conference made approximately 55 downward revisions of an equal number of items in its tariff allegedly to meet "competitive conditions" due to the operation of NYK. In some instances, the Conference tariff carried a rate for the specific item, while in others, the item had been rated NOS. In any event, the revision was downward. As of July 11, 1967, the Conference had made some 27 more downward revisions of an equal number of items in its tariff. In order to meet competition in the trade, Christensen resigned from the Conference at the end of the 1966 season. However, Christensen did rejoin the Conference in early 1967, expressing the hope that the proposed dual rate contract would result in more cargo for all the lines.

In December 1966, the Conference filed the proposed dual-rate system for Commission approval. This contract, among other things, provided for contract rates 15 percent lower than the ordinary rates set forth in the carrier's tariffs. Seaport of Chicago Traffic Development Council, a project of the Chicago Association of Commerce and Industry, intervened in support of the application. During the hearing, however, the Development Council changed its position to one of neutrality. Federal Commerce & Navigation Company (Federal), a corporation with its principal office in Montreal, Canada, intervened in opposition. Federal is engaged in the business of ocean transportation, to and from the Great Lakes, with no present commercial interest in the Great Lakes/South and East African trade. It asserts, however, it has vital interest in the continued growth and expansion of the Great Lakes trade via the St. Lawrence Seaway. It took no active part in the hearing but filed a brief.

Discussion and Conclusion

The Examiner, in his Initial Decision, found that the Conference's proposed dual-rate contract met all the specific requirements of section 14b of the Shipping Act, 1916, and concluded that:

> No showing ha[d] been made that the institution of the proposed dual rate contract will result in any of the consequences listed in section 14(b) that would require the Commission to deny the use of the contract as set forth in section 14(b).

Moreover, the Examiner found the proposed spread of 15 percent between contract and ordinary rates in the proposed dual-rate contract to be reasonable in all the circumstances. Accordingly, he approved the Conference's application.

Hearing Counsel except generally to the Examiner's approval of the proposed dual-rate contract. While they concede that the proposed

contract conforms to all of the specific requirements of 14(b)(*1*) through 14b(9), they challenge the Examiner's findings that:

a. The proposed spread between the non-contract rates and the rates charged contract shippers of 15% the ordinary rates is reasonable in all the circumstances; and,

b. The proposed contract will not be detrimental to the commerce of the United States or 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.

For the most part, Hearing Counsel's arguments in support of their exceptions are but a recapitulation of contentions already advanced to the Examiner. For reasons hereinafter stated, we find that the Examiner's conclusions with regard to these issues were proper and well founded.

A. *Reasonableness of the 15 Percent Spread between Contract and Noncontract Rates*

In his Initial Decision, the Examiner made the following findings with respect to the reasonableness of the differential between contract and noncontract rates in the proposed contract:

2. The Chairman of the Rate Agreement testified that based on his experience with other contract systems: (a) anything less than a 15 percentum spread would be insufficient inducement to major shippers to sign a dual rate system; (b) the operation of a dual rate system assures the carrier of basic cargoes and at the same time assures a regular carrier service.

3. The Chairman of the Rate Agreement testified further: he is chairman also of the S/E Africa Conference out of the U.S. east coast; the dual rate system of that conference has a 15% spread; a number of the 2500 shippers who are signers of the coast conference, are prospective shippers and signatories of the proposed dual rate contract out of the Great Lakes; the probabilities of their signing the Great Lakes dual rate contract would be greatly diminished if the level were less than 15%, for "They would [not] be too happy about taking a lesser spread in one area on world wide trade."

4. * * * [no shippers] opposed the proposed 15% spread even though the order of the Commission stated specifically that the reasonability of the 15% spread would be in issue.

5. The Congress in passing section 14(b) of the Act, decided that a 15% spread was reasonable * * *

* * * * *

6. Accordingly, it is found that the spread of 15% between contract rates and ordinary rates in the proposed dual rate contract is reasonable in all circumstances. [Footnotes omitted].

Hearing Council's objection to the Examiner's approval of the proposed spread boils down to the basic contention that Respondents, as proponents of the present contract, "* * * had the burden to show that a spread of 15% was reasonable * * * and this they have not done." They characterize the testimony of record relied on by the

Examiner as "opinion or attempted justification" and submit that it falls short of providing the requisite justification for the proposed 15-percent spread. Respondents, on the other hand, reply that the testimony of record was "uncontroverted and unshaken" and that, in any event, to suggest that they "* * * have the burden of proof on this issue is incorrect and without support in law." A review of the legislative history of section 14b of the Act and our decision in *The Dual Rate Cases*, 8 FMC 16 (1964), should serve to cast this dispute in its proper light.

Prior to the enactment of section 14b of the Act, and particularly section 14b(7), carriers and conferences initiating dual-rate systems were virtually free of restraint in determining the amount of differential between contract and noncontract rates.[5] As an inducement to attract shipper customers, proposers of dual rate systems could establish any differential that they felt was commercially expedient, so long as it was not unjustly discriminatory.[6] Even under these circumstances, however, the concept of the differential was, generally, acknowledged to be a matter of business judgment as to what was practical and fair.[7] For example, in *Contract Rates—North Atlantic Cont'l Frt. Conf.*, 4 F.M.B. 355, 365 (1954), our predecessor, the Federal Maritime Board, concluded that:

> * * * the determination of the differential in this case was made after considerable deliberation and with expert advice, and the 10-percent differential was selected by the conference, based on the business judgment of its members, as being (1) no larger than was necessary to induce shippers to sign and abide by contracts for stabilized rates; (2) not so great as to be coercive to shippers to prevent them from patronizing nonconference lines if they so desired, * * *; and (3) not so great as to cause loss of revenue to conference carriers which would be crippling to their business operations.

Based on criteria such as the above, conferences inaugurating dual-rate systems prior to 1961 and the advent of section 14b of the Act, put into effect differentials between contract and noncontract rates which ranged from a low of 10 percent, which was "about as low as * * * [would] be effective to attract shippers,"[8] to a high of 20 percent.[9]

Congress, in formulating section 14b(7) in terms of a 15 percent

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[5] Section 14b of the Shipping Act, 1916, provides, *inter alia*, that:

> * * * the Federal Maritime Commission * * * shall * * * permit the use by any * * * conference * * * of any contract * * * provided the contract * * * expressly * * * (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates;

[6] *Contract Rates—North Atlantic Cont'l Frt. Conf.*, 4 F.M.B. 98 (1952).

[7] *Contract Rates—North Atlantic Cont'l Frt. Conf.*, 4 F.M.B. 355, 365 (1954).

[8] *Id.* at 373.

[9] In *Contract Rates-Japan/Atlantic-Gulf Freight Conf.*, 4 F.M.B. 706, 716 (1955), the Board approved a 9½ percent spread after recognizing that:

> Many of the conference lines favored a differential of 12½ percent to 15 percent as reasonable and more satisfactory than 9½ percent, but considered the conference limited, under Japanese law, to 9½ percent. * * *

differential, took full cognizance of the foregoing. As Senator Engel stated during debate on the bill which ultimately added section 14b to the Shipping Act, 1916:

> * * * The spread provided by this measure is 15 percent. Some may argue that it should be 10 percent; some may argue that it should be 20 percent. But the committee examined the entire situation, and arrived at the 15-percent figure on the basis of the information which appears on page 14 of the report, as follows:
>
>> Of the 62 dual-rate conferences serving U.S. ports in 1959, 21 expressed their spread between contract and noncontract rates in percentage figures (showing the percentage above the contract rate of the noncontract rate). Of the 21, 18 were using a 20-percent spread; 1, 15 percent; and 2, 10 percent. [See Hearings Before Antitrust Subcommittee of Committee on the Judiciary, House of Representatives, on Monopoly Problems in Regulated Industries; Ocean Freight Industry, 86th Cong., 2d sess., pt. 1, vol. 1, at 740–741 (1959).]

Another example of the reasoning behind the 15-percent spread is found in this statement of the Committee on Merchant Marine and Fisheries:

> *The provision authorizing a maximum spread between the rate charged the casual shipper and the exclusive patronage contract signer of 15 percent appeared to the committee, in the light of its experience, as reasonable.* The problem was to find a figure that would not act as a penalty upon the shipper who did not choose to limit his shipments to conferences and at the same time would provide sufficient inducement to others to execute such agreements. As stated, it is the belief of the committee, which was shared by carrier and shipper witnesses alike, that the dual rate conference system provides definite advantages in assuring a nucleus of cargo to established carriers, thus enabling them to provide the equipment and service required by the majority of shippers. The *contract/noncontract spread is the best practical device to assure these aims and the 15-percent difference in rates is, in the judgment of the committee, fair and reasonable to achieve this end without imposing a penalty on, or discriminating against the nonsigner.* [H.R. Rep. No. 498, 87th Cong., 1st Sess. 1961]. [Emphasis added].

Therefore, in arriving at the 15-percent spread found in section 14b(7), Congress was not acting arbitrarily. On the contrary, there was, as expressed by the Senate Commerce Committee,[10] a "general satisfaction with the 15-percent spread".[11]

[10] S. Rep. No. 860, 87th Cong., 1st Sess. p. 14.

[11] Hearing Counsel, misinterpreting the Examiner's decision with respect to his discussion of the legislative history of section 14b(7), contend that:

> Nowhere can this legislative history be seen to justify a conclusion that Congress intended that in all circumstances the differential should or *must* be 15%.

The Examiner has not, as Hearing Counsel allege, made any finding that the differential between contract and ordinary rates *must* be 15 percent but merely has determined that on the basis of the present record and the legislative history of section 14b(7) the 15-percent spread in the proposed dual rate contract is reasonable in all the circumstances. The reports of both Houses of Congress make it clear that what Congress did was merely to find that, based on its study of existing dual rate systems, a maximum spread of 15 percent was reasonable, so far as they were concerned, but left it to the Commission, applying its expertise, to determine, under the provisions of section 14b(7), "* * * a spread between ordinary rates and rates charged contract shippers which * * * [is] reasonable in all circumstances * * *"

In *The Dual Rate Cases*, the Commission, in reviewing some 60 existing dual-rate contracts, had an opportunity to interpret and implement the statutory provisions of section 14b. In so doing, the Commission, mindful of the legislative history of section 14b(7) and Congress' general desire that insofar as possible, dual-rate contracts should be standard or uniform,[12] confirmed the "general satisfaction with the 15-percent spread" and concluded that "* * * the 15-percent spread as provided for in the majority of the proposed contracts is reasonable." Thus, consistent with the mandates of section 14b(7), the Commission, calling upon its experience in the field, determined that a spread between "ordinary rates and rates charged contract shippers" of 15 percent, as proposed by Respondents here, was "reasonable in all circumstances." The effect of the legislative history of 14b and our decision in *The Dual Rate Cases* was to establish a presumption that a spread of 15 percent is reasonable within the meaning of section 14b of the Shipping Act, 1916, unless shown to the contrary. This presumption, together with Respondents' testimony of record, formed Respondents' case for the approval of 15 percent. Hearing Counsel, being opposed to the institution of a 15-percent differential, then had the obligation of going forward with sufficient evidence to demonstrate the unreasonableness of the spread in this trade. However, Hearing Counsel merely attack the evidence and testimony submitted by Respondents as "opinion or justification." Just what type of evidence Hearing Counsel would require to establish the reasonableness of the spread is not suggested; nor does Hearing Counsel offer any evidence to show that the proposed spread is unreasonable. In light of all the foregoing, we conclude that the 15-percent spread between ordinary rates and noncontract rates in the Conference's proposed dual rate contract is reasonable.

B. Approvability of Proposed Contract Under Standards Set Forth in Section 14b of the Shipping Act, 1916

Hearing Counsel admittedly have "no quarrel" with the Examiner's finding that "* * * the proposed contract meets the eight specific requirements of section 14(b)(1) through 14(b)(8);" they do, however, oppose approval of the contract predicating their opposition " * * *

[12] The express, detailed requirements which were imposed for all dual-rate contracts are fair indication that the intent of the statute was, at least as to these requirements, that uniformity would be the rule and the legislative history makes clear that this was the intention of Congress. As the Committee on Merchant Marine and Fisheries advised:

> It is the expectation of the Committee that a standard form of contract to be utilized by all conferences will be approved by the Board [now Commission] with such riders as may be required to suit the needs of a particular trade. This will greatly simplify the problem of shippers, who of necessity must be members of a number of conferences, with respect to interpretation and application of differing provisions. (H.R. Rep. No. 498, 87th Cong., 1st sess., p. 9 (1961).)

upon the fact that the system would be violative of section 14b, as detrimental to commerce, contrary to the public interest and unjustly discriminatory and unfair as between Great Lakes shippers and ports and their domestic and foreign competitors." The thrust of Hearing Counsel's argument is that the Great Lakes is a unique and developing area and the institution of a dual rate system in this trade will inhibit the natural competition necessary to the establishment of the proper level of rates.[13]

In support of this position, Hearing Counsel develop at some length the facts and conclusions of other cases which involve the Great Lakes and which purportedly stand for the following propositions:

(1) Vast sums of money have been expended in developing the Lakes as a trading area;

(2) That it is a unique and still developing area;

(3) That utilization of Great Lakes ports has allowed local shippers to obtain a competitive position in foreign markets;

(4) That the short navigation season, the differential in rates with North Atlantic/Gulf ports and the institution of a dual-rate system can cause a drain off of cargo from Lake ports; and

(5) That carriers serving Atlantic and Gulf ports can benefit from this drainoff of cargo from the Lakes.[14]

Of these principles elicited by Hearing Counsel from the cases cited, the only one which is in any way related to the issue here is that "* * * the institution of a dual-rate system can cause a drain off of cargo from the Lake ports." This proposition, drawn from the Examiner's decision in Docket No. 1043,[15] served December 30, 1963, was directed to a situation where the contract system involved included "Great Lakes ports in addition to United States Atlantic and Gulf ports." Indeed, as Respondents have been quick to point out, all of the

[13] A consideration of Hearing Counsel's position lends considerable support to Respondents' proposition that:

> The main thrust of Hearing Counsel's Exception on this point * * * is not that this particular dual rate contract should be disapproved but that all *dual* rate contracts from Great Lakes should be disapproved * * *

However, neither Congress, in enacting section 14b of the Act, nor the Commission, in its interpretative pronouncements on that section, have excluded from its coverage dual rate contracts involving the Great Lakes. Accordingly, the approvability of such a contract must be determined in the light of the clearly stated standards of section 14b as would proposed contracts from any other trade area. Simply stated, the development of the Great Lakes as a trading area, does not authorize the Commission to disapprove *all* dual rate contracts proposed for that area, but only if such contracts contravene the mandates of section 14b.

[14] The cases cited by Hearing Counsel are: *River Plate and Brazil Conferences Exclusive Patronage (Dual Rate) Contract,* Docket No. 1043, *8 FMC 16, 267,* affirmed, *The Dual Rate Cases,* 8 F.M.C. 16, 44 (1964) and *Agreement-U.S. Atlantic & Gulf/Australia-N. Zealand Con.,* 9 F.M.C. 1 (1965); *Contract Routing Restrictions,* 2 U.S.M.C. 220 (1939).

[15] The Examiner's decision was affirmed by the Commission in *The Dual Rate Cases, supra,* p. 44.

cases cited by Hearing Counsel involved situations where one conference dual rate contract covered *both* the Atlantic and Great Lakes trade, whereas, in the instant proceeding, the two trades served by the Conference are not combined under one dual rate system. Moreover, in *Agreement-U.S. Atlantic & Gulf/Australia-N. Zealand Con.*, *supra*, a case cited by Hearing Counsel, we found that a situation where a dual rate contract covers "both the Atlantic and Gulf as well as the Lakes" could be "* * * harmful not only to the shipper, but to the development of the Great Lakes as a trading area;" we also recognized "* * * that one of the fundamental purposes of the dual rate law was to allow the steamship conference to compete effectively with the independent carrier," and concluded that all interests could best be served "* * * by the institution of a separate dual rate contract for the Great Lakes section, independent of the dual rate contract from the Atlantic and Gulf."

The Examiner himself has already considered and rejected the theory that the proposed dual-rate contract will divert cargo from the Lakes to the Atlantic Coast. On the basis of the present record, we see no compelling reason, nor has any been proposed to us why we should disagree with the Examiner on this point. Our conclusion here also serves to dispose of Hearing Counsel's suggestion that the Examiner erred because he "* * * chose not to discuss cases in which the Commission has reviewed the developing or exploratory stage of waterborne commerce from the Great Lakes."

Finally, in support of their position that the proposed contract should not be approved because it will be detrimental to the development of Great Lakes ports,[16] Hearing Counsel place great reliance on the following statement offered by Federal Commerce & Navigation Co.:

1. A dual rate system in this trade is not warranted at this time because the trade is in its formative growth years and requires stimulation in the

[16] In contending that the institution of the proposed dual rate system will destroy the natural competition necessary to the establishment of a proper level of rates and the development of Great Lakes, it would appear that Hearing Counsel are failing to take into consideration the position that the independent NYK holds in the trade, which position Hearing Counsel themselves have summarized as follows:

> The conference competitor, Nippon Yusen Kaisha Ltd., is not a periodic, undependable intruder but rather a carrier offering regularly scheduled service. Indeed, in 1966, NYK had eight sailings in the trade, three more than did the entire conference. NYK maintains an advertising program, regularly solicits cargo and visualizes a similar number of sailings in the future covering the same ports and carrying a similar volume of cargo. NYK would be willing and capable of serving other ports on the Lakes and in 1966 was the only carrier in the trade to serve the Port of Duluth. (Transcript references omitted.)

We have been provided no reasons why such a firmly established independent is not in a position to provide competitive freight rates.

form of maximum steamship service providing frequent sailing opportunities to shippers to encourage their use of United States Great Lakes gateway ports.

2. The trade requires competitive ocean freight rates in order to make possible the use of Great Lakes shipping services by the shipping public and thereby induce the trade to develop its cargo potential.

3. The institution of a dual rate system by the United States Great Lakes/South and East African Conference will, in the judgment of Federal Commerce and Navigation Company, Limited, inhibit the growth of competitive berth line services in this trade, which is believed vital for the future growth and development of the trade. (Ex. 29).

No facts are offered in support of these conclusions. In addition, Hearing Counsel speculate that "* * * if NYK were forced out of this trade, Chrysler would have little success in inducing other independent lines to enter the trade * * *" although there is absolutely no evidence in the present record which would in any way indicate that NYK is being "forced" out of the trade. On the contrary, the record bears out the fact that NYK's competitive position in this trade is equally as strong, if not stronger, than the Conference's.

In brief, all that we have been offered in opposition to the proposed contract are speculative conclusions unsupported by any evidence of record. Such is not ground for disapproval. Hearing Counsel themselves concede that their position is based on something less than "detailed factual evidence" but urge us to take into consideration the "newness of the trade" and depart from the "*Alcoa* rule."[17] Actually, what Hearing Counsel refer to as the "*Alcoa* rule" was first formulated some 17 years ago by the Federal Maritime Board in *West Coast Line, Inc.* v. *Grace Line*, 3 F.M.B. 586, 595 (1951), wherein the Board advised that it was "only able to decide cases on the evidence of existing facts and the reasonable deductions to be drawn therefrom" and not on "speculative possibilities." Even were we of a mind to depart from this long-standing rule, nothing offered by Hearing Counsel suggests that this is the proper case in which to do so.

In the light of all the foregoing, we are wholly unable to conclude, on the basis of the evidence of record, that the proposed dual-rate contract will be detrimental to the commerce of the United States,

[17] See *Alcoa S.S. Inc.* v *CIA. Anonima Venezolana*, 7 F.M.C. 345, 361–364 (1962), affd. *sub. nom Alcoa Steamship Company* v. *Federal Maritime Com.*, 321 F 2d 756, 760 (D.C. Cir. 1963). The Commission has long held that it does not decide cases on speculative possibilities. We have also stated that the mere possibility that a conference agreement may result in a violation of the Act is insufficient reason to disapprove the agreement. *Agreement 8492—Alaskan Trade*, 7 F.M.C. 511, 519 (1963) ; *Agreement 134–24–Gulf/Mediterranean Ports Conference*, 8 F.M.C. 459 (1965). This doctrine has been extended to cover situations involving section 14b dual rate contracts as well as section 15 agreements. *Pacific Westbound Conference*, 9 F.M.C. 403 (1966). Should it appear in the future, however, that any of the consequences enumerated in section 14b occur, the Commission is specifically authorized by section 14b to withdraw its permission after notice and hearing.

contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, and ports, as well as between exporters from the Great Lakes and their foreign competitors, as alleged.

An appropriate order will be entered.

(Signed) THOMAS LISI,
Secretary.

No. 67-26

U.S. GREAT LAKES/SOUTH AND EAST AFRICA RATE AGREEMENT EXCLUSIVE PATRONAGE (DUAL RATE) SYSTEM

ORDER

Full investigation in this proceeding having been had and the Commission on this day having made and entered of record a Report stating the findings and conclusions thereon, which Report is hereby referred to and made a part hereof, and having found that the Exclusive Patronage (Dual Rate) contract of the U.S. Great Lakes/South and East Africa Rate Agreement submitted to the Commission should be approved pursuant to section 14b of the Shipping Act, 1916.

Now therefore, it is ordered, That the aforesaid contract of the U.S. Great Lakes/South and East Africa Rate Agreement is permitted for use by said Rate Agreement.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65–11

INTERNATIONAL PACKERS LIMITED

v.

NORTH PIER TERMINAL CO., ET AL.

Decided May 10, 1968

Respondents' tariff provisions relating to "overtime charges" and "extra service charges" result in unreasonable practices under section 17 of the Shipping Act, 1916, inasmuch as they provide no standard by which prospective users of those services can determine applicable charges.

Respondents' tariff provisions which exclude refrigerator cargo from free time and from the benefits of the "three o'clock" rule found not unlawful due to characteristics of refrigerator cargo and Respondents' facilities for handling such cargo.

Respondents' tariff provision on wharf demurrage not shown to result in assessment of charges to importer for delays not due to fault of the importer.

Respondents' tariff provision establishing truck and railroad car loading and unloading rates not shown to be unlawful under the standards of the Shipping Act, 1916.

Frederick W. Smart for complainants International Packers, Ltd.

Joseph E. Wyse, *Abraham A. Diamond* and *John P. Kennedy* for respondents North Pier Terminal Co., *et al.*

REPORT

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

This proceeding was instituted by a complaint filed by International Packers Limited (Complainant) against six Chicago terminal companies and wharf operators who comprise the Port of Chicago Marine Terminal Association (Respondents). The Complainant charges that certain of Respondents' terminal tariff rates and regu-

lations are violative of sections 15, 16, 17, and 18 of the Shipping Act, 1916 (Act). Reparation is sought.

Hearings were held before Examiner Edward C. Johnson who issued his initial decision February 7, 1968. In the absence of exceptions, we decided to review the Initial Decision on our own motion.

FACTS

Complainant is an importer and exporter of packing house products, byproducts, and other foodstuffs, operating at the Port of Chicago.

The Respondents in this proceeding are terminal operators engaged in the business of stevedoring and marine terminal operations.[1] As stevedores, they load and discharge cargo from water carriers. As marine terminal operators, they provide a waterfront facility and perform various services to accomplish the interchange of cargo between inland carriers and water carriers.

Prior to March 1965, it had been the practice of steamship lines serving the Port of Chicago in the foreign trades to include railroad car and truck loading and unloading within their ocean linehaul rates. However, in March 1965, the terminal operators were notified by the steamship lines that the latter would no longer absorb the car and truck loading and unloading charges. The notice advised the Respondents that they would have to file a tariff immediately.

Respondents, thereupon, prepared a tariff and on March 24, 1965, mailed it to the Commission. The tariff was designated Port of Chicago Marine Terminal Association Tariff No. 1, FMC No. T-12, FMC-T No. 1 and was effective April 1, 1965. This tariff was the first ever published by the Respondents and the first ever published in the Port of Chicago.

Prior to publication of this tariff, and in anticipation that such publication might be necessary, Respondents conducted a simple cost study covering the period October 28 to November 8, 1963, in an effort to determine specific railroad car and truck loading and unloading costs. Respondents realized that the study was inadequate as a basis for a permanent rate structure, and they then retained Mr. Philip E. Linnekin, an authority in the field of cost accounting with extensive experience as a consultant on marine terminal rate matters. On October 26, 1964, he issued a preliminary report, which was followed on February 18, 1965, by a preliminary study limited to the cost of loading

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[1] The Respondents are North Pier Terminal, Calumet Harbor Terminals, Inc., Great Lakes Storage and Contracting Co., Maritime Services, Ltd., Rogers Terminal and Shipping Corporation, and Trans-Oceanic Terminal Corp., and the Port of Chicago Marine Terminal Association.

and unloading inland carriers. This study was based on information supplied by some four of the respondent terminals and covered operations during the months of October and November 1964. Mr. Linnekin concluded, and so advised the terminal operators, that these studies, together with the published rates of other terminals, should provide a reasonable basis for their initial tariff. He urged, however, that a more substantive cost study be made by all operators during the 1965 season.

After the opening of the 1965 season, Respondents retained Mr. Linnekin to conduct the further, more definitive, study he had recommended. This study covered the three-month period of August, September and October 1965, considered reasonably normal months representing about 40 percent of the shipping season, and included the operating results of five of the then operating members of the Port of Chicago Marine Terminal Association. Data was submitted to Mr. Linnekin by the terminal operators on the forms which he prepared, which included separate reports for each rail car and truck loading and unloading operation. These reports totaled some 19,244 in all. Tonnages, man-hours and direct costs were determined for truck labor, lift trucks, cranes, checkers, foremen, and overhead. Ten percent was added to commodity totals as provision for profit before federal income taxes. In summary, the study disclosed the following:

	Short Tons	*Total Cost*	*Total Cost and Profit*	*Cost per 100 lbs.*
All Commodities	242, 169	$635, 350	$698, 885	14. 4¢
Prepalletized Cargo	8, 388	11, 923	13, 115	7. 8¢
Containerized Cargo	1, 533	2, 199	2, 419	7. 9¢

These costs did not include the facility cost factor. The addition of that factor of 5.4¢ per 100 pounds made the total cost for each category respectively 19.8¢, 13.2¢ and 13.3¢ per 100 pounds.

These studies prepared by Witness Linnekin appeared to be in accordance with principles underlying the so-called Freas Formula. They are, however, limited to cost analyses and are not concerned with such other ratemaking factors as competition, value and ability to pay.

Discussion

Complainant has objected to several provisions of Respondents' terminal, Tariff FMC–T No. 1, alleging violations of the Act and seeking reparation. The Examiner found no merit in Complainant's allegations and recommended against reparation. We agree that reparation is unwarranted, but we find certain provisions of Respondents' tariff to result in unreasonable practices under section 17.

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At the outset, in reference to certain allegations of Complainant, it is unclear from the pleadings or from the record in what respects Complainant's objections are related to violations of the Act. Complainant has offered statements of dissatisfaction with certain tariff provisions but has in some instances failed to specify if or in what sense any provisions of the Act are contravened. However, we have considered Complainant's general allegations of unlawfulness and have attempted to relate them to each of Complainant's specific objections.

Definitions

Complainant objects that no provision is made in the "definitions" section of Respondents' tariff for palletized goods, containerized cargo, or other types of normal freight requiring less handling costs. It was later stipulated by the parties that this portion of the complaint has been satisfied by an amendment to Respondents' Tariff No. 2 effective September 1, 1966.

Overtime Charge

Section 3 of Respondents' tariff reads in pertinent part:

The rates provided herein are for work performed during normal working hours, i.e., 8:00 A.M. to 12:00 Noon and 1:00 P.M. to 5:00 P.M., Monday through Friday, inclusive; all holidays specified in the collective bargaining agreement in effect being excepted.

Overtime work, i.e., work performed outside of normal working hours, specified in the collective bargaining agreement in effect, except as specifically set forth in the immediately preceding paragraph, shall be performed only by mutual agreement.

Complainant suggests that to avoid discrimination, the tariff should specify exact holidays and that overtime rates of various classes of labor should be spelled out to enable verification of charges. Complainant also objects to the reference to the "collective bargaining agreement" since that agreement is neither public information nor filed with the Commission.

The Examiner stated that Complainant has made no allegation of unlawfulness but has merely expressed dissatisfaction with the provision. The Examiner concludes there is nothing unlawful about the provision.

The record is scant on this point. However, we feel that the language of the tariff speaks for itself and we find it to be objectionable inasmuch as it provides for overtime work to be performed only by mutual agreement and does not specify any standard for determining rates for such overtime work. In *Empire State H'w'y Transp. Ass'n* v. *American Export Lines*, 5 F.M.B. 565, 590 (1959), we considered a terminal conference tariff provision which provided for an extra charge for loading

or unloading cargo weighing 6,000 pounds per piece. Such charge was to be determined by negotiation. The tariff provided no standards by which individual member terminals were to be guided in determining the special charge. We stated that:

> The provisions of respondents' tariff should be reasonably clear and precise in order that its application will be understood by the terminals, the truckers, and the general public, and so that charges will be uniform as between shippers similarly situated. We consider a tariff provision such as this one, under which it is impossible to know that a charge will be or how it will be determined, to be an unjust and unreasonable practice in violation of section 17 of the Act. We will insist that this provision be modified by the inclusion of reasonable standards by which the individual terminals will determine this extra handling charge uniformly.

In *Truck and Lighter Loading and Unloading*, 9 F.M.C. 505, 517 (1966), we were faced with the situation in which a terminal conference was performing certain lighter loading and unloading services without a tariff on a negotiated basis. We stated:

> . . . that to the extent such services are performed respondents are required to have a published tariff to inform potential recipients of such services of the exact charges to be expected. Negotiated rates are unsatisfactory . . . .

The principle of the above-mentioned cases is equally applicable here. Respondents hold themselves out to perform overtime services. The tariff does not specify rates for such services. Neither does it give any indication, other than the "mutual agreement" language, as to what criteria will be used to determine such rates. This is unsatisfactory and is found to be an unjust and unreasonable practice under section 17 of the Act inasmuch as there is no guarantee that Respondents' overtime charges will be uniform for similarly situated users of Respondents' services. However, since the record contains no evidence that Complainant has ever been injured by this practice, it will not support an award of reparation.

We think the above applies with equal force to the listing of specific holidays instead of referring to those specified in the collective bargaining agreement, and we conclude that Respondents' failure to do so is an unreasonable practice under section 17.

Three O'Clock Rule

The last paragraph of the "overtime charges" section of Respondents' tariff reads:

> Any carrier in line to receive or discharge cargo by 3:00 P.M. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, and is in all respects ready to be loaded or unloaded, shall be worked at the straight time tariff rates, until loading or discharging is completed, with the exception of refrigerated cargo.

Complainant charges that the exclusion of refrigerated cargo from the applicability of this provision results in discrimination and prejudice. On the face of the provision, it is apparent that general cargo is preferred over refrigerated cargo in respect to the three o'clock rule. We conclude, however, that such preference is not so undue as to result in a violation of the Act.

Respondents have offered testimony, undisputed in the record, which serves to explain the difference in treatment. Respondents explained that refrigerated cargo is excluded from the application of the three o'clock rule because Respondents are unable to predict when rain, mechanical breakdown, labor disputes, or other factors might cause the cessation of loading or unloading of the vessel. Respondents state that unloading of refrigerated cargo from the truck would cease in that event because, unlike general cargo, refrigerated cargo cannot be set just anywhere in the warehouse or on the dock for sustained periods of delay awaiting resumption of vessel loading. Respondents feel they should not be required to guarantee the completion of truck unloading because to do so would place them in the position of being responsible for refrigerated cargo on their premises when they do not have adequate storage facilities to protect refrigerated cargo.

For the reasons advanced by Respondents, which were undisputed by Complainant, we find that Respondents' practice of exempting refrigerated cargo from the benefit of the three o'clock rule results in no violation of the Act.

Extra Service Charge

Respondents' tariff has a provision entitled "Extra Service Charges" which reads as follows:

> When loading or unloading is in other than the ocean bill of lading lots requiring special stowage, split deliveries, handling, sorting, grading or otherwise selecting the cargo, for the convenience of the carrier, shipper or consignee, the Terminal Operator shall make an extra charge for each such service to the party ordering the service.

Complainant alleges that this provision allows a charge which is too broad and indefinite and which should be restricted to actual labor used in extra service. Complainant states that the actual man-hour rates in effect should be shown in the tariff to enable the exporter or importer to accurately check the charges and to avoid discrimination between shippers.

The Examiner found that there is insufficient record testimony to show that this provision is in violation of any statutory provisions.

We disagree with the Examiner's conclusion since, as in the case of the "overtime charge" provision, this provision contains no standard

of determining rates to be applied on such extra services. For the same reasons advanced in respect to the "overtime charge" provision, we find the extra service charge provision to be an unreasonable practice under section 17 of the Act. Respondents will be required to include in their tariff some reasonable standard to enable users of the services to determine applicable charges.

Complainant admits that he has had no shipments to which this provision applies and that he was never billed for extra charges. For these reasons, Complainant is not entitled to reparation on account of the unreasonable practice.

Free Time

Respondents' rule regarding free time provides five days for import cargo and ten days for export cargo, but states that no free time shall be allowed on refrigerator cargo. Complainant is of the opinion that failure to allow free time on refrigerator cargo is unreasonable and discriminatory. Complainant argues that Respondents could allow free time on refrigerator cargo and still protect themselves by including in their tariff a clause which relieves the terminal operator of liability for deterioration of refrigerator cargo left during free time periods.

The Examiner concludes that there was insufficient record evidence to support the allegation that lack of free time on refrigerator cargo is unreasonable and discriminatory. We agree.

In *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 539 (1966), we considered certain free time practices and stated:

> Thus the establishment of the minimum amount of free time which under the law must be granted by carriers is a relatively simple proposition—the period must be realistically designed to allow the consignee sufficient time to pick up his cargo, taking into account physical limitations of the facilities, other delays, etc., i.e., the so-called transportation necessities of the particular port or terminal.

In determining whether Respondents are justified in denying free time to refrigerator cargo, we must take into account the physical limitations of Respondents' facilities and the necessities of Respondents' terminal. The record shows that Respondents have very little storage space for refrigerator cargo and in those terminals in which it does exist, storage is provided for the benefit of the vessel operators and is not offered to shippers as a public service. Consequently, Respondents generally attempt to handle refrigerated products in coordination with the loading of the vessel thereby precluding any storage or placing on the dock for sustained periods of time. It is apparent that Respondents do not have the facilities to provide free time on

refrigerator cargo and therefore their failure to so provide is neither unreasonable nor unduly prejudicial.

Furthermore, the record shows that various other terminal operators throughout the country have similar rules denying free time on refrigerator cargo.

Complainant's suggestion that Respondents provide free time on refrigerator cargo while disclaiming liability for deterioration is likewise objectionable. As pointed out by Respondents, it would be unwise for them to attempt such a procedure inasmuch as their insurance underwriters were of the opinion that, as a public terminal, Respondents could not contract away their liability.

Wharf Demurrage

Respondents' tariff provides for a demurrage charge against the owner of import cargo if the cargo remains on the pier after expiration of free time. Complainant states that cargo is frequently held up on the pier while awaiting Government inspection and that to assess demurrage charges when the cargo is held up due to no fault of the importer is unreasonable.

The only evidence to support Complainant's allegation that Government inspection officials have held up cargo beyond free time periods is Complainant's testimony to the effect that it is "fairly common" that the Department of Agriculture is unable to make a complete inspection during the five-day free time period. Complainant's witness, however, admitted that their company has never been assessed demurrage charges under this provision of the tariff. While we agree with Complainant that an importer should not be assessed demurrage charges when cargo is held up due to no fault of his own, the record before us does not sufficiently establish that such does occur at Respondents' terminals. Accordingly, we find no illegality in Respondents' demurrage charge provision.

Loading and Unloading Charge

Respondents' tariff assesses a charge of nine cents per 100 pounds for the service of loading and unloading cargo to and from railroad cars and trucks.

Complainant suggests that the nine-cent rate is unreasonable inasmuch as it greatly exceeds the actual costs of loading and unloading trucks in the Chicago area. Complainant has offered certain testimony from a compilation made by the Interstate Commerce Commission, which is said to support the proposition that truck loading or unloading charges in excess of three or four cents per 100 pounds would be excessive and unreasonable.

The Examiner correctly recognized that this same tariff charge was given full consideration by us in Docket 65-12—*Crown Steel Sales, Inc.* v. *Port of Chicago Marine Terminal Association*, 7 S.R.R. 1015 (January 27, 1967) (adopted Initial Decision). We there found that the nine-cent rate was not an unjust or unreasonable practice, did not unduly or unreasonably prejudice shippers using the Port of Chicago, did not operate in a manner detrimental to the commerce of the United States, and was not contrary to the public interest.

Nothing has been offered in this proceeding which would cause us to change our conclusion reached in Docket 65-12. The testimony offered by Complainant is of questionable relevance or probative value inasmuch as the cost figures which are said by Compainant to demonstrate loading costs at Chicago did not include allowances for supervision, billing and clerical expense, cost of facilities or overhead. On the other hand, the cost figures offered by Respondents in Docket 65-12 and again in this proceeding are significantly more thorough and reliable. Weighing Complainant's evidence here against our conclusion in Docket 65-12 that Respondents' expense of truck loading *exceeds* its charge of nine cents per 100 pounds, we cannot conclude, as Complainant would wish, that the nine-cent charge is excessive.

Complainant further charges that Respondents' loading and unloading rate is objectionable in that it fails to classify charges as to commodities and handling characteristics, thereby resulting in discrimination against easier handled cargo. Complainant is particularly disturbed by Respondents' failure to publish a lower charge for palletized and container cargo.

A similar challenge of the same tariff provision was made in Docket 65-12, *supra*. There we found no violations but we stated that the prolonged continuance of the across-the-board nine-cent charge may be subject to question. We pointed out that while Respondents acted in good faith in the first instance in initiating the disputed rate, they would subsequently gain sufficient experience to enable them to determine a rate structure under which the charges will be compensatory and will be borne by those for whom the services are rendered. We warned that prompt action to this end is expected.

Since the same tariff is in question here, our previous findings and conclusions are applicable. The Examiner observed that in a subsequent reissuance of their tariff, Respondents in fact published a lower charge for palletized and container cargo (FMC-T No. 2). We have examined Respondents' latest reissuance of their tariff on file here, FMC-T No. 4, effective April 8, 1968, and have found that Respondents have in certain respects published rates related to commodities and handling characteristics.

Consistent with our conclusions in Docket 65–12, *supra*, we find nothing unlawful in Respondents' failure to classify charges as to handling characteristics of commodities in its tariff, FMC–T No. 1. Our examination of Respondents' subsequent tariffs demonstrates continuing good faith on their part.

Complainant also objects to Respondents' truck loading and unloading rate provision because it fails to provide for a "partial loading or unloading" charge on truck deliveries. The term "partial loading or unloading" refers to the practice of moving cargo between a place on the dock and the tail gate of the truck, but involves no movement of cargo on the truck. Complainant states that many truck tariffs provide that the driver and sometimes a helper will move the cargo on the truck to and from an area directly accessible to the tail gate. Under Respondents' tariff, this is not permitted since Respondents' tariff does not provide for partial loading or unloading.

Respondents point out that they are unable to provide partial loading and unloading services because the union contract between Local 19 of the International Longshoremen's Association and the individual Respondents states that the trucker shall at no time handle any cargo. Respondents fear that to allow partial services would result in immediate labor trouble and most likely a strike.

We have previously considered the failure of a terminal operator to provide a partial loading and unloading and found it to be justified. In *Empire State H'w'y Transp. Ass'n*, *supra*, at p. 589, we stated that the elimination of partial service would relieve congestion at the piers, reduce costs, and would remove an important area of friction and dispute between truckers and terminals.

We find that Respondents' failure here to provide a partial loading and unloading serivce has not been shown to result in violation of the Act.

CONCLUSION

We have considered the complaint in its entirety and have found Respondents' tariff provisions regarding "overtime charges" and "extra service charges" to result in unreasonable practice in violation of section 17 of the Act. The record shows that Complainant has suffered no injury as a result of such practices and accordingly, the requested reparation is denied.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65–11

INTERNATIONAL PACKERS LIMITED

v.

NORTH PIER TERMINAL CO., ET AL.

ORDER

This proceeding having been initiated by complaint of International Packers Limited, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That respondents be, and they are hereby, notified and required to cease and desist from engaging in the practices found herein to be unreasonable under section 17 of the Shipping Act, 1916 (46 U.S.C. 816); and

It is further ordered, That respondents be, and they are hereby, required within 30 days after the date of service of this order to modify the provisions of their tariff in a manner consistent with our Report herein; and

It is further ordered, That the complaint in Docket No. 65–11 is hereby dismissed.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

TABLE OF COMMODITIES

Furniture. Los Angeles to Hawaii. 134.
General. Hong Kong-United States Atlantic and Gulf. 168.
Household goods. North Atlantic to Mediterranean. 202.
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INDEX DIGEST

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

ADMINISTRATIVE PROCEDURE ACT. See Practice and Procedure.

AGREEMENTS UNDER SECTION 15. See also Terminal Operators; Wharfage.

—In general

There was no evidence of an unfiled section 15 agreement between a carrier and shipper-van lines. The carrier's rates were available to all shippers alike. The record showed only an association between the carrier and its customers. Rates on U.S. Government Cargoes, 263 (284–285).

To the extent that a carrier (member of conferences) will transport cargo in a through movement between inland ports and ocean ports, it will engage in activities beyond the scope of the approved conference agreements and dual rate contracts and thus not subject to their provisions. The carrier will not be free to use a dual rate system for any portion of its through movements. To the extent the carrier will engage in a port-to-port movement, it will still be subject to all of its conference obligations. To the extent the conferences attempt to apply their arrangements to cargo involved in other than port-to-port movements, their conduct is unlawful as unauthorized by their approved arrangements. The carrier's charge for the water portion of its through service need not be the same as the port-to-port rates in the conference tariffs. Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 and 2, FMC Nos. 10 and 11, 476 (490–492).

Contention of a conference member that the filing of papers in a proceeding investigating its tariffs by the other conference members constitute an unapproved section 15 agreement, inasmuch as the member did not authorize the filing and the conference agreement requires unanimous vote, is without merit. Such interpretation would thwart the conference from bringing an action against a member for any violation of the Shipping Act. This would be against the public interest and the Commission could not approve any agreement authorizing such an effect. Id. (492).

—Antitrust policy (See also Merger of carriers)

Antitrust exemption which results from approval of agreements under section 15 was granted by Congress only on the asumption that the anticompetitive combinations thereby authorized would be effectively supervised and controlled by an agency of the government. Calcutta, East Coast of India and East Pakistan/U.S.A. Conference, 43 (46).

—Approval

Agreement among three carriers which would permit joint data processing and joint purchasing programs was approved in the absence of any showing of

unjust discrimination, unfairness, detriment to commerce, or any violation of the Act. It could not be assumed that the carriers were attempting to induce illegal price discrimination (unjustified volume discounts on purchases of fuel oil). Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Line, Inc., 53 (68–70).

An agreement between a conference in the North Atlantic-Mediterranean outbound trade and a conference in the South Atlantic and Gulf-Mediterranean outbound trade, providing that the chairmen of the conferences may discuss "transportation conditions" and "agree to recommend to their respective conference member lines the adoption of ocean freight rates and practices applicable to common commodities" is an agreement allowing the conferences jointly to fix and regulate rates. The agreement is not contrary to the public interest and there is no showing of any reasonable probability of detriment to commerce of the United States. The agreement should be approved since, inter alia, it would benefit commerce by assisting in maintenance of non-discriminatory rates applicable to ports in the different ranges. Uniformity of rate action would tend to eliminate preferences between ports. Inter-Conference Agreements United States/Mediterranean Trades, 183 (189, 193–195).

Conference agreement governing trade between certain United States ports and ports in several South American countries is approved. Provisions of the agreement which recognize the policies of the United States and Brazil with respect to their foreign commerce and merchant marines were not objectionable under section 15. The agreement does not bind conference members to any positive action in furtherance of Pan-Americanism (national flag lines vis-a-vis third flag carriers), and does not require members to relinquish their rights to future negotiations on any terms and conditions of the agreement, or their rights to appeal any condition that might develop in the future, or their rights to appeal any quota or condition set up by any pooling agreement. Inter-American Freight Conference Agreements Nos. 9648 and 9649 and Other Related Agreements, 332 (336–338).

An evidentiary hearing is not required before approval of a conference agreement in a trade to permit exploration of alleged malpractices in the trade, of the effects of decrees of a foreign country whose commerce was involved in the trade, or whether the agreement represents the full agreement of the parties. There is need to restore some form of stability and order in the trade whether or not actual malpractices exist. Absent an agreement the foreign government may unilaterally allocate shipments to assure minimum participation of national flag lines, and approval will not affect the power of the government to take such action. Existence of other agreements, already filed or to be filed, does not render the subject agreement less than complete. The conference agreement is a self-contained agreement and does not prevent the parties from entering into other agreements which can be acted on when filed with the Commission. Id. (340–342).

Approval of conference agreement does not mean that the Commission is relinquishing control over the trade. The agreement is approved for a period of 18 months. The trade is one in which relatively short periods of time can produce significant changes in circumstances. The limitation will give the parties an opportunity to restore order in the trade and allow them to demonstrate that the conference will operate to the benefit of the shipping public. Id. (342–343).

—Cancellation

Conference agreement is cancelled for failure of certain members to comply with subpoenas lawfully issued pursuant to section 27 of the Shipping Act.

The public interest requires that the Commission remove the aegis of section 15 from the concerted activities of an anti-competitive combination whose refusal to supply lawfully demanded information frustrates the Commission's efforts at effective supervision and control of those activities and deprives a shipper in our commerce of the necessary means to prosecute his complaint (of unlawful rates) under the Shipping Act. Failure to cancel would grant the parties that "unrestricted right of action" which Congress withheld in 1916. Calcutta, East Coast of India and East Pakistan/U.S.A. Conference, 43 (47).

Failure of Congress to enact Commission proposals to condition approval of agreements under section 15 upon designation of a person on whom service of process could be made within the United States, and upon a provision in the agreement for advance agreement for submission of information, wherever located, if required by proper Commission order, did not mean that the Commission lacked the power to cancel an approved agreement for failure of conference members to produce documents under subpoena. The legislative history showed that, at the request of the State Department, a committee of one house rejected an amendment passed by the other. Congress left the agency's powers to require production of documents located abroad as they were under existing law. Id. (47–48).

Exercise of the Commission's power to cancel a conference agreement for failure of some members to comply with subpoenas would not be withheld because the demands had not been made on the conference itself. The conference is only its member lines. Id. (48–49).

Cancellation of conference agreement for failure of some conference members to comply with subpoenas for production of documents located abroad would not be withheld because other members offered full compliance. Continued operations of the conference could or would be screened from Commission supervision insofar as that supervision was dependent on full compliance with lawful demands for information. Such a result was not to be contemplated lightly since, because of its nature, effective supervision was almost totally dependent upon the Commission's ready access to information on conference activities and actions. Id. (49).

In determining to cancel a conference agreement for failure of some members to comply with subpoenas for production of documents located abroad, it did not matter that members refusing compliance were doing so because of laws or decrees of their respective sovereigns. Effective regulation is the *sine qua non* for antitrust exemption under the Shipping Act; and since regulation is directly dependent upon compliance with the Commission's lawful orders, the Commission cannot, if it is to discharge its statutory responsibilities, continue an exemption for the concerted activities of any combination even a portion of whose members refuse compliance. This is not interference with the internal affairs of foreign nations nor "punishment" for activity over which conference members have no control. Carriers willing to comply with the subpoenas were free to file a new conference agreement. Id. (49–50).

The Commission did not lack "substantial evidence" upon which to base cancellation of a conference agreement for failure of some conference members to comply with subpoenas for production of documents located abroad. No distinction exists between disapproving a newly filed agreement and cancelling an already approved agreement. Even if it did, the agreement should be cancelled as contrary to the pubic interest within the meaning of section 15. Id. (50).

An agreement between competing carriers to merge, since it eliminates all competition between the parties, is within the literal language of section 15 as an agreement "controlling, regulating, preventing or destroying competition". Under the "plain meaning" rule of statutory construction, the Commission would have jurisdiction over the agreement. However, the applicability of the rule today would seem at best doubtful, and its validity has been seriously challenged by the Supreme Court. Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines, Ltd. and Pacific Far East Line, Inc., 53 (56).

Neither the language of section 15 nor its legislative history shows that Congress did not intend section 15 to cover agreements between carriers to merge. Congress recognized that it could not legislatively control foreign mergers. A reasonable construction of section 15 would normally exclude foreign mergers from its coverage just as it would include domestic mergers. As to a merger between a U.S.-flag and a foreign flag carrier, there might be difficulties, but no more than there would be under the antitrust laws were business entities other than common carriers by water involved in the hypothetical merger. The Commission is concerned with equality of treatment regardless of flag under the Shipping Act. Subjecting an agreement between U.S.-flag carriers to merge to Commission scrutiny under section 15 will not operate to the detriment of foreign-flag carriers. Provisions of the Interstate Commerce and Federal Aviation Acts referring to mergers were enacted after section 15, and the subsequent specificity on the part of Congress in those Acts does not diminish the broad authority given in section 15 over anticompetitive agreements. Provision in section 15 for continuing supervision over agreements where it is called for does not limit the Commission's authority to only those agreements. Approval of an agreement to merge might be withdrawn or the agreement ordered to be modified. Just what the consequences would be were not before the Commission and speculations would be fruitless. Id. (56–61).

Commission lack of power to order divestiture, which power both the ICC and CAB get from section 11 of the Clayton Act, does not mean that the Commission lacks jurisdiction over mergers between carriers. If there is a merger by agreement, the agreement must be filed for approval under section 15 and if the agreement is approved, the merger takes place. If the agreement is not filed and is nevertheless carried out, the parties are at large under the antitrust laws and any remedy appropriate to those laws would be applicable. Id. (61).

The inclusion of the Commission in section 7 of the Clayton Act, while perhaps not "an unqualified acceptance of section 15 merger jurisdiction", showed that Congress was aware that the Commission claimed such jurisdiction. The Commission has on several occasions notified Congress that it has such jurisdiction. Id. (65–66).

Agreement among competing carriers to merge is subject to section 15 and to the extent that the section does not contain such words as "merger" or "corporate unifications" in describing the agreements covered therein, some implication is admittedly involved. But a great number of the agreements, such as terminal leases, transshipment agreements and a host of agency agreements, are not by name expressly included in section 15. Agreements to merge are literally agreements "controlling, regulating, preventing, or destroying competition", and when approved are expressly exempted from section 15. The principle that repeals of the antitrust laws by implication are disfavored, is not applicable. Id. (66).

Merger agreement among competing carriers is approved on the basis of the findings and conclusions in the Initial Decision. Question of the impact of the merger on subsidy is a matter for the Maritime Administration. Employee protection and prevention of local labor problems are peculiarly within that area of labor management relations which has been considered to be a part of managerial discretion beyond regulatory intervention by the Commission and its predecessors. The agreement is more than a mere agreement to agree and is sufficient for approval. Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines Ltd., and Pacific Far East Line, Inc., Id. 81 (82).

Carriers seeking approval of a merger agreement were not required to justify the merger by showing that it was necessary to produce important public benefits and was based on a serious transportation need. This is inconsistent with the plain words of section 15, as well as prior Commission and court decisions. Such showing is not necessary where it does not appear that an agreement would otherwise be contrary to the public interest or detrimental to commerce. The standards of section 15 are the ultimate and only bases for disapproval. Id. (105–106).

The Commission is not to measure proposed agreements by the standards of the antitrust laws, and in fact cannot decide definitely whether a contemplated transaction is forbidden under any of the ramifications of those laws; nevertheless, it may not ignore their policy. The "public interest" within the meaning of sections 15 includes the national policy embodied in the antitrust laws. Id. (106).

Section 7 of the Clayton Act sets forth the policy of the antitrust laws concerning mergers. Mergers are restrained to the extent that such combinations may tend to lessen competition or tend to create a monopoly. Id. (106–107).

The courts have developed market analysis principles to determine the probable effect of a merger to lessen competition or tend to create a monopoly. Under the antitrust laws, this effect must be measured within a definite area of effective competition, or "relevant market", as to product or services, and as to geographical boundaries. The relevant geographical market, in connection with a proposed merger of carriers would be that portion of the United States which utilizes ocean transportation of freight between California and the Far East. The outer boundary of the relevant service market would be transportation between the Far East and California in dry cargo vessels. Id. (107–108).

The relevant service market, in connection with a proposed merger of subsidized carriers, would be transportation between California and the Far East in dry cargo vessels. A further restriction to subsidized U.S.-flag liners only was clearly artificial. The slightly broader classification of all U.S.-flag liners was subject to similar criticism. U.S.-flag liners were in direct competition with foreign-flag liners. The most important "relevant market" question was whether the services of nonliner vessels should be considered. Whether the "relevant market", for antitrust purposes, should be the liner market only, or liners plus nonliners, market share was by no means controlling as to the public interest which was the ultimate test. Id. (108–110).

A merger must be functionally viewed in the context of its particular industry. The significance of merging carriers' aggregate share of the market was considerably diminished by the nature of the shipping industry. Ocean carriers in our foreign commerce are subject to some rate regulation by the Commission and the Shipping Act provides an effective safeguard against the evils attending

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monopoly. Control of cargo rates and practices by a single carrier, no matter how large, is virtually impossible. Id. (111).

Ease of market entry and the existence of interflag competition makes it apparent that for a single ocean carrier, even with what would be considered in some industries a disproportionate share of the market, to control prices or exclude competition is not practically possible, at least in the trade served by three carriers proposing to merge. Id. (112).

No substantial increase in economic concentration will result from the merger of American President Lines and its 93-percent-owned subsidiary, American Mail Line. The concentration resulting from the merger of Pacific Far East Line is somewhat diluted by the affiliation, through common ownership of stock, which has existed for more than 10 years. Congress' concern with concentration as such is directed to economic concentration in the American economy. U.S.-owned carriers in foreign commerce are a part of the American economy but foreign-owned carriers are not. Foreign carriers are free to concentrate and have done so. This must be considered in weighing the merger of U.S.-flag carriers in the same trade areas. Id. (112–113).

Under circumstances where U.S.-flag participation in cargoes inbound and outbound between California and Japan had been decreasing steadily, it would serve the public interest to permit a merger of three carriers serving the trade, which would improve the efficiency and ability to compete of U.S.-flag vessels serving the trade as well as less profitable trades, without stifling or excluding either U.S.-flag or foreign-flag competition. Id. (113).

The record establishes that substantial economies and efficiencies of scale will result from proposed merger of three carriers serving trade between California and Japan. It is not material that the stockholders of the merging companies will benefit. In the view of the Supreme Court, "the public interest is served by economy and efficiency in operation". Id. (113–114).

Merger between three carriers serving the California-Far East trade will not tend to create a monopoly, or lessen competition except for elimination of such service competition as exists among the merging carriers in a portion of trade route 29. Ample competition will remain as another carrier is about to enter this trade. Id. (114).

Proposed merger between competing carrier is not discriminatory or unfair as between other carriers or shippers or other classes referred to in section 15. Shippers and ports will be benefitted by improvements in service. The record does not establish the probability of any destructive or stifling effect upon competition or any competitor. Id. (115).

Contractual and legal obligations of carriers (proposing to merge) as subsidized carriers, and resulting control through MarAd over their maximum and minimum sailings and their trading areas, have been considered. It is not necessary to rely on these and thus to pass on to MarAd responsibility for preventing any injurious effects of the merger; nevertheless, it is recognized that as among subsidized U.S.-flag carriers, the existing power of government control would make destructive competition impossible in practice. Id. (115).

It is not certain whether proposal of carriers to merge would violate the antitrust laws, but the Commission need not determine this, and in fact cannot definitively do so. To the extent that it does touch upon the policy of the antitrust laws, the benefits of the merger will outweigh any potential injury. It is concluded that the merger will not be contrary to the public interest, detrimental to commerce of the United States, or in violation of any provision of the Shipping Act. Id. (115).

—Modification

The Commission may disapprove or modify a conference agreement where a conference rate is so unreasonably high or low as to be detrimental to commerce of the United States. Rates on U.S. Government Cargoes, 263 (282).

It is the policy of the Commission to withdraw approval of agreements where they have become dormant. Where there is no need for a section 15 agreement, leaving such agreement on the books to await a future event which was contemplated by original approval tends to handicap Commission responsibility to see that section 15 agreements operate in a manner consistent with law. Conference agreements having as their very core the negotiation of rates with MSTS, an activity which cannot be implemented at present, must be modified to delete authorization to negotiate rates with MSTS. Id. (286–287).

—Rates

The Commission and its predecessors have uniformly held that the expression "every agreement" in section 15 does not include "routine operations" relating to current rate changes and other day-to-day transactions. "Routine operations" has consistently been interpreted by the Commission to include conventional rate changes. Boston Shipping Assn., Inc. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (5).

Section 15 allows carriers to band together for joint ratemaking purposes. However, a conference is not permitted to engage in activity which is incompatible with the regulatory purposes of the Act. A conference, no matter what authority its organic agreement may contain, is not authorized to violate other provisions of the Shipping Act nor the general standards of section 15. Rates on U.S. Government Cargoes, 263 (282).

Conference agreement, under which rates on military cargoes were reduced so that they were noncompensatory, with the design of driving a competitor out of the trade, had operated in a manner which was knowingly at odds with the requirements of section 18(b)(5) and which was detrimental to commerce and contrary to the public interest. The agreement, therefore, operated in a manner which was in violation of section 15. Id. (283).

Fixing of special reduced rates by a conference on open-rated commodities was not a ratemaking action resulting from an unfiled and unapproved agreement. The conference agreement expressly authorized conference members to place "special conditions" on open-rated commodities. Moreover, the tariff specifically required that all "tariff-rules and regulations must be observed" with respect to open-rated items. This would of necessity include those relating to the rate reductions provided in the tariff. Special Rates to Alexandria and Port Said—North Atlantic Mediterranean Freight Conference, 291 (296).

—Right of independent action

Revision of terminal tariff by one member of terminal association, acting under the right of independent action of the basic agreement, was within the scope of the basic agreement. The agreement expressly provided that "the party proposing a change reserves the right to make it effective at its own wharves or piers regardless of the action of the other [terminal operators]". The only limitation on the right was adequate notice to the others and such notice was given. Boston Shipping Assn., Inc. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (6–7).

Conference agreement does not have to provide for the right of members to act independently on rates, etc. because of decrees and resolutions of a foreign country involved in the trade, which decrees reserved exports of the foreign

country to conference members. Inclusion of an independent action clause will not create any "outside' competition and, as for competition within the conference, the agreement provides for as much as most other conference agreements. Inter-American Freight Conference Agreements Nos. 9648 and 9649 and Other Related Agreements, 332 (338–340).

—Self-policing

Self-policing system which provides for review of Neutral Body decision by a panel of arbitrators is approved. A *de novo* trial before the arbitrators is not required. Review is limited to consideration of the record of the neutral body's proceeding, together with pleadings to be submitted by the parties. The arbitrators are free to reach their own decision on the question of guilt and on the level of the fine to be assessed. Modification of Self-Policing Provisions of Agreements No. 150 and 3103, 434 (440–441).

—Unapproved agreements

Where there was a substantial identity of membership in two approved conferences, the existence of an unfiled and unapproved agreement to fix rates could not be inferred from instances of identical or parallel rate actions following the legal conveyance of information from one to the other. Inter-Conference Agreements United States/Mediterranean Trades, 183 (196).

BILLS OF LADING.

Carrier providing a through transportation service (port-to-port between the United States and the United Kingdom and inland transportation in the United Kingdom) must revise its bills of lading to make clear that it is accepting common carrier responsibility for the through movement. Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 and 2, FMC Nos. 10 and 11, 476 (484–485).

BURDEN OF PROOF.

Whether or not Hearing Counsel had the burden of showing that rates and charges which were not suspended were unjust or unreasonable, was not determinative of the proceeding, since the carrier had justified its rates and charges on the basis of sufficient evidence of record. American Union Transport, Inc.—Increased Rates and Charges on Iron and Steel, New York to Puerto Rico, 149 (154–155).

Section 3 of the Intercoastal Act provides for hearings concerning the lawfulness of new rates filed with the Commission. The second paragraph of the section provides for suspension of such rates pending hearing and decision, and further provides that at any hearing "under this paragraph, the burden of proof to show that the rate . . . is just and reasonable shall be upon the carrier or carriers". The paragraph referred to in the quoted sentence refers only to suspension rate cases. Investigation of Minimum Charges and Terminal Delivery Services—Atlantic-Gulf/Puerto Rico Trades. 222 (230).

Both section 3 of the Intercoastal Act and Rule 10(o) of the Commission's Rules of Practice and Procedure quite clearly place the burden of proof on the carriers only in suspension rate cases. The legislative history does not support the view that carriers were also to have the burden of proof in non-suspension cases. Id. (231).

Where a non-suspended rate is preferential on its face, and is not suspended, the carrier must go forward and show why the prima facie preference should not be fatal to approval. Id. (232).

Where a rate increase was not suspended, Hearing Counsel had the burden of proof under section 3 of the Intercoastal Act and Rule 10(o) of the Commission's rules to show that the increase was unreasonable. Since the burden was not met, the increase was not unreasonable. Id. (232).

DEFERRED REBATES.

Action of a carrier in changing its supplier of chinaware did not violate section 14 First. It was immaterial whether the carrier was pressured into the change by threats of loss of commercial shipments. If by any stretch of the imagination the carrier's action was a "deferred rebate", it was not the kind or description defined in section 14 First. Maddock & Miller, Inc., *v.* United States Lines Co., 28 (31).

Section 14 First applies only to common carriers. Thus a complaint charging deferred rebates by persons other than common carriers was dismissed as to such persons. Id. (32).

DEMURRAGE. See Free Time.

DISCRIMINATION. See also Dual Rates; Free Time; Rates.

Revision of terminal tariff to assess wharfage against the vessel rather than the cargo was not a violation of section 16, as being "unjustly discriminatory" against the carriers who had historically used the terminal's piers, and "unduly prejudicial" in favor of carriers who used other piers in the port involved at which no such charge was assessed. Unless a terminal operator controls both terminals at which the different charges are assessed, the terminal operator cannot be held to have illegally discriminated against or preferred a carrier. The tariff involved was that of the Port Authority which owned all of the public terminals, but which controlled the wharfage charges only at the piers which it operated. The wharfage charge had been assessed against all carriers which used the Port-operated piers. The Port Authority's lack of control over the level, or method of assessment of wharfage charges at piers not subject to its operation precluded the existence of any unlawful discrimination or prejudice. Boston Shipping Assn. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (7–8).

No illegal discrimination or prejudice could be attributed to a Port Authority terminal tariff revision to assess wharfage against vessel rather than cargo at piers operated by Port Authority (leaving the charge against cargo at the piers of other terminal operators who were lessees of the Port Authority). To constitute a violation of section 16, there must always be given unequal treatment of persons by the carrier or other person subject to the Act. The manifest purpose of the section is to require those subject to the Act to "accord like treatment to all shippers who apply for and receive the same service". The Port Authority had afforded equal treatment to all carriers since the tariff revision was put into effect and the charge had been assessed equally against users of the Port-Authority-operated piers. There had been no showing of any competitive disadvantage injurious to any vessels using the Port Authority-operated piers. Id. (8).

Under section 2 of the Interstate Commerce Act (the counterpart of section 17 of the Shipping Act), discrimination arises when two shippers of like traffic, shipping over the same road between the same points under substantially similar circumstances and conditions, are charged different rates. Unlike section 3 (the counterpart of section 16), the equality required under section 2 is not dependent upon any showing that the shippers or consignees involved compete in the market-

place. Where the conditions of section 2 are met, a carrier may not make a difference in rates because of differences in circumstances arising either before the service of the carrier began, or after it was terminated; nor may a carrier make a difference in rates based upon the identity of the shippers and this is so whether the unfavored shipper is injured or not. North Atlantic Mediterranean Freight Conference—Rates on Household Goods, 202 (212).

Under the Interstate Commerce Act, to constitute unjust discrimination there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions but who are paying different rates. In such a case it is immaterial that the shippers are not in competition with each other. Where the service is different or the transportation is between different localities, it is a case of undue or unreasonable preference or prejudice unless the many relevant considerations render the different rates reasonable. Ordinarily, the shippers involved must be competitors. Applying this construction of the terms of sections 16 and 17 of the Shipping Act will not result in wholesale destruction of Shipping Act precedent. Id. (213).

Whether unjust discrimination under section 17 also constitutes undue or unreasonable preference or prejudice under section 16 is not decided. Section 17 applies only to common carriers by water in foreign commerce and if the circumstances and conditions constituting unjust discrimination under section 17 are not encompassed within the scope of section 16, it may be possible to argue that unjust discrimination is not prohibited in offshore domestic trades, a highly dubious constructon of the Act. Id. (214–footnote 20).

A number of cases clearly indicate that predecessor agencies of the Commission were aware of the difference between sections 16 and 17 of the Shipping Act (i. e. the distinction between unjust discrimination on the one hand and undue or unreasonable preference on the other, as between shippers). While discussions in many precedents often use "preference or prejudice" and "discrimination" interchangeably, the actual conclusions in a great many, if not all, are based upon the distinction between the two. Id. (213–216).

Whatever the criteria for measuring or judging unjust discrimination between ports may be (transportation would not be "between the same points"), there are no differences in transportation conditions between land carriage under the Interstate Commerce Act and ocean carriage under the Shipping Act which would warrant continuation of an unfortunate departure from long-established principles governing unjust discrimination as between shippers. There is no difference inherent in water carriage vis-à-vis land carriage which would justify the water carrier in charging different rates to two shippers of like traffic over the same line between the same points under substantially similar circumstances. Thus, the principles applicable in connection with sections 2 and 3 of the Interstate Commerce Act are properly applicable generally to sections 17 and 16 of the Shipping Act. Id. (216).

Carriers discriminated between shippers by charging the Department of State a higher rate to transport household goods than charged U.S. military departments. The carriers had, at least since 1950, treated the State Department and the military departments as distinct and separate entities each shipping cargoes in its own right, and the carriers were estopped from now arguing that the two shippers were one, i.e. the U.S. government. Further, the very difference in rates established the individuality of the shippers since no single shipper would stand the exaction of disparate rates on his shipments. Id. (216–217).

Discriminatory rates on shipments of household goods by the State Department and the military were not justified because the lower rate granted to MSTS

was in return for an increase in rates on other commodities which moved in considerable volume. The difference was not geared to the difference in the two movements, even if volume would justify otherwise unjust discrimination. The rate on one commodity, if discriminatory, could not be justified by the volume of movement of other commodities. Id. (217).

A difference in rates for substantially identical services is prima facie discriminatory. Hearing Counsel having established a prima facie case, it was then up to respondent carriers to go forward and show that the discrimination was justified by some *bona fide* transportation condition. Id. (218).

Conference members could not avoid their responsibility for discriminatory rates as between two shippers, the military and the State Department, by asserting that the rates were beyond their control. The vote on the State Department rate was unanimous and the members involved (U.S.-flag carriers) made no attempt to seek help from the Commission or the conference. A plea of compulsion or lack of control cannot rest upon an unbroken history of cooperation or acquiescence in the establishment and maintenance of that rate or the mere possibility that any attempt to correct the discrimination would be blocked by the foreign-flag lines of the conference. Id. (218).

U.S.-flag carrier members of a conference by charging different rates to the Department of State and the military departments for transporting the household goods of each over their lines, between the same ports under substantially identical circumstances and conditions, unjustly discriminated as between them in violation of section 17 of the Shipping Act. It was unnecessary to determine whether the same activity constituted a violation of section 16. Id. (218–219).

The public interest within the meaning of section 15 requires that a foreign-flag dominated conference relinquish control over the rates on cargoes reserved by law for carriage aboard American-flag vessels. The rates on these cargoes should be fixed by the American carriers free from any actual or potential veto by foreign-flag carriers. The Commission need not wait for an actual attempt by the foreign-flag segment of the conference to block a rate desired by the American-flag carirers. For as long as a portion of the discriminatory rates (rates on household goods as between State Department and military departments) remain under the potential control of the conference, any attempt to remove the discrimination by the U.S.-flag carriers would be subject to approval of the membership. Conference must either exclude Government cargoes reserved by law to carriage by U.S.-flag lines from the coverage of the conference tariff, or open all rates on such cargoes. Id. (219–220).

DUAL RATES. See also Reparation.

Arrangement under which a particular shipper to particular ports became entitled to special rates set forth in a tariff, on signing a dual rate contract with a 15 percent spread, and thus to rates of up to 28 percent lower than the ordinary rates applicable in the trade, violated the standards of section 14b. The dual rate contract was not "available to all shippers and consignees on equal terms", and the spread between the ordinary rate and the "contract" rate charged the shipper exceeded 15 percent of the ordinary rate. The arrangement was not, however, violative of section 15, nor was the tariff setting forth the special rates unlawful under section 18(b)(3) as a method of rebating. The question was one of unlawful implementation of a dual rate contract under 14b standards, not one of authority, or lack thereof, under section 15. Special Rates to Alexandria and Port Said—North Atlantic Mediterranean Freight Conference, 291 (294–296).

Conference discount rate system, under which individual members could discount contract and noncontract rates on certain iron and steel items up to 30

percent, was inconsistent with section 14b, was equivalent to instituting open rates, and could not be employed to retain the exclusive patronage of contract signatories. To conclude otherwise would destroy the concept of open rates inasmuch as any dual rate conference could accomplish the purpose of opening rates while not being subject to release of signatories and 90 days' reinstitution by simply permitting member lines the option of granting discounts subject to a maximum discount. Discounting Contract/Non-Contract Rates Pursuant to the Provisions of Item 735, Note 2, of the India, Pakistan, Ceylon & Burma Outward Freight Conference Tariff No. 10, 418 (425–426).

Fact that conference controlled the maximum discount under a discount rate system did not mean that the rates established were conference rates. Such discount rates could result in a different rate for each individual member. Id. (426).

Conference discount rate system, like an open rate system, would permit a different rate for each member. The mere quotation of a rate in dual form neither changes this fact nor establishes a dual rate contract. Id. (426).

Section 14b dual rate contracts are meaningless when considered apart from the tariff which establishes the dual rates. The statute in fact controls the time period within which rates under the contract may be increased as well as limiting the spread allowed between contract and noncontract rates. Id. (426).

The Commission thoroughly considered the question of dual rate contracts and departures therefrom in the form of open rates in the *Dual Rate Cases*. The Commission did not provide for the type of system under which conference members could discount contract/noncontract rates up to a maximum of 30 percent. Use of such system while retaining exclusive patronage contracts over users cannot be permitted since to do so would be inconsistent with the reasoning in the *Dual Rate Cases* and section 14b of the Act. Id. (427).

Conference discount tariff provision (discounting contract/noncontract rates up to 30 percent) could in theory result in a violation of section 14b(7). If one conference member took full advantage of the 30 percent-discount provision and another chose to effect no discount, the result would be a spread between the contract rate of the discounting member and the noncontract rate of the other member in excess of 15 percent. Id. (427).

A dual rate contract, which was not amended to include provisions required by the Commission, became unlawful and unenforceable on April 4, 1964. The Commission's cancellation of the existing contract made it unlawful. No contractual relationship of any kind existed between the parties after April 3, 1964. The Commission's Interpretations and Statements of Policy did not extend the validity of existing dual rate contracts; rather they merely granted carriers or conferences the right to accept notices from shippers and consignees that they agree to be bound by the "new agreement" once approved. United States Borax & Chemical Corp. *v.* Pacific Coast European Conference, 451 (458–461).

The Examiner properly denied a stay of proceedings to permit arbitration under an unlawful dual rate contract. The conference could not rely on the arbitration clause of an unlawful and unenforceable contract. Id. (461–462).

Where a conference which had no valid and enforceable dual rate system published "contract" and "noncontract" rates, a rate ambiguity was created and the shipper was entitled to the lower rate. The exaction of the higher rate in the instant case was predicated on an asserted breach of a contract which was unlawful. If the Commission were to accept the higher rate as the applicable rate, it would in practical effect be allowing the conference to enforce an un-

lawful contract. Unjust discrimination would be sanctioned in violation of the Shipping Act. The Commission clearly had authority to decide the issue. Id. (463–464).

Continued operations under an unapproved dual rate contract between April 4, 1964 and January 1, 1967, was a violation of section 14b. Refusal of the conference to execute a contract with a shipper after January 1, 1967 (the date on which the conference put into effect an approved form of dual rate contract) was also a violation of section 14b. The refusal was not justified because the shipper had not paid liquidated damages allegedly due under an existing contract. Since the existing contract became unlawful on April 4, 1964, it was not determinative of the rights of the parties after that date. Refusal to execute a contract after January 1, 1967 was clearly contrary to the "equal terms and conditions" provision of section 14b. Id. (464–465).

Where a conference charged a shipper noncontract rates and the shipper's competitors contract rates, under a contract which was not permitted by the Commission and was unlawful, the conference had violated sections 16, First and 17. Preference and discrimination based on a contract unlawful under the Act is undue, unjust and unreasonable. Shippers receiving similar services should be charged the same rates and, absent a lawful dual rate contract, a difference in rates is violative of sections 16 and 17. Id. (465–466).

Shipper did not violate section 16 of the Shipping Act when it advised a conference that it desired to continue to ship at contract rates and would execute a contract in the form approved by the Commission. The conference had advised the shipper that contract rates would be accorded only under terms of the existing contract, and the shipper had misinterpreted the Commission's Interpretations and Statements of Policy to mean that the conference was required to continue to accord contract rates to a shipper complying with the rule. The misinterpretation was not without foundation, and the shipper acted in good faith. There was no basis for a finding that the shipper knowingly and wilfully obtained the lower contract rates by an unjust or unfair device or means. Id. (472–473).

Spread of 15 percent between contract and noncontracts rates in the Great Lakes/South and East Africa Trade was reasonable. The effect of the legislative history of section 14b(7) and the Commission's decision in the *Dual Rate Cases* was to establish a presumption that a spread of 15 percent is reasonable. The presumption, together with the testimony, formed the case for approval. It was then Hearing Counsel's obligation to go forward with sufficient evidence to demonstrate the unreasonableness of the spread. This Hearing Counsel failed to do. U.S. Great Lakes/South and East Africa Dual Rate Agreement, 513 (520).

Proposed dual rate contract in the Great Lakes/South and East Africa Trade would not be detrimental to commerce, contrary to the public interest and unjustly discriminatory and unfair as between Great Lakes shippers and ports, or between exporters and their foreign competitors. The development of the Great Lakes area as a trading area does not authorize the Commission to disapprove all dual rate contracts for that area, but only those which would contravene the mandates of section 14b. Other cases involved situations where one conference dual rate contract covered both the Atlantic and Great Lakes trade. On the basis of the record, the proposed contract would not divert cargo from the Great Lakes to the Atlantic Coast. Speculative conclusions unsupported by the evidence were not grounds for disapproval. Id. (521–523).

FIGHTING SHIP.

Where the carrier customarily served the various ports in a certain range, although not all ports on every voyage, the carrier's action in putting a ship into

a port to load MSTS cargo at rates below those of another carrier did not constitute use of a fighting ship; the act was nothing more than run-of-the-mill competition for a parcel of cargo. Rates on U.S. Government Cargoes, 263 (284).

FREAS FORMULA. See Terminal Operators.

FREE TIME.

The purpose of free time is to offer consignees a reasonable time to pick up cargo without being assessed demurrage charges. Free time is not designed to allow free storage of cargo. Investigation of Minimum Charges and Terminal Delivery Services—Atlantic-Gulf/Puerto Rico Trades, 222 (234).

Practices engaged in at the Port of New York respecting free time and demurrage during and immediately after the 1965 longshoremen's strike were not unjust and unreasonable under section 17 in the light of the facts that the strike appeared to have been settled in advance and the then existing free time practices had worked well in the past, including post-strike situations. Various free time and demurrage practices were in compliance with reasonable interpretations of General Order 8, Part I, as then worded. Free Time and Demurrage Practices on Inbound Cargo at New York Harbor, 238 (249).

General Order 8, Part I, with respect to free time and demurrage charges at the Port of New York is amended to enumerate "longshoremen's strikes" as a factor beyond a consignee's control preventing removal of cargo by a consignee. The change would be merely a specific enumeration of a factor already acknowledged to be covered. Id. (249–250).

The *American President Lines* case, 317 F 2d 887, is not dispositive of the problem of the propriety of the collection of demurrage at first period (compensatory) rates when a carrier disability arises after termination of free time. The regulation involved in that case dealt with assessment during a consignee, rather than a carrier, disability, and would have forbidden just compensation to a carrier during a time when free time had expired and consignees, through no fault of the carrier, could not pick up their cargo. Id. (252).

A carrier has certain duties with respect to cargo not picked up within the free time period, but, the Commission having defined the minimum period of reasonable time as five days, it cannot be said that a carrier has a duty, as a matter of law, to extend free time if his disability occurs after expiration of free time. Under some circumstances a carrier may be required to tender cargo for delivery free of assessment of any demurrage for a time period exceeding five days. A carrier may grant free time whenever it cannot tender cargo for delivery, as is the present practice of many carriers. This is the more equitable approach and should be encouraged. General Order 8, Part I, is amended to provide for free time or first period demurrage as specified in the appropriate tariff, in case of carrier inability or refusal to tender cargo for delivery arising after expiration of free time. Id. (252–253).

Removal of "port area requirement" at New York with reference to longshoremen's strikes and consequent disability of consignees to pick up cargo, will not unjustly discriminate against Philadelphia. Philadelphia may do the same. Id. 254–255).

It would be an unreasonable practice to allow the assessment of penal demurrage during any longshoremen's strike affecting a consignee's ability to remove his cargo. General Order 8, Part I, respecting free time and demurrage charges at the Port of New York is amended to provide that when a consignee is prevented from removing his cargo by a longshoremen's strike which affects only one pier or less than a substantial portion of the port area, carriers shall

(after free time) assess demurrage at the rate applicable to the first demurrage period. Id. (254–255).

Any automatic extension of free time or nonpenalty demurrage following a longshoremen's strike may tend to encourage consignees to leave cargo on piers for the duration of the extended periods and thus increase congestion. On the other hand, it seems unfair to assess penal demurrage against consignees who, through no fault of their own, have been unable to pick up cargo. Id. (256).

Any extensions of free time or first period demurrage granted after a longshoremen's strike should not be granted to cargo that was already on penal demurrage when the strike began. Id. (256).

Following a longshoremen's strike of five days or more, free time (five days) should be extended for five days, exclusive of Saturdays, Sundays and legal holidays, coupled with a requirement that cargo actually be picked up within the extended period. First-period demurrage, normally five calendar days, should be extended for an additional five calendar-day period, with a similar requirement for picking up the cargo. If cargo is not in fact available for pickup during the extended free time period, free time must be extended until it is. If such cargo cannot be tendered for delivery during the extended first demurrage period, free times or first demurrage would apply as specified in the applicable tariff. No departure from the present practice of starting the running of free time from discharge of the vessel rather than any particular cargo from the vessel is intended. If a workable truck appointment system acceptable to carriers and consignees is adopted, extension of free time or first period demurrage will terminate within 24 hours of advance notification that cargo is available for pickup and readily accessible. General Order 8, Part I, is amended accordingly. Id. (258–259).

Carriers are entitled to compensation for use of their piers during longshoremen's strikes by cargo on which free time had expired before start of the strike. No special relief need be granted importers of tea, coffee, spices, food and other products whose cargo is subject to U.S. government inspection. Inspection delays are caused by factors other than those relating to the obligation of the carrier. Id. (259–260).

To the extent that carriers engage in the transportation and tendering for delivery of containerized freight, rather than breakbulk cargo, there appears no necessity to require changes in these carriers' practices pursuant to amendments to General Order 8, Part I. Id. (260).

Lack of free time on refrigerated cargo is not unreasonable and discriminatory. The terminals have very little storage space for such cargo and in those terminals where it exists, storage is provided for the benefit of the vessel operators and is not offered to the shippers as a public service. Various other terminal operators throughout the country have similar rules. Disclaimer of liability for deterioration would not solve the problem, inasmuch as insurance underwriters were of the opinion that, as a public terminal, respondents could not contract away their liability. International Packers Ltd. *v.* North Pier Terminal Co., 525 (531–532).

Tariff provision for a demurrage charge against the owner of import cargo if the cargo remains on the pier after expiration of free time is not unreasonable. The record fails to establish that any importer was assessed demurrage charges when cargo was held up due to no fault of his own. Id. (532).

GENERAL ORDER 8, Part I. See Free Time.

JOINT RATES. See Rates.

JURISDICTION OF COMMISSION. See also Rates.

Carriage of government household goods is "commerce of the United States" which is regulated by the Shipping Act. The cargo transported need not be commercial in character. It is the act of transportation itself that subjects a common carrier to the Act's jurisdiction. A violation of one provision of the Act might require that the movement in question be commercial in nature and the shippers involved be in competition with each other, but it does not follow that these conditions must attend all other situations regulated by the Act. North Atlantic Mediterranean Freight Conference—Rates on Household Goods, 202 (205–206).

The provisions of the Shipping Act which confer upon the Commission authority over rates and practices of water carriers and prescribe its mode of exercise closely parallel those of the Interstate Commerce Act establishing the corresponding relations of the ICC to carriers by rail; and where dissimilarities in the respective modes of transportation do not warrant a different construction, the Shipping Act should be construed in the light of the similar provisions of the Commerce Act. Id. (209).

OVERCHARGES. See Reparation.

PICKUP AND DELIVERY SERVICE. See Rates.

PORTS.

Assuming, *arguendo*, that a showing that a terminal practice resulted in a diversion of traffic from a port, without more, was sufficient to substantiate a claim of "unreasonableness" under section 17, carriers complaining about revision of a terminal tariff to assess wharfage against vessel rather than cargo had not made their case. There was no showing of diversion of cargo from the port involved, although cargo had been lost to the piers operated by the Port Authority which had made the tariff revision effective only at its own operated piers. Boston Shipping Assn., Inc. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (8).

Record would not support a finding that a carrier diverted cargo unlawfully from one port to another. The cargo attracted came by virtue of its low rates, not by any absorption. Rates on U.S. Government Cargoes, 263 (285).

Conference practice of restricting discounted rates on iron and steel to outports such as Baltimore, Philadelphia, New Orleans and Mobile and not extending such rates to New York, could not be found to violate or not violate sections 16 or 17 on the basis of the record. Factors of shipper preference, steel mill location, character of cargo, and port facilities tended to show that iron and steel would have moved away from New York even if there had been no discount, but they did not serve to justify the rate disparities. Comparative loading costs and non-conference carrier competition could justify the disparities, and the case was remanded to the Examiner to obtain evidence on costs and competition. Discounting Contract/Non-Contract Rates Pursuant to the Provisions of Item 735, Note 2, of the India, Pakistan, Ceylon & Burma Outward Freight Conference Tariff No. 10, 418 (428–430).

PRACTICE AND PROCEDURE. See also Burden of Proof.

Carriers which did not participate in a trade under investigation, and which were named as respondents on the basis of their close working relationship through an interconference agreement, were dismissed as respondents. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (177).

The Administrative Procedure Act and Rule 10(o) of the Commission's Rules of Practice and Procedure place the burden of proof upon the proponent of a

rule or order. There is no failure of proof on any of the issues and the evidence does not preponderate equally between the antagonists on any issue. Therefore, there is no occasion to base any conclusion on the failure of any party, to sustain its burden of proof. Rates and Practices of the Pacific Northwest Tidewater Elevators Assn., 369 (378).

An agency, in making a final decision upon review of a hearing officer's initial decision, is not limited to those sections of the Act upon which the Examiner chose to base his decision or which the complainant specifically and formally referred to in the complaint. United States Borax & Chemical Corp. *v.* Pacific Coast European Conference, 451 (464).

PRACTICES. See also Free Time; Terminal Operators.

Assuming, *arguendo*, that a showing that a terminal practice resulted in a diversion of traffic from a port, without more, was sufficient to substantiate a claim of "unreasonableness" under section 17, carriers complaining about revision of a terminal tariff to assess wharfage against vessel rather than cargo had not made their case. There was no showing of diversion of cargo from the port involved, although cargo had been lost to the piers operated by the Port Authority which had made the tariff revision effective only at its own operated piers. Boston Shipping Assn., Inc. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (8).

As used in section 17, and as applied to terminal practices, a "just and reasonable practice" means a practice otherwise lawful, but not excessive, and which is fit and appropriate to the end in view. Wharfage assessed against the vessel is a proper and "otherwise lawful charge". Incident to the carrier's duty to tender for delivery is the duty to provide the shipper with adequate terminal facilities upon which cargo may be placed by the shipper and/or from which it may be picked up by the consignee. Since the terminal provides a service which is in furtherance of the carrier's obligation, it follows that "wharfage" is an appropriate charge against the vessel. Commission General Order 15 expressely sanctions this method of assessment. Id. (9).

Revision of terminal tariff by Port Authority to assess wharfage against the vessel rather than the cargo at Port Authority-operated piers was not an unreasonable practice under section 17. As applied to terminal practices, a "just and reasonable practice" means a practice otherwise lawful, but not excessive, and which is fit and appropriate to the end in view. Wharfage assessed against the vessel was clearly a proper and "otherwise lawful charge". As to its fitness and appropriateness to the end in view, the Port Authority had suffered losses in its pier operations and the revision was made in the belief that more cargo would be attracted to Port Authority piers and thus increase revenues. It was not important that there was a drop in tonnage for several months as compared with the same months in the prior year. Id. (8–11).

Practice of furnishing terminal services at other than tariff rates is not an unjust or unreasonable practice under section 17. A port may offer terminal facilities pursuant to an agreement as well as a tariff. *Storage Practice at Longview, Washington* (6 FMB 178), merely stands for the prepositon that a terminal which holds itself out to offer services solely by tariff must abide by that tariff. Agreement No. T–1870: Terminal Lease Agreement at Long Beach, California, 12 (25).

The plain language of the second paragraph of section 17 of the Shipping Act dictates the conclusion that a showing of actual discrimination is not needed to support a finding of violation of the section. This paragraph is di-

rected at unjust or unreasonable regulations as well as improper practices. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (176).

The Commission may suspend a new "practice", as well as a new "rate", under section 2 of the 1933 Act. The attempt of a carrier to remove a service of a type long held subject to FMC jurisdiction was a new practice within the meaning of section 2. The carrying on of such service without a properly filed tariff with FMC was an apparent violation of section 2 which the FMC was empowered to suspend. The carrier was free to suspend its service at any time on proper notice, but until it did so it must have lawfully filed tariffs covering the service. Alaska Steamship Co.—Cancellation of FMC Port-to-Port Rates—West Coast/Alaskan Trade, 314 (329–330).

PREFERENCE AND PREJUDICE. See also Dual Rates; Terminal Operators.

Revision of terminal tariff to assess wharfage against the vessel rather than the cargo was not a violation of section 16, as being "unjustly discriminatory" against the carriers who had historically used the terminal's piers, and, "unduly prejudical" in favor of carriers who served other piers in the port involved at which no such charge was assessed. Unless a terminal operator controls both terminals at which the different charges are assessed, the terminal operator cannot be held to have illegally discriminated against or preferred a carrier. The tariff involved was that of the Port Authority which owned all of the public terminals, but which controlled the wharfage charges only at the piers which it operated. The wharfage charge had been assessed against all carriers which used the Port-operated piers. The Port Authority's lack of control over the level or method of assessment of wharfage charges at piers not subject to its operation precluded the existence of any unlawful discrimination or prejudice. Boston Shipping Assn. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (7–8).

No illegal discrimination or prejudice could be attributed to a Port Authority terminal tariff revision to assess wharfage against vessel rather than cargo (leaving the charge against cargo at the piers of other terminal operators who were lessees of the Port Authority), with regard to its assessment at the Port Authority-operated piers. To constitute a violation of section 16, there must always be given unequal treatment of persons by the carrier or other person subject to the Act. The manifest purpose of the section is to require those subject to the Act to "accord like treatment to all shippers who apply for and receive the same service". The Port Authority had afforded equal treatment to all carriers since the tariff revision was put into effect and the charge had been assessed equally against users of the Port Authority-operated piers. There had been no showing of any competitive disadvantage injurious to any vessels using the Port Authority-operated piers. Id. (8).

Section 16 of the Shipping Act is substantially identical with section 3(1) of the Interstate Commerce Act. The prohibition in section 3(1) against undue or unreasonable preference or prejudice is designed to deal with two or more competing shippers or localities receiving different treatment, not justified by differences in competitive or transportation conditions. Since the section is intended to prevent unlawful favortism among competitors in the same marketplace, the allegedly preferred shipper must ordinarily be in competition with the allegedly prejudiced shipper. North Atlantic Mediterranean Freight Conference—Rates on Household Goods, 202 (209–210).

Normally, and because the aim is to eliminate arbitrarily different treatment between competitors, a prejudice to one to be unlawful under section 3(1) of

the Interstate Commerce Act (substantially identical with section 16 of the Shipping Act) must ordinarily be such that the preference arising out of it is a source of advantage to the other allegedly favored. A case of undue prejudice is not made out, however, by a mere showing of lower rates between competing shippers. Other factors may make a preference or prejudice reasonable or due. Id. (210).

Under section 2 of the Interstate Commerce Act (the counterpart of section 17 of the Shipping Act), discrimination arises when two shippers of like traffic, shipping over the same road between the same points under substantially similar circumstances and conditions, are charged different rates. Unlike section 3 (the counterpart of section 16), the equality required under section 2 is not dependent upon any showing that the shippers or consignees involved compete in the marketplace. Where the conditions of section 2 are met, a carrier may not make a difference in rates because of differences in circumstances arising either before the service of the carrier began, or after it was terminated; nor may a carrier make a difference in rates based upon the identity of the shippers and this is so whether the unfavored shipper is injured or not. Id. (212).

Under the Interstate Commerce Act, to constitute unjust discrimination there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions but who are paying different rates. In such a case it is immaterial that the shippers are not in competition with each other. Where the service is different or the transportation is between different localities, it is a case of undue or unreasonable preference or prejudice unless the many relevant considerations render the different rates reasonable. Ordinarily, the shippers involved must be competitors. Applying this construction of the terms of sections 16 and 17 of the Shipping Act will not result in wholesale destruction of Shipping Act precedent. Id. (213).

Whether unjust discrimination under section 17 also constitutes undue or unreasonable preference or prejudice under section 16 is not decided. Section 17 applies only to common carriers by water in foreign commerce and if the circumstances and conditions constituting unjust discrimination under section 17 are not encompassed within the scope of section 16, it may be possible to argue that unjust discrimination is not prohibited in offshore domestic trades, a highly dubious construction of the Act. Id. (214, footnote 20).

A number of cases clearly indicate that predecessor agencies of the Commission were aware of the difference between sections 16 and 17 of the Shipping Act (i.e. the distinction between unjust discrimination on the one hand and undue or unreasonable preference on the other, as between shippers). While discussions in many precedents often use "preference or prejudice" and "discrimination" interchangeably, the actual conclusion in a great many, if not all, are based upon the distinction between the two. Id. (213–216).

Whatever the criteria for measuring or judging unjust discrimination between ports may be (transportation would not be "between the same points"), there are no differences in transportation conditions between land carriage under the Interstate Commerce Act and ocean carriage under the Shipping Act which would warrant continuation of an unfortunate departure from long-established principles governing unjust discrimination as between shippers. There is no difference inherent in water carriage vis-a-vis land carriage which would justify the water carrier in charging different rates to two shippers of like traffic over the same line between the same points under substantially similar circumstances. Thus, the principles applicable in connection with sections 2 and 3 of the Interstate

Commerce Act are properly applicable generally to sections 17 and 16 of the Shipping Act. Id. (216).

U.S.-flag carrier members of a conference by charging different rates to the Department of State and the military departments for transporting the household goods of each over their lines, between the same ports under substantially identical circumstances and conditions, unjustly discriminated as between them in violation of section 17 of the Shipping Act. It was unnecessary to determine whether the same activity constituted a violation of section 16. Id. (218–219).

A tariff rule requiring consignees to accept store-door delivery by the carrier of minimum bill of lading shipments while not requiring the same of other less than trailerload shipments was not violative of sections 16 or 18(a) because minimum shipment consignees were not afforded an option to pick up the cargo. The apparent preference or prejudice was not undue, unjust or unreasonable inasmuch as it did not operate to any real disadvantage to minimum shipments. Any inconvenience or additional cost burden imposed on minimum shipment consignees would necessarily be slight and would be far outweighted by the attendant benefits in the form of terminal operating efficiency and elimination of loss and damage claims. Investigation of Minimum Charges and Terminal Delivery Services—Atlantic-Gulf/Puerto Rico Trades, 222 (234–236).

An offer to transport military cargo free of charge was not in violation of the Shipping Act, since the offer was part of early negotiations between the carrier and the government and the final conditions of the offer were never formulated. However, this is not to say that sections of the Act are not applicable to transportation of military cargo. Rates on U.S. Government Cargoes, 263 (285).

RATES. See also Agreements Under Section 15; Burden of Proof; Discrimination; Dual Rates; Practices; Preference and Prejudice; Tariffs.

—In general

Investigation to determine whether rates in the inbound trade from Hong Kong to United States Atlantic and Gulf ports were so low (in 1961–62) as to be detrimental to commerce under section 18(b)(5) of the Shipping Act will be discontinued on the ground of mootness. The rate war was over and the trade had regained an element of stability. There had been protracted delay due in large measure to the need for subpoena enforcement proceedings. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (173).

In an appropriate case the Commission could consider a section 18(b)(5) case, even though the carrier or conference involved had increased or decreased rates at the 11th hour. However, some useful purpose must be served. The Commission will not consider out-dated economic evidence upon which findings of unreasonableness and detriment to commerce must be based. Id. (173).

—Filing

The requirement in section 18(b) that common carriers by water in foreign commerce file their rates with the Commission does not mean that each rate filed is approved. The mere act of filing a rate raises no inference on way or the other concerning the lawfulness of the rate. North Atlantic Mediterranean Freight Conference—Rates on Household Goods, 202 (220, footnote 30).

—Other than tariff

Where carriers have violated section 18(b)(3) by charging rates other than those specified in their tariffs, the offenses cannot be ignored because they may have been isolated instances or inadvertent, although the finding of violation may be coupled with other factual determinations tending to mitigate the

seriousness of the offenses. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (178).

Where a shipper obtained transportation at less than rates otherwise applicable and the carrier allowed the shipper to obtain transportation at less than regular rates on charges, the carrier violated section 18(b)(3) of the 1916 Act and section 2 of the Intercoastal Act, each in its respective areas of application. Any deviation from rates on file with the Commissioner violates these sections. Pacific Far East Lines—Alleged Rebates to Foremost Dairies, Inc., Connell Bros. Co., Ltd., and Advance Mill Supply Corp., 357 (365–366).

—Reasonableness

Extra-length charge of 65¢ per foot, per ton, W/M on iron and steel from New York to Puerto Rico was just and reasonable because of the difficulty and expense involved in loading extra-length iron and steel aboard the carrier's vessels. American Union Transport, Inc.—Increased Rates and Charges on Iron and Steel, New York to Puerto Rico, 149 (152).

Late-delivery charge of $5 per ton, W/M, on iron and steel from New York to Puerto Rico was just and reasonable because it more nearly assured compliance by the shipper with prearranged delivery time and partially compensated the carrier for costs resulting from delay in delivery and loading. The reasonableness of the charge was further supported because it was not assessed if the ship was not held for cargo, but rather demurrage was assessed against the cargo pending arrival of the next ship. Id. (152).

Rate of $26 per ton, W/M, on piling sheets, nested, from New York to Puerto Rico, was just and reasonable. The return to the carrier was slightly less than the total of fully distributed costs but well in excess of total stevedoring costs on the commodity. Id. (152–153).

Rate of $26 per ton, W/M, on iron and steel, N.O.S., from New York to Puerto Rico, was just and reasonable. It could not be said that the method of calculating stevedoring "extra" used by the carrier was unreasonable. The computation of extras as a percentage of the stevedoring rate on the commodity was supported by the record, which indicated that at least some of the extra expense items had a relation to the commodities involved inasmuch as they were functions of productivity and the contract rate paid the stevedore depends upon his productivity. Most iron and steel commodities transported at the rate contended for by Hearing Counsel would not realize a return above the carrier's fully distributed costs. Id. (153–154).

Rate on cast iron, $3 higher than rate on iron and steel, N.O.S., from New York to Puerto Rico was justified by the frailty of the commodity, which subjects it to a higher claim potential. Id. (154).

Where one carrier or conference is alleging that the rates of another carrier or conference are so unreasonably low as to be detrimental to the commerce of the United States, the criteria for findings under section 18(b)(5) are: A rate which fails to meet out-of-pocket costs is unreasonably low. Out-of-pocket costs mean cost of handling cargo into and out of the vessel plus any directly assignable costs such as brokerage. A showing by a complaining carrier of its own out-of-pocket costs establishes a presumption of the prevailing costs on a particular commodity in a particular trade. A complaining carrier must also establish a prima facie showing of detriment to commerce. A showing by the complaining carrier of adverse economic impact upon itself establishes such a prima facie case. These showings would be subject to rebuttal. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (174).

The fact that the conference rate on household goods may have been a factor which contributed to the State Department's decision to provide its overseas employees with furnished living quarters did not justify a conclusion that the rate was unreasonably high so as to be detrimental to United States commerce. North Atlantic Mediterranean Freight Conference—Rates on Household Goods, 202 (220).

While studies of the cost of carrying military cargoes were not as accurate or complete as they might be, there was no justifiable reason not to accept them as a fair and honest attempt by carriers to come up with a meaningful story. The studies represented a reasonably close approximation of costs. Therefore, there was no showing on the record that the rates in effect prior to competitive reductions were so unreasonably high as to be detrimental to commerce within the meaning of section 18(b)(5). Rates on U.S. Government Cargoes, 263 (279).

Issue of whether rates met the standards of section 18(b)(5) is moot. That section permits the Commission to disapprove rates upon certain findings. Since the rates are no longer effective, they are no longer amenable to 18(b)(5). Id. (279).

Rate reductions designed to eliminate a carrier from the carriage of military cargo, and which were admittedly unreasonable and noncompensatory, were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, were contrary to section 18(b)(5). The rates of the carrier against which the rate reductions were issued were not found to be contrary to 18(b)(5). Id. (279–280).

—Through routes and joint rates

Although section 2 of the Intercoastal Shipping Act, 1933, requires carriers to file with the Federal Maritime Commission all their rates in connection with establishment of a through route, the provision applies only if the other carrier to the arrangement is a water carrier. Sea-Land Service, Inc.—Cancellation of FMC Port-to-Port Rates—West Coast/Alaska Trade, 137 (142).

Public Law 87–595 (which, inter alia, gave the ICC jurisdiction over through routes and joint rates between Alaska and other states) was designed to authorize a type of transportation which neither the FMC nor the ICC would permit. Congress did not intend to repeal section 27(b) of the Alaska Statehood Act or overturn long-standing FMC practice in accepting port-to-port tariffs of a water carrier operating between West Coast and Alaska, which tariffs included pickup and delivery service in port areas. The law was intended to cover the type of operation where joint rates were established between a motor carrier and a water carrier to cover service from interior points in the United States to Alaska (or Hawaii). Id. (142–143).

The purpose of Public Law 87–595 was to confer the benefits of through routes and joint rates on the users of motor-water services between Alaska and Hawaii and the other 48 states. Under such a through route and joint rate, shippers would be able to make one contract with the originating carrier, ascertain the rate by consulting a single tariff, and enjoy the economy of joint rates. Id. (143).

Under section 27(b) of the Alaska Statehood Act jurisdiction over water transportation between Alaska and the other states was explicitly preserved in the FMC. A principle of statutory construction directs that past legislation shall not be repealed by implication. Clear and manifest language indicating such an objective must appear. There is no such language in Public Law 87–595 which amends two sections of the Interstate Commerce Act and makes no mention of the Alaska Act. Id. (144).

Pursuant to section 2 of the Intercoastal Act, 1933, the FMC has authority to accept filings of port-to-port rates which include incidental pickup and delivery services. The FMC has long accepted such tariffs. Id. (144).

In enacting Public Law 87–595, Congress knew of the many FMC decisions under section 2 of the 1933 Act whereby single-factor rates including pickup and delivery services had been for many years filed with the FMC. Congress intended to leave jurisdiction of the FMC where it had always been and apply Public Law 87–595 to a *bona fide* through route and joint rate situation such as one involving movement from interior points of the mainland to Hawaii or Alaska. Id. (145).

Congress, the courts and regulatory agencies have long considered incidental transportation service rendered in conjunction with the major line-haul to be part of the overall dominant service, even if the dominant service were provided by a different mode of conveyance. Examples are found in past actions of the ICC, and the Congress in enacting the Transportation Act of 1940 and the Civil Aeronautics Act of 1938. Id. (145).

A motor carrier in Alaska may enter into a true through route and a joint rate arrangement with a water carrier as contemplated by Public Law 87–595. The ICC cases establish this and nothing more. The cases are not pertinent to the inquiry as to whether a port-to-port service between Seattle and Anchorage with pickup and delivery is a through route and joint rate. It is not. Id. (147).

Where a carrier had not changed the physical elements of its service from Seattle to Anchorage (port-to-port with pickup and delivery service), but merely changed the nomenclature to describe the service as joint with a motor carrier, the change did not divest the FMC of jurisdiction. The service remained one contemplated by the Intercoastal Act, 1933, not a joint service as contemplated by Public Law 87–595. Accordingly the tariff for the service must be filed with the FMC. Id. (148).

The Commission was not deprived of jurisdiction over the rates of a carrier between Seattle and Alaska ports because of a pickup and delivery service provided within the Seattle commercial area by a motor carrier which was required to obtain ICC certification. The pickup and delivery service was an incidental part of a port-to-port service, subject to FMC jurisdiction. Rates for the service had to be filed under section 18(a) of the 1916 Act and section 2 of the 1933 Act. Jurisdiction over the motor carriers performing the pickup and delivery services is not claimed. Alaska Steamship Co.—Cancellation of FMC Port-to-Port Rates—West Coast/Alaskan Trade, 314 (320–321).

Use (for economic reasons) by a carrier in the West Coast/Alaska Trade of a vessel of Alaska Ferry to transport cargo over a portion of a route did not deprive the Maritime Commission of jurisdiction over the carrier's rates in the trade. Inasmuch as the substituted service involved participation between certain ports by another water carrier, it constituted a through route with another water carrier for which all rates, fares, and charges had to be filed with the Commission under section 18(a) of the 1916 Act and section 2 of the 1933 Act. Id. (322–323).

The fact that ICC treats a ferry as a public way and any carrier utilizing Alaska Ferry must be certificated as a motor carrier was not relevant to the question of FMC jurisdiction over rates of Alaska Steam which used Alaska Ferry to transport cargo over a portion of a route from Seattle to Alaska. Any motor carrier transporting any cargo in interstate commerce must, unless exempted, be certificated by the ICC. That agency, moreover, has indicated that carriage by water over the route traversed by Alaska Ferry is not within its jurisdiction. Alaska Ferry was not a true ferry, in light of the large distances

traversed, the length of time elapsed, and the lavishness of service provided. Id. (323–324).

The operation of Alaska Ferry is carriage by water on regular routes with fixed schedules for all who wish to avail themselves of the service. One who performs such service is obviously a carrier by water. Id. (325).

The service of Alaska Ferry utilized by Alaska Steam for the continuous carriage from originating point on the line of Alaska Steam to destination on the line of Alaska Ferry must be included in tariffs filed with the FMC, pursuant to the provisions of section 18(a) of the 1916 Act and section 2 of the 1933 Act. The facts that there was no express agreement between Alaska Steam and Alaska Ferry for the carriage of the former's cargo and that Alaska Steam did not control Alaska Ferry's operation were irrelevant. Nor was the fact that no joint rates or any agreement upon rates existed important. The sections of the Acts speak not of "joint rates" but only of "through routes". A "through route" is "an arrangement, express or *implied*, between connecting carriers for the continuous carriage of goods from an originating point on the line of one carrier to destination on the line of another". Id. (325–326).

Participation of Alaska Steam as a motor carrier and of other ICC-certificated motor carriers, in driving containers on and off vessels of Alaska Ferry, in connection with carriage of cargo by Alaska Steam between Seattle and Alaska ports, was incidental to port-to-port movement and was not of the type envisaged by Public Law 87–595 as granting to ICC jurisdiction over the entire water movement. Alaska Steam itself visualized the service as essentially a water service, and as its own water service. Id. (326–328).

Inasmuch as conference agreements involved cover all rates and charges for a port-to-port service, it follows that as long as a carrier is a member of the conference, it must charge the conference rates for its solely port-to-port service. These rates are "on file with the Commission and duly published and in effect at the time" within the meaning of section 18(b)(3) of the Shipping Act. Container Marine Lines through Intermodal Container Tariffs Nos. 1 and 2, FMC Nos. 10 and 11, 476 (485).

One performing through services between inland points (including a water movement) in the foreign commerce of the United States and not offering a separate port-to-port service must file a break-out corresponding to the charge for the port-to-port portion of the service. Regulation by the Commission cannot be evaded by offering more than a port-to-port service. Id. (485).

—Volume rates

Where a carrier contracted to purchase bunker fuel oil from a shipper in order to hold the shipper's patronage; and the shipper, not being in the fuel oil business, assigned the contract and received a commission from the assignee on each barrel of oil supplied to the carrier, there was no violation of section 14 Fourth. There was no discernible relation between the commission paid to the shipper and the amount of its cargo offering to the carrier. Pacific Far East Lines—Alleged Rebates to Foremost Dairies, Inc., Connell Bros. Co., Ltd., and Advance Mill Supply Corp., 357 (366).

Public lumber terminal operator's tariff which provided for a volume discount for the handling of lumber at Port Newark subjected the lessee of a lumber terminal to undue and unreasonable disadvantage, in violation of section 16 First, and constituted an unjust and unreasonable regulation and practice, in violation of section 17. The public terminal operator's volume discount rates were not practically available to complainant or other tenants while they were available to nontenants. The discount rate provision applied only to the complete

package of truckloading, wharfage, and backhandling. Since complainant performed its own truckloading and used its own premises for storage, it did not qualify for the discount. It is irrelevant to propriety of volume discounts whether a difference in rates might be justified because one customer uses the public terminal and another uses a leased area 1.8 miles away from the public terminal. Each customer is entitled to similar treatment in respect to whether a discount based on volume of lumber backhandled is to be granted. Ballmill Lumber & Sales Corp *v.* Port of New York Authority, Weyerhaeuser Co., Atlantic Terminals, Inc., and Maher Lumber Terminal Corp., 494 (503–504, 506).

REBATES. See also Deferred Rebates.

Carrier which granted illegal rebates violated sections 16 Second and 18(b) (3) of the Shipping Act. Evidence was clear that rebates were granted as a constant practice. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (179–180).

Where a carrier purchased bunker fuel oil from a shipper who was not regularly engaged in the oil business; and the contract covering the purchase was assigned to an oil company, with the shipper receiving a commission of 10 cents per barrel from the supplier without performing any substantial services to earn the commission, the carrier violated section 16 Second and the shipper violated section 16, first paragraph. The carrier knew that it was paying a premium price for the oil supplied under the assignment. The supplier was the conduit for the rebate. Absent an extraordinary circumstance, not present in the case, a violation of section 16 Second by a carrier necessarily involves a violation of section 16, first paragraph, by the favored shipper where the shipper "knowingly and wilfully" acquiesces in the arrangement whereby the rebate is allowed. If the scheme itself is illegal, the words "knowingly and wilfully" in the first paragraph mean simply that the shipper's participation was with knowledge of the benefits which would flow from the arrangement and an intent to enjoy such benefits. The fatal defect in the arrangement was the lack of any means whereby any actual or potential competitiors of the shipper could find out what the shipper's actual transportation costs were. Pacific Far East Lines—Alleged Rebates to Foremost Dairies, Inc., Connell Bros. Co., Ltd., and Advance Mill Supply Corp., 357 (361–365).

The words "knowingly and wilfully" in section 16, first paragraph, cannot be interpreted as meaning actual or constructive knowledge that the requirements of the statute are being disregarded. Such a construction would make ignorance of the law a valid defense and substitute some subjective standard whereby actual knowledge of statutory language would have to be established before a violation could be found. Id. (363–364).

Known illegality is not an essential element of proof of a violation of section 16, first paragraph. The essential element of proof to which the *Philippine Merchants* case, 9 FMC 155, was addressed was the "unfair device or means" and in that case the missing element of proof was the unfair device or means. The practice involved there was open and aboveboard. Id. (364).

Disclosure of bunker fuel oil contract between a carrier and a shipper to a bank and to the Maritime Administration, as well as to the oil suppliers, did not constitute disclosure to an important class of persons that section 16 was designed to protect, namely, competing shippers. Id. (364–365).

Unlike section 16, First, there is no requirement under sections 16, first paragraph, or 16 Second, that actual competitive injury be established. It is enough that the practice involved has the capacity or tendency to injure competition. Id. (365).

REPARATION.

Carrier is ordered to refund $530.39 to the United States on account of overcharges on a shipment of two trucks overseas. The carrier applied the wrong heavy-lift rate. United States *v.* American-Oriental Lines, Inc., 33 (34).

Shipper was entitled to refund of excess freight charges where the carrier charged the N.O.S. rate on shipment of furniture in containers to Hawaii because, in publishing a new tariff, the carrier failed to anticipate that container-load shipments of furniture would be delivered to its container freight station by rail and inadvertently failed to include such shipments in the lower container-load rate for shipments picked up by the carrier within a prescribed pick-up area. The long standing container rate was a reasonable rate. The higher rate charged was unreasonable because of the lesser service provided thereunder and because it was deleted after being in effect only a short time. R. A. Eastman & Co. *v.* Matson Navigation Co., 134 (135).

Conference rule providing that claims for adjustment of freight charges must be presented within six months after date of shipment cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the 1916 Act more than six months but less than two years after the shipment date. The Commission has stated that its failure to promulgate a rule was not to be interpreted to allow carriers to limit the rights of shippers under section 22 and that it will not permit carriers by contract to change the time limitation in section 22. United States *v.* American Export Isbrandtsen Lines, Inc., 298 (302).

Reparation in the amount of $6,810.54 is ordered to be paid in accordance with the decision in Docket 67–30 (11 FMC 298), the case involving a conference rule providing that claims for adjustment of freight charges must be presented within six months after date of shipment. The claim was presented more than six months but less than two years after date of shipment. United States *v.* American Export Isbrandtsen Lines, Inc., 303.

Reparation in the amount of $1,862.30 is awarded in accordance with the decision in Docket 67–30 (11 FMC 298), the case involving a conference rule providing that claims for adjustment of freight charges must be presented within six months after date of shipment. The claim was presented more than six months but less than two years after date of shipment. United States *v.* Hellenic Lines, Ltd., 304.

Reparation in the amount of $28,018.79 is awarded in accordance with the decision in Docket 67–30 (11 FMC 298), the case involving a conference rule providing that claims for adjustment of freight charges must be presented within six months after date of shipment. The claim was presented more than six months but less than two years after shipment. United States *v.* American Export Isbrandtsen Lines, Inc., 305.

Reparation in the amount of $11,819.20 is ordered to be paid in accordance with the Commission decision in Docket 67–30 (11 FMC 298), the case involving a conference rule providing that claims for adjustment of freight charges must be presented within six months after date of shipment. The claim was presented more than six months but less than two years after shipment. United States *v.* American Export Isbrandtsen Lines, Inc., 312.

Where a shipper demonstrated that its shipments were assessed noncontract rates while others were assessed contract rates, an award of reparation was warranted based on established violations of section 14b. The mere collections of the excessive rates, without more, constituted violations of sections 14b. The measure of damages for the purpose of awarding reparation was to be based on the difference between the two rates. The award is not based on any proof of

unlawful discrimination within the meaning of the Act, but rather on a showing that the shipper was assessed and paid an excessive rate. United States Borax & Chemical Corp. *v.* Pacific Coast European Conference, 451 (467–468).

In cases arising out of unlawful discrimination, the right to recover reparation for injury incurred is limited to pecuniary loss suffered and proved. Although discrimination is a byproduct of the implementation of an unlawful dual rate contract or the denial of a lawful contract, the gist of the offense is clearly analogous to an overcharge. Thus any reparation granted should be based on principles application to overcharges. Id. (468–469).

Failure of a shipper to expressly pray for interest in its complaint seeking reparations was not a waiver of the collection of interest. The complaint did pray for damages and also for such sum as the Commission might determine to be proper as an award of reparation. Exercising its discretion, interest at the rate of six percent from the date inapplicable rates were exacted was allowed. Id. (470).

The Commission has no authority to award reparation when a complaint is filed more than two years after the cause of action accrues. The time limitation in section 22, and not state law, governs. In any event, the complaint was based on an alleged breach of a dual rate contract which had become unlawful, and the Commission will not consider provisions of a contract unlawful under the Act as determinative of the rights of the parties in a proceeding concerning the Commission's authority to award damages. Id. (471–472).

In view of the fact that the issue was not briefed by parties other than Hearing Counsel, and that the decision in the case rested on other grounds, the Commission would not consider at this time whether section 22 does or does not authorize an award of damages or reparation to a carrier against a shipper. Id. (473).

Awarding of reparation is a matter of discretion with the Commission. Reparation was not warranted where there was no real and tangible proof that any pecuniary losses which complainant may have suffered were the proximate result of violations of the Act. Ballmill Lumber & Sales Corp. *v.* Port of New York Authority, Weyerhauser Co., Atlantic Terminals, Inc., and Maher Lumber Terminal Corp., 494 (510).

RETALIATION.

Carrier which unbooked MSTS refrigerated cargo because of its dissatisfaction with MSTS's policy of distributing the carriage of general cargo violated section 14 Third. Rates on U.S. Government Cargoes, 263 (284).

Carrier which unbooked refrigerated MSTS cargo, at the same time remonstrating with MSTS on the latter's policy for use of competitive vessels for general cargo, was not retaliating in violation of section 14 Third. The particular vessel had limited commercial bookings, a maritime strike was pending, and MSTS did not provide general cargo in addition to the refrigerated cargo, hence cancellation of the sailing was necessary. Id. (284).

SELF-POLICING. See Agreements Under Section 15.

TARIFFS. See also Rates; Terminal Operators.

Tariff rule providing for certain services on commodities to shippers and consignees of Chinese descent did not lend itself to discrimination in rates, but was objectionable on the ground that it permitted performance of a special service to Chinese shippers and consignees where such service was not available to others. The rule was an unjust and unreasonable regulation under section 17 which prohibits making available any privilege, facility or service only to certain

persons based solely on their race, nationality or ethnic origin. Where such a practice is codified into a rule, the existence of the rule itself constitutes the violation. No showing of actual discrimination is needed. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (175–176).

A carrier which failed to follow the terms of its tariff with respect to POV loading costs and heavy lift charges violated section 18(b)(1) by failure to file appropriate provisions in its tariff. Rates on U.S. Government Cargoes, 263 (285).

Where a tariff item provided a rate for "automobile parts" defined as including "those items which are integral parts of automobiles . . . necessary for their operation", and another tariff item provided a higher rate for "engines, caloric, gas, internal combustion, oil or steam", complainant which shipped cargo described as "engines, internal combustion automobile" and "engine diesel, auto" was entitled to the automobile parts rate. Automobile engines were integral parts of automobiles. The fact that engines were not listed among the examples given in the tariff of automobile parts did not mean that they were not automobile parts. If the tariff item could be considered ambiguous, it had to be construed against the carrier. Fact that shipper used the words "automobile" or "auto" as a "suffix" rather than a "prefix" was not determinative. The description by the shipper accurately described the cargo for the carrier's benefit. Complainant, having been charged the wrong rate, was entitled to reparation. United States *v.* Gulf & South American Steamship Co., Inc., 306 (309–310).

Failure to file a tariff subject to FMC jurisdiction with FMC is a violation of the statutes administered by FMC, not those of ICC. The FMC has a duty to investigate and suspend in a proper case. Water carrier seeking to come under jurisdiction of ICC, rather than FMC, could have sought a declaratory order from the FMC, rather than cancelling its FMC tariffs. The Commission, in taking action on the matter, was not required to file a complaint with the ICC. Alaska Steamship Co.—Cancellation of FMC Port-to-Port Rates—West Coast/Alaska Trade, 314(329).

Where a carrier provides a through transportation service consisting of port-to-port transportation between the United States and the United Kingdom and inland transportation in the United Kingdom, the tariffs must break out the charge for the water portion of the transportation. The provision of section 18(b)(1) requiring that "tariffs shall plainly show the places between which freight will be carried" further makes mandatory the clear indication of the ports or ranges of ports between which water transportation will be performed. While "places" is not intended to include inland points because the jurisdiction of the Commission is only port-to-port, inland points must be identified because section 18(b)(1) requires that "tariffs . . . shall . . . state separately . . . any rules or regulations which in anywise change, affect, or determine any part or the aggregate of rates, or charges". Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 and 2, FMC Nos. 10 and 11, 476 (483).

The Commission must insure that it retains effective regulatory authority over those activities which are within the scope of its authority, and failure of a carrier to disclose the inland points to and from which its service applies and thus indicate the purported charge for the inland movement would make it impossible to determine whether or not the ocean portion of a rate is one which a carrier may lawfully charge. Failure to disclose inland points would enable the carrier to treat similarly situated shippers differently in possible violation of sections 16 and 17 of the Shipping Act. Id. (484).

TERMINAL LEASES.

Terminal lease agreement, with a minimum-maximum payable per year, was not unjustly discriminatory or unfair between carriers or shippers and did not give the lessee an undue and unreasonable preference and advantage in violation of section 16. First because no other user of the facilities operated under a similar arrangement, and all other users paid tariff rates. A terminal lease agreement is not unlawful or unreasonable merely because it does not follow otherwise applicable tariff charges. Agreement No. T–1870: Terminal Lease Agreement at Long Beach, California, 12 (19).

Return on minimum-maximum payment terminal lease agreement must be compensatory to support a conclusion that other users of facilities at the port are not burdened by the arrangement. Id. (20).

Rate of return on terminal lease agreement was not required to be based on the Freas formula. Use of "stand on its own feet method", which uses the estimated cost and expense of the facility to be leased to the carrier, was proper. Id. (20).

Use of capital recovery method of depreciation in determining cost of terminal facility to be leased to a carrier was a matter of business judgment with which the Commission would not interfere. Id. (21).

Failure of terminal, in connection with determination of return on terminal lease agreement, to provide for a return on lands which supported roads, bridges and an administration building, did not result in other users bearing costs which should have been allocated to the lessee. The lessor had acquired the lands without original cost. It was questionable whether any costs were incurred to maintain the lands considering that the bridges and administration building appeared to require little or no maintenance. As to the roads, opponents of the lease included an allocation of expenses for streets and freeway maintenance, as well as for maintenance of the bridges and administration building. In view of these circumstances, there was no need to provide for a return on these lands and, therefore, failure to provide for a return on such non-revenue producing lands would not result in a noncompensatory rate of return on the lease agreement. Id. (22).

Terminal provided sufficient information to support the conclusion that the rate of return on a terminal lease agreement would provide a reasonable profit for the use of the particular facility involved. Id. (22).

Lease agreement between an agent and affiliate of a carrier and a terminal for use of the terminal's facilities providing for compensation at tariff rates, but with a minimum-maximum amount payable per year, was not unjustly discriminatory or unfair as between carriers or shippers, and did not give the carrier an undue and unreasonable preference and advantage in violation of section 16 First. Assuming competition between the carrier and another carrier and between their respective customers, there was no discrimination or preference inasmuch as the terminal was willing to make similar arrangements with other carriers. The fact that few other carriers had the financial resouces necessary to take advantage of such offer did not mean that the carrier was being preferred or that others were suffering from discrimination. Id. (19–20, 23).

Terminal lease agreement was not to be condemned merely because it provided for terminal charges at other than tariff rates; the return had been shown to be compensatory and placed no burden on other users of the facility; and there had been no showing that any competitor of the lessee had been denied a similar arrangement. Id. (23).

The record did not show that a minimum-maximum payment terminal lease agreement at Long Beach, Calif., would operate contrary to the public interest or to the detriment of the commerce of the United States. Chaos had not resulted from approval of several such agreements at California ports. Only a few carriers were willing or able to assume the tremendous financial obligations inherent in such agreements. Even if the carrier paid less than tariff rates during some years, the terminal would benefit by keeping business which might otherwise dwindle away. The public interest would also be advanced if the speedy and healthy development of first-class containerized operation in the intercoastal and foreign trade were advanced by a modicum of price-wise competition between terminals. Id. (23–25).

Terminal lease agreement at Long Beach, California, does not violate the California Association of Port Authorities' Agreement pursuant to which California terminals operate. The Association agreement does not require that its members provide services only according to tariff rates. The agreement requires strict adherence to tariff rates only to the extent charges are proposed to be assessed by tariff. Id. (25).

Where a terminal lease agreement has been found to be approvable under section 15, the legality of the terms of the lease under state law is a matter for the state, not for the Commission. Id. (26).

Terminal lease agreement between a municipal corporation and an importer, exporter, manufacturer and charterer of vessels in foreign commerce, under which the lessee would operate the premises as a public terminal, concurring in the lessor's tariff, and would pay a minimum sum during each 12-month period of the lease; thereafter the revenue earned in the balance of each 12-month period for wharfage and dockage charges would be divided, 25 percent to the lessor and 75 percent to the lessee, with all other tariff charges accruing to the lessee; and under which the lessor would receive an adequate return on its investment in the leased premises, was approved. There was no conclusive evidence of unlawfulness under section 15. No carrier or shipper objected. No diversion of cargo was alleged. Agreements No. T–1985 and T–1986: Lease Agreements at Long Beach, California, 35 (37–40).

The term "compensatory" is given the connotation of fair and reasonable return on investment (in connection with determination of whether terminal lease is compensatory). Agreements Nos. T–1953 and T–1953–A: Terminal Lease Agreements Between the City of Oakland and Matson Navigation Co., 156 (162).

Determination of the compensatory nature of a terminal lease on the basis of estimated costs, rather than actual costs, of filling land and constructing a wharf would be a matter of concern if estimates were accepted without proof of a reasonable relationship to actual costs. The record supported the conclusion that the estimates were reasonable where the cost of the wharf was calculated as $1,442,250; the low bid was $1,750,612; the rent included a contingency factor; a substantial portion of the fill had been completed at less than estimated cost; and the port engineer was confident that the cost of the balance of the fill would be within his estimate. Id. (163).

Method of land valuation employed by a port, in connection with establishing a rent base for lease of land for a marine terminal and freight station was a reasonable exercise of good judgment, where submerged land was valued as such plus cost of fill, rather than valued as filled. The circumstances existing at the time of negotiations for the lease had to be considered. While factual computations of the amount of rental were material to the approvability of the lease, the issue was whether the ultimate result provided a fair return on investment.

There is no inflexible rule for establishing land values for the purpose of computing rental for future occupancy. The rental would produce a 7 percent return on investment in land. It was not unreasonable for the port to consider its investment as the value of the land plus the cost of putting it in a productive condition. Id. (163–165).

A fair contribution to general and administrative expense should be included in the rentals for terminal leases. A 0.5 percent of the cost of improvements involved in leases is not an unsubstantial amount. The record shows that the cost of servicing and billing of the leases will be minor. In any event, the amount involved would not render the leases noncompensatory, which is the major issue. Id. (1965).

Terminal leases at a fixed term and rent could be approved although they did not include provisions for periodic review and adjustment of the rent, since section 15 requires continuing agency scrutiny of such agreements. Id. (166).

TERMINAL OPERATORS. See also Free Time; Practices; Preference and Prejudice; Terminal Leases; Wharfage.

A tariff rule requiring consignees to accept store-door delivery by the carrier of minimum bill of lading shipments while not requiring the same of other less than trailerload shipments was not violative of section 16 or 18(a) because minimum shipments were deprived of five days' free storage. The rule was instituted to alleviate congestion at the terminals and had been successful. The rule eliminated the need for free time and thus resulted in no loss for minimum shipments. Investigation of Minimum Charges and Terminal Delivery Services—Atlantic-Gulf/Puerto Rico Trades, 222 (233–234).

Initial decision is adopted, except that the Commission neither agrees nor disagrees with the conclusions, or reasoning supporting them with respect to the reasonableness of respondent's rate of return on investment or the inclusion of leased property in the rate base and respondent's method of valuing land and plant facilities. Rates and Practices of the Pacific Northwest Tidewater Elevators Assn., 369 (371).

Marine grain terminals are an inseparable link in the transportation system serving our waterborne foreign commerce. The plan of the Shipping Act would be frustrated and rate-payers would be left to the mercies of the terminals if, having authorized their collective rate-making through section 15, thus eliminating rate competition, their practices in making the rates were held to be exempt from regulation. Id. (378).

The Commission had jurisdiction in a proceeding to determine the legality of revisions in the traiff rates, rules, and practices of marine grain terminals. The question was not the reasonableness of rates, but whether the practices of respondents in their determination and allocation of costs were reasonable. Id. (377).

As between vessel and cargo, it was proper for marine grain terminals to allocate the cost of the wharf (connected to the land by a ramp and analogous to the apron wharf at a general cargo terminal) to the vessel. The wharf was not used for the benefit of cargo to any appreciable extent. Under a proper allocation of costs between vessel and cargo, the cargo is assessed over 87 percent of all terminal costs. Respondents will bear this large porportion of costs in connection with their exports of grain. Their dual operation need not subject them to payment of costs expended for the benefit of others. Id. (384–385).

As between vessel and cargo, marine grain terminals properly allocated the cost of the waterway to the vessel. Id. (386).

Grain sales contract between the Department of Agriculture or a marine grain terminal, as seller, and a buyer of grain does not determine the propriety of any particular allocation of costs between vessel and cargo any more than does the provision of the charter party between the vessel and the grain buyer, who is the shipper. Id. (388).

The Freas formula is designed to develop the total costs of the terminal and then apportion them to vessel and cargo in proportion to the use made of the facilities provided and of the services rendered. The vessel is held responsible to the wharfinger for all usages and services from, but not including, the "point of rest" of the cargo. Id. (389).

The "point of rest" criterion was used by Freas as a shorthand expression to define the tradition concept as to the respective duties of the carrier and shipper with respect to transfer of cargo between them for the purpose of ocean transport. The shipper is traditionally obliged to bring cargo to a point where it can be reached by "ship's tackle" and the ship has the responsibility to accept the cargo at the point—the "point of rest"—for loading aboard the vessel. Id. (389.)

Practice of marine grain terminals in allocating 50 percent of the expense of the shipping gallery (a high speed conveyor and multiple spout system) to the vessel was not unreasonable under section 17. Allocation of 50 percent to the vessel was a conservative and acceptable estimate of the vessel's obligation. Id. (387–390).

The "point of rest" test is not entirely helpful with reference to the shipping gallery (a high speed conveyor and multiple spout system for grain) because of the physical difference between grain-loading and general cargo operations. The "end-of-ship's hook" concept has no parallel in the case of a vessel loading grain. Id. (390).

Elevator employees control the volume of flow of the grain and type of grain being loaded on vessels in response to signals from the stevedores. Thus the operation of the system is a joint undertaking between ship and elevator, the latter acting for cargo. The loading facility itself serves and benefits both ship and grain. Its costs should be borne jointly and equally by vessel and cargo. Id. (390).

Depreciation of facilities and equipment of marine grain terminals should be based on original cost, not an estimated cost of reproduction. Id. (390).

Marine grain terminals properly included a return on working capital in their cost studies, with the fund measured by two months operating expenses. Id. (395).

Institution of a services and facilities charge by marine grain terminals, similar to that in use by other terminals on the Pacific Coast, was not an unjust and unreasonable practice under section 17. Id. (401–406).

Overtime loading charge of $57 per hour by marine grain terminals, which charge included an incentive factor to induce the terminal to work during overtime hours was not an unjust or unreasonable practice under section 17 when the overtime loading was required by the vessel. However, inclusion of the incentive factor was an unjust and unreasonable practice when the terminal requested overtime loading. In such a situation a rate in excess of $40 per hour would be the result of unjust and unreasonable practices. Id. (407–409).

Action of port authority in permitting a lumber dealer to backhandle lumber for itself and for other receivers of lumber at Port Newark under a lease agreement while requiring other tenants to use the public terminal was an undue and unreasonable preference and advantage to the former and an undue and unreasonable prejudice and disadvantage to the other tenant-receivers of lumber,

and constituted an unjust and unreasonable regulation and practice, in violation of sections 16 First and 17. Ballmill Lumber & Sales Corp. *v.* Port of New York Authority, Weyerhaeuser Co., Atlantic Terminals, Inc., and Maher Lumber Terminal Corp., 494 (500).

Contentions, inter alia, of Port Authority that different treatment of two lumber dealers was necessitated and justified by differences in characteristics of the dealers and by other circumstances; that one lumber dealer did not have a competitive advantage over the other dealer because the service of backhandling which one was permitted to perform through its subsidiary while the other could not, was of little importance; that complainant dealer had not shown any real disadvantage to itself; and that the dealers were not similarly situated and therefore did not require similar services, did not affect the conclusion that the Port Authority violated section 16 First and section 17. Id. (500–503).

Public lumber terminal operator's tariff which provided for a volume discount for the handling of lumber at Port Newark subjected the lessee of a lumber terminal to undue and unreasonable disadvantage, in violation of section 16 First, and constituted an unjust and unreasonable regulation and practice, in violation of section 17. The public terminal operator's volume discount rates were not practically available to complainant or other tenants while they were available to nontenants. The discount rate provision applied only to the complete package of truckloading, wharfage, and backhandling. Since complainant performed its own truckloading and used its own premises for storage, it did not qualify for the discount. It is irrelevant to the propriety of volume discounts whether a difference in rates might be justified because one customer uses the public terminal and another uses a leased area 1.8 miles away from the public terminal. Each customer is entitled to similar treatment in respect to whether a discount based on volume of lumber backhandled is to be granted. Id. (503–504, 506).

Tariff of terminal operators relating to overtime charges and holiday rates is an unjust and unreasonable practice insofar as it fails to set forth the criteria used to determine the overtime charges and fails to specify holidays. Reparation is not awarded since the record contains no evidence of injury to complainant. International Packers Ltd. *v.* North Pier Terminal Co., 525 (528–529).

Exclusion of refrigerated cargo from a terminal's three o'clock rule gives a preference to general cargo but the preference is not so undue as to result in a violation of the Shipping Act. The difference is warranted by such matters as the unpredictability of the weather, mechanical breakdowns, labor disputes, etc., and inadequacy of storage facilities to protect refrigerated cargo. Id. (529–530).

Tariff of terminal operators relating to extra services charges for certain services is an unreasonable practice in violation of section 17, since it did not contain a standard for determining rates to be applied on such extra services. No reparation is awarded since complainant had no shipments to which the charges applied and was never billed for extra charges. Id. (530–531).

Truck loading and unloading charge of 9¢ per 100 lbs. by terminal operators at the port of Chicago is not excessive or unreasonable. As to failure to classify charges as to commodities and handling characteristics, respondents were expected, after they gained experience to publish rates relating to commodities and handling characteristics, and they had in certain respects done so. Failure to provide partial loading and unloading charge (moving cargo between a place on the dock and the tail gate of the truck) on truck deliveries is justified. Elimination of partial service relieves congestion at the piers, reduces costs and removes an important area of dispute between truckers and terminals. Id. (532–534).

THROUGH ROUTES. See Rates.

TRUCK LOADING AND UNLOADING. See Terminal Operators.

WHARFAGE. See also Practices.

Revision of terminal tariff to assess wharfage charge against the vessel rather than the cargo was clearly authorized and contemplated by the approved basic agreement between terminal operators. The agreement specifically authorized the issuance of tariffs covering "wharfage" and provided for the filing of such tariffs and any changes therein with the Commission. Thus the revision was merely an implementation of the general ratemaking authority provided in the basic agreement. Boston Shipping Assn., Inc. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (5–6).

Revision of terminal tariff to assess wharfage against the vessel rather than the cargo did not require prior approval of the Commission under section 15. The action was routine and was authorized and contemplated by the approved basic agreement. Id. (5–7).

As used in section 17, and as applied to terminal practices, a "just and reasonable practice" means a practice otherwise lawful, but not excessive, and which is fit and appropriate to the end in view. Wharfage assessed against the vessel is a proper and "otherwise lawful charge". Incident to the carrier's duty to tender for delivery is the duty to provide the shipper with adequate terminal facilities upon which cargo may be placed by the shipper and/or from which it may be picked up by the consignee. Since the terminal provides a service which is in furtherance of the carrier's obligation, it follows that "wharfage" is an appropriate charge against the vessel. Commission General Order 15 expressly sanctions this method of assessment. Id. (9).

Revision of terminal tariff by Port Authority to assess wharfage against the vessel rather than the cargo at Port Authority-operated piers was not an unreasonable practice under section 17. As applied to terminal practices, a "just and reasonable practice" means a practice otherwise lawful, but not excessive, and which is fit and appropriate to the end in view. Wharfage assessed against the vessel was clearly a proper and "otherwise lawful charge". As to its fitness and appropriateness to the end in view, the Port Authority had suffered losses in its pier operations and the revision was made in the belief that more cargo would be attracted to Port Authority piers and thus increase revenues. It was not important that there was a drop in tonnage for several months as compared with the same months in the prior year. Id. (8–11).

As to whether Port Authority practice of assessing wharfage against the vessel (rather than cargo) was "fit and appropriate to the end in view", it clearly was. The charge was instituted primarily as a result of losses in pier operations. The Port Authority hoped to attract truck traffic, which might otherwise be lost to competing ports. The Authority also anticipated that more efficient pier utilization would be encouraged by creating an incentive for shippers to use unitization, palletization and containerization. A drop in tonnage for several months as compared with the same months in the prior year was not important. Id. (9–10).

Examiner's finding that the ocean freight rate at Boston contains a wharfage factor or that assessment of wharfage against shippers and consignees at the public piers in Boston, other than those operated by the Port Authority, involved a duplication of charges, was not supported by the record. There was no basis for a determination that assessment of a double charge was unjust and unreasonable. Id. (11 footnote 16).

nomic freedom."[1] This principle is implemented through a policy which frowns upon undue restrictions on competition.

Section 15 of the Shipping Act, 1916, does not conflict with that policy but rather complements it. Congress authorized the approval of shipping conferences to forestall monopolistic movements that are more anticompetitive than the conference system itself. Thus a Federal court has said:

> The condition on which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute.[2]

It is incumbent upon this Commission to evaluate every proposed agreement in the light of this standard; and it should not be forsaken even though only a simple and innocuous agreement is involved.[3] We are here presented with an agreement which does not qualify for approval under our congressional mandate or under the guidelines we have set heretofore.

The time an agreement is presented for initial approval is when we must evaluate it thoroughly and determine the anticompetitive scope it is to possess. We are not soothsayers. We cannot predict what in fact will happen as a result of approval. We can, however, predict the probable consequences of approval. That is our expertise. When approving an agreement we should understand the gamut of activity inherently concomitant to the specific conduct as set forth in the agreement. We should not grant antitrust immunity to agreements which are overbearing or unnecessary and which thereby might contain latitude for unauthorized actions within the approved area of conduct. It is an undesirable situation when we must call upon hindsight to uncover the pitfalls of an agreement which may trap a conference in violations of the law.

As I said in docket 66–45,[4] "[t]he desire of the parties to enter into agreements alone is not considered sufficient to warrant approval."

> For presumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combinations seek to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purpose of the Shipping Act.[5]

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[1] *Mediterranean Pools Investigation,* 9 FMC 264 at 288.

[2] *Isbrandtsen Co., Inc.* v. *United States et al.,* 211 F. 2d 51 at 57.

[3] Transcript, Oral Argument, p. 20.

[4] *Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Lines, Inc.*

[5] *Mediterranean Pools Investigation,* 9 FMC 264, 290.