DECISIONS OF THE

FEDERAL MARITIME COMMISSION

VOLUME 14

JULY 1970 TO JUNE 1971

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1972

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Washington, D,C, 20402 - Price $2.75

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1971

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ASHTON C. BARRETT, *Vice Chairman*
JAMES V. DAY, *Member*
JAMES F. FANSEEN, *Member*
GEORGE H. HEARN, *Member*

FRANCIS C. HURNEY, *Secretary*

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FEDERAL MARITIME COMMISSION

DOCKET NO. 69–48

INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE NO. 1092

SPEED-FREIGHT INC.

Decided August 11, 1970

License revoked. Respondent found to be connected with and controlled by a shipper in foreign commerce; to have submitted false statements in its freight forwarder application; to be without personnel qualified in freight forwarding; and to have failed to report to the Commission required changes of facts as required.

Nicholas Stecopoulos, for respondent.
Donald J. Brunner and *Paul J. Kaller*, as hearing counsel.

REPORT

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

This proceeding was instituted to determine: (1) Whether Speed-Freight Incorporated is connected with and/or controlled by a shipper to foreign countries contrary to sections 1 and 44 of the Shipping Act, 1916 (46 U.S.C. 801, 841(b)), and section 510.2(a) of Federal Maritime Commission General Order 4 (46 CFR 510.2(a)); (2) whether Speed-Freight submitted willfully false statements in connection with its application for a license; (3) whether Speed-Freight's present financial position and personnel no longer qualify it as an independent freight forwarder; (4) whether Speed-Freight violated section 510.5 (c), General Order 4, by failing to submit required reports of changes of facts; and (5) ultimately whether Speed-Freight continues to qualify for a freight forwarder's license.

Examiner John Marshall issued an initial decision in which he concluded that Speed-Freight: (1) Is connected with, and controlled by Calson Co., a shipper to foreign countries, contrary to sections 1 and 44 of the Shipping Act, 1916; (2) has, through its president and owner, submitted willfully false statements to the Commission in connection with its application for a license, contrary to section 510.9(c) of General Order 4; (3) has changed its personnel to the extent that it no longer qualifiies as an independent freight forwarder, contrary to section 510.9(c) of General Order 4, and has failed to report such changes to the Commission as required by section 510.5(c) of General Order 4. The examiner on the basis of the foregoing revoked Speed-Freight's forwarding license pursuant to section 44(d) of the act and section 510.9 of General Order 4. Speed-Freight has filed exceptions; hearing counsel have replied. We heard oral argument.

FACTS [1]

Marion Calas is managing partner of Calson Co. and president of Calsonaire, Inc. Calson is an exporter shipping by air and water. Nicholas Stecopoulos is the owner, president, treasurer, director, stockholder, and attorney of record of Speed-Freight. His principal occupation is attorney associated with a prominent New York law firm.

Calas and Stecopoulos have been friends for many years. For the past 9 years Stecopoulos has been the attorney for Calson and Calsonaire. During that time period, Stecopoulos earned approximately $150 per year in legal fees from Calas. Certain services, however, were performed gratis, such as those relating to Calas' purchase of the interest of his partner, Mr. Pearson, in Calson and Calsonaire, and Mrs. Calas' claim arising out of an automobile accident. Calas feels a "moral obligation" to help Stecopoulos whenever he needs help. It was Calas who suggested that Stecopoulos enter the freight forwarding business by employing Eugene Pagano, a prior employee of Calson with approximately 17 years' experience in freight forwarding.

As vice president, Pagano alone handled all aspects of Speed-Freight's operations. Stecopoulos had no knowledge of the freight forwarding business. Throughout Pagano's tenure, Calson and its affiliates were Speed-Freight's principal customers. Approximately 80 percent of Speed-Freight's work was for Calson. Pagano came to believe that he was actually working for Calas.

[1] The facts set out here are those found by the examiner.

In addition to the regular freight-forwarding service performed by Speed-Freight, a "special forwarding service" was performed almost daily whereby it delivered Calson packages to the airport, presumably John F. Kennedy International.[2] The delivery charge was $2.25 per package, irrespective of the number. Although this charge was comparatively high, it was agreed to by Calas. Pagano picked up the packages from Calson's office and ordinarily the vehicle used was a station wagon belonging to Calas' partner, Pearson. The "special forwarding service" consumed approximately 3 hours of Pagano's workday. When he found this to be too much, he complained to Calas. Although the problem was never discussed with Stecopoulos, Calas prevailed upon him to continue the service.

Throughout Pagano's tenure as vice president, Speed-Freight lost money. During this time Octavio Romaro, a full-time Calson bookkeeper, maintained all of Speed-Freight's books and records. These were kept at his Calson office. Therefore, in order to keep Romaro appraised of Speed-Freight's financial affairs, it was necessary for Pagano to visit Calson's office almost daily. Romaro, as treasurer of Speed-Freight, had the authority and responsibility to countersign, with Pagano, all Speed-Freight checks. When, on one occasion Pagano cashed an uncountersigned check, it was Calas who advised him not to do so again.

Pagano was fired from Speed-Freight in October 1966. He was first informed of this by Calas and thereafter received confirmation by calling Stecopoulos.

Some time after Pagano left Speed-Freight, Joseph W. Dueber was hired as traffic and office manager. Having had 12 years of forwarding experience, he had the qualifications necessary for an ocean freight forwarder. He was initially interviewed by Stecopoulos at a meeting with Calas and Stecopoulos in Calson's office.

In the latter part of 1966 there was an interim period between the firing of Pagano and the hiring of Dueber during which time Adji Tjokronolo ran the entire Speed-Freight operation. He was then named, and continues to be, a vice president of Speed-Freight. Adji (as he is referred to throughout the record) has been employed by Calson continuously since 1963. Except for work in that company's exporting business, his only freight-forwarding experience has been with Speed-Freight. Even after Dueber was hired, Adji continued to frequent the Speed-Freight office to oversee the operation and assure that it was "going along the way it was supposed to." During the month of January 1967, he spent up to half of each workday at Speed-Freight

[2] Calson has now hired a man to provide this truck service.

teaching Dueber the "details and technical features of certain accounts." For "a couple of weeks" he continued to sign all documents and correspondence. Thereafter Dueber began to exercise this function. However, even after Dueber's initial "training period", Adji continued to visit the Speed-Freight offices especially in regard to Calson business. Calson had merchandise stored at Speed-Freight and Adji would go there to pack it and to assist Dueber if the volume of work required.

During Dueber's employment, 1967 and 1968, Romaro continued as Speed-Freight's main financial officer, maintaining complete control over its financial records which he kept at his Calson office. It was therefore necessary for Dueber to visit the Calson office in order to deliver Speed-Freight invoices or other financial papers to Romaro. Dueber, at no time, had authority to draw Speed-Freight checks, that function being performed jointly by Adji and Romaro.

During 1967, 60–70 percent of Speed-Freight's work was for Calson. Since then, 40–50 percent has been for Calson.

When Dueber felt the "special forwarding service" was taking too much time, he complained to Adji who then came to Speed-Freight to provide assistance. Whenever Dueber had questions or complaints as to the Speed-Freight operation, he consulted Adji.

Adji continues to serve both as vice president of Speed-Freight and manager of Calson. Although, since Dueber's departure the latter part of 1968, Adji alone has run the entire Speed-Freight operation, he has received no salary from Speed-Freight. His entire salary has been paid by Calson.[3] He maintains one office at Speed-Freight and another at Calson, spending approximately 50 percent of his workday at each place. Adji is the only person now having authority to sign Speed-Freight checks. He infrequently receives instruction, direction, or guidance from Stecopoulos.

On October 7, 1969, Herbert Cooper, senior district investigator for the Federal Maritime Commission, attempted to serve a subpoena upon Adji. In an effort to reach him, he called the Speed-Freight office. He was informed that Adji "had been transferred to the main office." The address given for the main office was 27 Union Square, New York City, the address of the Calson office.

Romaro is still Speed-Freight's main financial officer. Although he is employed as a full-time bookkeeper by Calson, he continues to maintain all of Speed-Freight's books and financial records. These include the "Cash Receipts Journal, Cash Disbursements Journal,

[3] Calas testified that Speed-Freight recently reimbursed Calson three or four thousand dollars for Adji's services during fiscal year ended Apr. 30, 1969.

Sales Journal, and Accounts Receivable Subsidiary Ledger." He is assisted by the C.P.A. firm of Osterweil, Oshrin, and Gruhn, which firm also represents Calson. He receives no salary from Speed-Freight, his entire salary being paid by Calson. He has no experience as a freight forwarder.

Romaro's affiliation with Speed-Freight was a result of the close relationship between Calas and Stecopoulos. Stecopoulos knew that he could use whatever Calas had available. One evening Stecopoulos mentioned to Calas that "* * * somebody has to do the books." Calas suggested that he use Romaro. Stecopoulos, an old friend of Romaro, then asked him to become treasurer of Speed-Freight on a part-time basis.

Romaro left Calson and Speed-Freight in January 1968, to go to California. When he returned 1 year later, he was immediately rehired by both companies. During his absence, Adji maintained Speed-Freight's books and records.

Speed-Freight's rental for its original office at 24–26 13th Street, New York City, was $300 per month. Calson, or its affiliate Calsonaire, paid $200 of this as compensation for storage space. A company called Jalma's Importers of Antiques also rented storage space from Speed-Freight at "something like $25 or $35 per month." Recently, Speed-Freight purchased its own premises at 153–07 Rockaway Boulevard, Jamaica, N.Y., paying a deposit of $1,500. Calson continues to rent space there at $200 per month.[4]

At the present time Speed-Freight is paying salary to no one. A Mr. Loffredo is stationed at 153–07 Rockaway Boulevard to make deliveries for Calson from its stock stored at that location. He also answers the phone for Speed-Freight but is paid by Calson.

During the period 1965–67 over $11,000 was billed to Calson for the "special forwarding service." Only $3,060 was paid or credited to Speed-Freight's accounts receivable. Up until the time that Romaro left in 1968, that debt had not been paid. This was so even though Speed-Freight, according to Romaro, was and is operating at a loss.[5]

Romaro never had authority to sign Calson checks. However, on occasion immediate payment by Calson would be required when no one with authority to sign the check was available. Romaro, then having authority to draw Speed-Freight checks, would pay the bill with

[4] Testimony of Calas, which conflicts with that of Romaro, indicates that the new building was purchased jointly by Calas and Stecopoulos as individuals, Calas owning two-thirds and Stecopoulos one-third.

[5] Stecopoulos testified that the balance due Speed-Freight has been paid and that Speed-Freight presently shows a profit of $1,800. However, he could not remember when it was paid.

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Speed-Freight funds and Calson would thereafter make reimbursement. Permission for this procedure was granted by Stecopoulos while acting in his capacity as attorney for Calson.

In 1965 Calsonaire paid a $1,000 security deposit to Speed-Freight for the space used at its premises.[6] The security deposit which Stecopoulos was required to pay on the entire premises was only $600. To date, neither the $1,000 nor the $400 excess has been returned to Calas.

In 1966, the financial condition of Speed-Freight necessitated a $2,000 loan which was arranged with Chemical Bank New York Trust Co. Repayment of the loan was guaranteed by Calas and his then partner, Pearson.

Stecopoulos specifically requested that Calas watch over the Speed-Freight operation. This was because Calas was Speed-Freight's most important customer, and because of their long time friendship.

In his application for an independent ocean freight forwarder license, Stecopoulos listed the officers as follows:

President-Treasurer—Nicholas Stecopoulos.
First Vice President—Eugene Pagano.
Assistant Treasurer—Octavio Romaro.
Secretary—Palma Pirrallo.

Stecopoulos admitted under oath that his present operation is in violation of the Shipping Act and that an intolerable situation exists because the entire operation is being run by an employee of a shipper for whom he does over 50 percent of his forwarding. He also admitted several violations of Commission regulations because of his failure to report changes. He failed to report that Romaro was employed by Calson; that Romaro left his position with Speed-Freight; that Miss Pirrallo had resigned as secretary; that Mrs. Stecopoulos had become secretary; and that Adji, who was known by him to be shipper connected, had joined Speed-Freight.

The license application form contains a question as to whether the applicant, or any officer, director, stockholder, or employee of the applicant, is an owner, in control of, or associated or connected with any: (*a*) shipper, consignee, seller, or purchaser of shipments to foreign countries. Although knowing that Romaro was employed by Calson, Stecopoulos stated "Octavio Romaro is employed as a bookkeeper by the Indonesia Supply Mission (5 East 68th Street, New York City)."

[6] Calas could not remember exactly why this was done, but thought that it was because Stecopoulos wanted it.

On May 23, 1969, Stecopoulos informed the Commission by letter that the present officers of Speed-Freight were:

President-Treasurer—Nicholas Stecopoulos.

Vice President—Adji Tjokronolo.

Secretary—Irene Stecopoulos.

That letter failed to inform the Commission that Adji was at this time a manager of Calson. At the time Romaro was reinstated, Stecopoulos knew that he was putting a man in charge of Speed-Freight's books who was in fact "shipper connected".[7]

In his application Stecopoulos stated further that "applicant shares office space or office expenses" with no one.

Two and one-half years ago, two Commission investigators questioned Stecopoulos in regard to violations by Speed-Freight. They discussed "the whole problem" and Stecopoulos was thus put on notice that there was a need to "clear up this situation".

Discussion and Conclusions

Speed-Freight has taken some 11 numbered exceptions to the findings and conclusions of the examiner.[8] These exceptions all deal with the Examiner's findings of fact or the inferences he drew therefrom. We have carefully and thoroughly reviewed the transcript of the hearing and the other pleadings of record and we conclude that all of the examiner's findings were well founded and proper and that the inferences he drew were permissible and valid. Therefore, we shall specifically not treat each exception in this opinion, rather a few examples should suffice to show the nature of Speed-Freight's objections to the examiner's decision to revoke its license.

Speed-Freight takes exception to the examiner's finding that "Calson is an exporter shipping by air and water." In the words of Mr. Stecopoulos,[9] "Nowhere in the hearing is it ever brought out that Calson ships by ocean-going carrier." Yet, Eugene Pagano testified that Calson Co. supplied Speed-Freight with both "air freight and ocean freight." Speed-Freight attempts to counter the testimony of Pagano on the grounds that he was a disgruntled ex-employee whose credibility should be questioned." Yet, respondent made no attempt whatsoever to discredit Pagano's testimony at the hearing. In fact as

[7] When asked what office he currently holds with Speed-Freight, Romaro replied "Treasurer". Stecopoulos then testified that while Romaro maintains and has control of all of the books and records, he "is not the treasurer * * * does not know what my books contain * * * is not an officer at this time."

[8] Although the exceptions are set forth in 11 numbered paragraphs, the actual number of specific exceptions taken exceeds 11.

[9] Mr. Stecopoulos acted as counsel for Speed-Freight.

hearing counsel point out, Pagano's testimony is wholly uncontradicted. It was up to Speed-Freight to challenge Pagano's credibility at the hearing and when it failed to do so, it can hardly charge the examiner with error because he "ignored the fact that Pagano was a disgruntled ex-employee." But the charge that Calson was not a shipper by water is even more difficult to understand in view of the following which appears in the exceptions of Speed-Freight:

> Even if Calson Co. did have a number of shipments go overseas by ocean carrier, as an incidental part of its business, which shipments did not amount to more than $1,000 annually in freight charges, would that make Calson Co. a "shipper" within the contemplation of Public Law 87–254 and therefore, be reason enough to force respondent out of business.

The examiner's finding was fully supported by the record and clearly correct.

Speed-Freight also excepts to the examiner's finding that $2.25 charged for the "special forwarding service" was "comparatively high". Speed-Freight says of that finding by the examiner, "This is his own conclusion and not proven by the facts or by any comparison with trucking rates charged at that time by others. Here, again, this finding was solidly based upon the testimony of Pagano and here again this testimony was wholly uncontroverted. It was certainly not the examiner's duty to introduce the then current truck rates into evidence to prove or disprove testimony otherwise unchallenged by the respondent at the hearing. And it is too late for respondent to gratuitously offer to make such a comparison now.

One other example should suffice. Speed-Freight takes as its "eighth" exception the following: "The examiner states that the $1,000 security deposit paid by Calson Co. to Speed-Freight, has not been returned. The said deposit was returned on September 1, 1969." The examiner's finding was based on the following colloquy concerning the security deposit which took place at the hearing:

Q. Has any amount of it ever been paid back?

A. If it hasn't it will be. Up to this time, it has not.

The witness was Mr. Stecopoulos himself and this exception is necessarily based upon a challenge of his own credibility.

After a careful review of the record and the exceptions taken by Speed-Freight, we conclude that the following conclusions reached by the examiner in his decision are well founded and proper.

Beginning with its initial conception, then formation, and continuously in its operations thereafter, Speed-Freight has maintained the closest imaginable cooperative and supporting relationship with Calas' company Calson, a shipper of goods by water in foreign commerce. Pagano, Speed-Freight's vice president, who handled all aspects of its operations, actually thought that he was working for Calas. Calas, through his companies, provided personnel, two-thirds of the rent, up to 80 percent of the forwarding business, plus economic support through the guise of an overpriced so-called "special forwarding service." Calsonaire's payment of the $1,000 security deposit to Speed-Freight and the Calas and Pearson guarantee of the $2,000 loan are merely further proof of the connection of Calas, Calson, and Calsonaire with Speed-Freight.

Adji, while employed full-time as manager of Calson, runs the entire Speed-Freight operation. He maintains an office at both companies, spending approximately half of his time at each.

Romaro, also a full-time employee of Calson, maintains complete control of Speed-Freight's books and financial records. They are actually located in his Calson office. At no time have either of these men received any salary from Speed-Freight. As hearing counsel put it, the entire Speed-Freight operation rests in the hands of, and is under the direct control of, full-time, fully salaried employees of Calson, a company which accounts for more than half of the business of this forwarder. Since Dueber there has been no one with Speed-Freight who has had any experience in freight forwarding and consequently no one who could possibly qualify it as a freight forwarder.

It is true, as hearing counsel contend, that Speed-Freight is neither an independent, nor a qualified ocean freight forwarder, and therefore it cannot qualify to be licensed as such. Sections 1 and 44 of the act, 46 U.S.C. 801, 841; General Order 4, sections 510.2(a), 510.5(a), 46 CFR 510.2(a), 510.5(a). See *Application for Freight Forwarder License—William V. Cady*, 8 F.M.C. 352, 360 (1964); *Application for Freight Forwarder License—York Shipping Corp.*, 9 F.M.C. 72 (1965), and *Application for Freight Forwarder License—Del Mar Shipping Corp.*, 8 F.M.C. 493, 497 (1965).

The Commission has held that this licensing statute, like other licensing statutes, should be applied with a liberal attitude to the end that licenses may be granted to qualified applicants, but that if the applicant is not fairly within the definition of independent ocean freight forwarder set forth in section 1 of the act, there is no room for the exercise of liberality. *Cady*, supra, at 357.

Accordingly, we adopt the foregoing conclusions as our own and while the shipper connection alone is sufficient to revoke Speed-Freight's license, the record equally supports the other conclusions of the examiner: That Speed-Freight submitted false statements in connection with its application for a license contrary to section 510.9(c) of General Order 4; has changed its personnel to the extent that it no longer qualifies as an independent ocean freight forwarder, contrary to section 510.9(d) of General Order 4, and has failed to report such changes to the Commission as required by section 510.5(c) of General Order 4.

Accordingly, pursuant to section 44(d) of the Act and section 510.9, General Order 4, Independent Ocean Freight Forwarder License No. 1092, issued to and now held by Speed-Freight Inc., is hereby revoked. An appropriate order will be entered.

By the Commission.

(SEAL)

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-48

INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE NO. 1092

SPEED-FREIGHT INC.

ORDER

The Commission having fully considered the above matter, and having this date made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the Independent Ocean Freight Forwarder License No. 1092, issued to and now held by Speed-Freight Inc., is hereby revoked pursuant to section 44(d), Shipping Act, 1916, and rule 510.9 of General Order 4.

It is further ordered, That notice of this order be published in the *Federal Register*.

By the Commission.

(SEAL)

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET NO. 423

THE EREGLI PURCHASING MISSION, EREGLI IRON & STEEL WORKS CO., EREGLI, TURKEY

v.

LYKES BROS. STEAMSHIP CO., INC.

Adopted August 12, 1970

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

No exceptions having been taken to the initial decision of the examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on August 12, 1970.

It is ordered, That Lykes Bros. Steamship Co. Inc. is authorized to refund to the Eregli Purchasing Mission, Eregli, Iron & Steel Works, the amount of $52,728.64.

It is further ordered, That applicant publish promptly in its appropriate tariff the following notice.

Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 423, that effective February 20, 1970, the project rate for machinery, equipment, supplies and parts (Proprietary Cargo) for expansion and construction of Steel Mill in Eregli, Turkey, for purposes of refunds or waiver of freight charges on any shipments which may have been shipped during the period from February 20, 1970 to March 13, 1970 is $52.00 w/m, subject to all other applicable rules, regulations, terms, and conditions of the said rate and this tariff.

It is further ordered, That refund shall be made within 30 days of this notice and Lykes Bros. Steamship Co., Inc. shall within 5 days thereafter notify the Commission of the date of the refund and of the manner in which payment has been made.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 423

THE EREGLI PURCHASING MISSION, EREGLI IRON & STEEL WORKS CO., EREGLI, TURKEY

v.

LYKES BROS. STEAMSHIP CO., INC.

Lykes Bros. Steamship Co., permitted to refund a portion of the freight charges colled on three shipments of building material from Mobile, Ala., to Eregli, Turkey.

T. S. Buchanan, Jr., for applicant.

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

Lykes Bros. Steamship Co., Inc. (applicant), a member of the Gulf/Mediterranean Ports Conference and a common carrier by water in foreign commerce, has filed an application for permission to refund $52,728.64, a portion of the freight charges collected from Eregli Purchasing Mission, Eregli Iron & Steel Works, Eregli, Turkey (shipper), on three shipments of building material from Mobile, Ala., to Eregli, Turkey, which material was to be used in the construction of a steel mill and in connection with an agency for International Development loan program.

On February 20 and 25, 1970, applicant issued three bills of lading on the shipments, as follows:

B/L No.	Commodity/weight	Charge
1	1,613,899 lbs. fire brick	$59,753.15
2	1,607,360 lbs. fire brick	59,511.21
3	206,544 lbs. castable refractories	7,244.36
	Total charged and collected	126,508.72

[1] This decision became the decision of the Commission August 12, 1970.

The amount assessed and collected was pursuant to the conference tariff (No. 11—FMC 7) effective at the time the bills of lading were issued and when carriage began.

Applicant alleges that prior to the shipment, the shipper's agent contacted applicant's New York office and was erroneously informed that the conference tariff contained a project rate identical to the project rate of the North Atlantic/Mediterranean Freight Conference for cargo to be used in the construction of the steel mill at Eregli. It further alleges that applicant's conference had previously published a project rate for cargo to be used in this construction but had canceled this rate effective July 31, 1965, because cargo for the project had not been offered to the conference or any of its members; however, that it is conference procedure to reestablish a project rate in the event such cargo is offered. It appears that the conference was not promptly notified by applicant that the cargo had been offered and by concurring in this application, the conference agrees that had it been approached to reestablish the project rate for the Eregli Steel Mill project, it would have promptly done so. It further appears that the project rate here sought to be applied became effective on March 13, 1970, prior to the delivery of the cargo on March 16–19, 1970, and prior to payment of the charges on March 26, 1970.

The conference tariff in effect at the time of the shipments included an arbitrary charge on cargo unloaded at Eregli, a bill of lading charge, and a heavy lift charge on packages weighing 801 kilograms or more. The project rate which became effective on March 13, 1970, eliminated the arbitrary charge and the bill of lading charge. The heavy lift charge was applicable only on packages weighing over 4,800 pounds. The fire brick involved in these shipments was packed on skids, each of which weighed approximately 2,629 pounds, and the castable refractories were shipped on pallets each weighing approximately 3,129 pounds, thus under the new tariff the heavy lift charge was not applicable. Applicant seeks to apply the project rate and to refund the difference between the amount collected and the charges at this new rate which, it applied, would be as follows:

B/L No.	*Freight at project rate*
1	$34, 943. 76
2	34, 802. 14
3	4, 034. 18
Total	73, 780. 08

The charges at the project rate would be $52,728.64 less than the amount collected.

Public Law 90–928, 75 Stat. 764, authorizes the Commission to permit a common carrier by water in foreign commerce to refund a portion of the freight charges collected from a shipper where there is "an error due to inadvertence in failing to file a new tariff." It is found that the conference of which applicant is a member, under its existing procedure, would have promptly filed the new rate on cargo to be used in the Eregli Steel Mill project had it been notified by applicant that such cargo had been offered, and applicant's failure to notify the conference until after the bills of lading had been issued and the cargo had been shipped was an error due to inadvertence which prevented the timely filing of the new rate.

The application was filed within 180 days of the date of the shipments. No other shipments of the same or similar commodities moved on conference vessels during approximately the same time as the shipments here involved. There are no special docket applications or other proceedings involving the same rate situation now pending.

It appearing that the application involves a situation within the purview of Public Law 90–298, and good cause appearing, the applicant is permitted to refund to the shipper the sum of $52,728.64. The notice referred to in the statute shall be published in the conference tariff. The refund shall be effectuated within 30 days after publication of the notice and within 5 days thereafter applicant shall notify the Commission of the date of the refund and the manner in which payment was made.

HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C., *July 15, 1970.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 68–47

VALLEY EVAPORATING CO.

v.

GRACE LINE, INC., ET AL.

Decided August 12, 1970

Respondents' failure to retain a commodity rate on dried fruit items is found to be unjustly prejudicial to shipments of that commodity in violation of section 16 of the Shipping Act, 1916.

Respondents' assessment of an $88 W/M N.O.S. rate on dehydrated apples has not been shown to be unjustly discriminatory in violation of section 17 of the act or so unreasonably high as to be detrimental to the commerce of the United States in violation of section 18(b)(5) of the act.

Reparation for injury caused as a result of the established violation of the act is awarded to Valley Evaporating Co., in the amount of $8,876.

William L. Dwyer for complainant.
F. Conger Fawcett for respondents.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James V. Day, George H. Hearn, *Commissioners*)

This proceeding was initiated by the complaint of Valley Evaporating Co., against Grace Line, Inc., Westfal-Larsen and Co., and the Pacific Coast River Plate Brazil Conference, alleging that respondents subjected complainant to the payments of rates with respect to two shipments of dehydrated apples from Argentina to the Pacific Coast of the United States which were violative of sections 16 first, 17 and 18(b)(5) of the Shipping Act, 1916. For injury allegedly incurred as a result of the unlawful rates, complainant seeks reparation from Grace and Westfal-Larsen, in the total amount of $11,912.47. Examiner John Marshall issued an initial decision, dismissing the complaint, to which exceptions and replies have been filed. We have heard oral argument.

II. Discussion and Conclusions

The examiner in his initial decision found no violations of either section 16, 17, or 18(b)(5) of the act resulting from respondents' assessment of an $88 W/M N.O.S. rate on the above-described shipments of dried fruit. In dismissing the complaint, the examiner determined that:

> * * * the carriers were legally bound to collect the N.O.S. rate and that no duty was imposed upon the conference or the carriers to provide complainant with actual notice of the tariff revision.

Respondents except to the examiner's conclusions and his dismissal of the complaint and interpret his failure to rule specifically on each of the substantive allegations as an attempt to evade the "central questions" of the case by simply concluding that "since the challenged rate was contained in a published tariff it was perforce lawful regardless of its size." We are in agreement with the examiner's ultimate disposition of the issues in this proceeding with one very important exception. For reasons set forth below, it is our opinion that the facts presented here do support the finding that Valley has been unduly and unreasonably prejudiced in violation of section 16 of the act.

Before addressing ourselves to each of the specific provisions of the act relied upon, we should like to first dispose of another issue raised by complainant in its exceptions. Complainant interprets the examiner's decision as standing for the proposition that a carrier's filing under section 18(b)(3) of the act[4] automatically "exempts the rate from all substantive requirements" and that, thereafter, "the rate no matter how outrageously high or discriminatory becomes 'the only lawful rate.'" While we do not read the examiner's decision as precluding the challenging of a published rate as being otherwise unlawful under the Shipping Act, we should like to dispel any mistaken notions that may have been inadvertently created.

In enacting section 18(b), it certainly was not the intent of Congress to repeal the other substantive provisions of the act and leave carriers free to charge unreasonable and unjustly discriminatory or prejudicial rates by the simple device of first filing such rates with the Commission. The distinction here is between a rate that is lawful and one that is merely legal. In dealing with shippers the carrier is required under section 18(b)(3) to conform the freight charges actually collected to the amount fixed in its published tariffs. In that sense the

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[4] Section 18(b)(3) provides, in pertinent part, that:

"No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property * * * than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time, * * *" published rate in effect at the time of the movement is the "legal rate." But a rate may be legal in the sense that it is the regularly published rate and yet be unlawful if it violates other provisions of the act. Thus, in publishing a rate or schedule of rates, the carrier or conference acts under the admonition of the statute and, if it establishes a rate which is unreasonable or unduly discriminatory or prejudicial, it may be subject to the payment of preparation for any injury caused by such rate. To hold otherwise would be to make the mere establishment of rates by a carrier conclusive of their reasonableness and justness while in effect.

What we have stated here is by no means novel. As early as 1915, the Supreme Court in *Louis. & Nash. R.R.* v. *Maxwell*, 237 U.S. 94, 97, held that the rate of a carrier duly filed pursuant to section 6 of the Interstate Commerce Act (after which our own section 18(b)(3) was patterned) is the only legal charge and that shippers and carriers "* * * must abide by it *unless it is found by the Commission to be unreasonable.*" (Emphasis added). This principle was reaffirmed in *Arizona Grocery* v. *Atchison Ry.*, 284 U.S. 370, 384 (1932), where the court, after discussing the duties of a carrier at common law with respect to the exacting of rates, explained:

> * * * In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute [Interstate Commerce Act] required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the legal rates, that is those which must be charged to all shippers alike. Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper. Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under § 6 the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation.

Likewise, while the publication of rates by carriers and conferences operating in the foreign commerce of the United States in the manner required by section 18(b)(3) of the act fixes the standard of legal rates for the time being and so long as such published rates are in effect, this standard is by no means conclusive of their reasonableness and justness under other provisions of the act.[5] The mere publication of a rate cannot make that rate lawful, in the sense of being immune from attack, either with respect to past or future shipments, if it is

[5] For example, see *Investigation of Ocean Rate Structures,* 12 F.M.C. 34 (1968), where the Commission found that the North Atlantic United Kingdom Conference had established rates on specific commodity rates and general cargo N.O.S., which were so unreasonably high as to be detrimental to the commerce of the United States in violation of section 18(b)(5) of the act.

otherwise unjust or unreasonable. We move now to a consideration of the specific provisions of the act allegedly violated by respondents.

Section 16 first of the act makes it unlawful for any common carrier within the purview thereof, directly or indirectly:

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

Respondents maintain that to establish a violation of this section, it is generally necessary to show "an existing and effective competitive relationship" between the prejudiced and the preferred shipper or cargo. They submit that the complainant has failed to make the required showing here and accordingly no violation of section 16 has been established. Without deciding the validity of respondents' allegation that no "competitive relationship" has demonstrated herein, we find that the unlawful prejudice to which complainant and its shipments of dried apples have here been subjected is not dependent on the existence of such a relationship.

In support of their contention that a competitive relationship is an essential ingredient of an alleged section 16 violation, respondents rely on several Commission decisions involving alleged discrimination or preference. *West Indies Fruit Co.* v. *Flota Mercante*, 7 F.M.C. 66 (1962); *United States* v. *American Export Lines*, 8 F.M.C. 280 (1964); *North Atlantic Mediterranean Freight Conference*, 11 F.M.C. 202 (1967). These cases, however, are not pertinent here. For while an effective competitive relationship is a necessary part of liability under section 16 in situations where the allegedly preferential or prejudicial rates or charges are geared to transportation factors or the differing characteristics of commodities, it is not required where the carrier's obligation to render a particular service is "absolute" and not dependent upon such factors or differences. As the Supreme Court recognized in *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 280 (1968), "* * * the Commission, in cases not involving freight rates * * * has often found section 16 violations even in the absence of a 'competitive relationship.' " We have such a "case" before us here.

In an effort designed to delete "paper rates" on nonmoving commodities, the Conference and its member lines set about updating their tariffs.[6] The process by which this was to be accomplished was for each of the lines involved in a given trade to compile a list of the commodities moving on its vessels "in sufficient volume" to warrant retention of a specific rate, which lists would then be, and subsequently were,

[6] The elimination of "paper rates," in and of itself, was not only proper but consistent

correlated by the Conference secretary.[7] The Grace Line effort was to list all commodities moving in excess of 25 tons or more per year. While the record does not indicate what volume cutoff point Westfal-Larsen adopted as a standard, the record does make it clear that Westfal-Larsen established specific commodity rates on a number of commodities that moved in much smaller quantities during the relevant period than did the dried apple items. It was in determining what constituted "sufficient volume" to justify the retention of a commodity rate that all of the transportation factors and cargo characteristics of the various commodities should have been taken into consideration. And were the attack upon the rates in question prompted by a failure of dried apples to meet the "sufficient volume" criteria lack of competition could well be a defense. But such is not the case here.

Having once established the "sufficient volume" criteria using whatever factors were warranted, respondents, in determining what commodity rates were to be discarded were then required to apply them in a totally fair and impartial manner. At this point the single question involved was whether a given commodity moved in sufficient volume or not. Questions as to the characteristics inherent in the particular commodity involved were irrelevant as were questions of whether the particular commodity competed with any other commodity. Thus, as we stated in *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966), the equality of treatment required in situations of this kind is "absolute and not conditioned on such things as competition." The situation here is analogous to that existing in *New York Foreign Freight F. & B. Association* v. *Federal Maritime Commission*, 337 F. 2d 289, 299 (2d Cir. 1964), where the court, in concluding that no "competitive relationship" need be shown where there was substantial evidence that forwarders, "in random fashion," charged shippers markups of widely varying amounts, stated:

> * * * Transportation or wharfage charges are dependent upon the particular commodity involved; the cost for shipping or storing bananas, for example, bears no relation to the fees levied for heavy industrial equipment. To find an unlawful discrimination in transportation charges thus quite properly requires a showing of competitive relationship between two shippers who are charged different prices. But forwarders render substantially the same service to all shippers in procuring insurance or arranging for cartage; the commodity being

[7] The lists of the individual lines were prepared and presented to the Conference secretary who prepared a composite list. On his own initiative he added certain additional commodities for which rates had recently been established, plus others which moved from time to time, of which he had personal knowledge. The resulting composite list was subsequently used as the basis for specific rate adjustments pursuant to the conference's rate increase decision.

shipped has little or nothing to do with the reasonableness of the fee exacted for the forwarder's service. The very practice of charging shippers disguised markups of widely varying amounts on substantially identical services, without justification, seems to us to be prima facie discriminatory in a regulated industry.

Thus, while the respondents had an obligation under section 16 to administer the established volume standards equally to all commodities, the record shows that no commodity rate was adopted on dried fruit items, although commodity rates were established on other items that had moved in smaller quantities during the period involved herein. This, without more, establishes a clear situation of undue prejudice to a "description of traffic," namely dried fruit, vis-a-vis other commodities, in violation of section 16 of the act.

Respondents freely admit that the volume movement of dried apples had been such that a commodity rate on that item should have been retained. Respondents, however, ascribed their failure to establish a commodity rate on dried fruit to an inadvertent "oversight" on the part of a member line.[9] We are not impressed by this argument. While we have no reason to doubt respondents' bona fides in this matter, the fact remains that good faith will not save an otherwise unjustly prejudicial practice from condemnation. The equality of treatment required by section 16 of the act is not conditioned on a carrier's intentions. As we stated in *American Tobacco Co.* v. *Compagnie Generale Transatlantique*, 1 U.S.S.B. 53, 56 (1923), if a carrier's conduct subjects a shipper to undue discrimination, the carrier's "knowledge or lack of knowledge of such condition is plainly immaterial."

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[9] We cannot agree with the examiner's dismissal of "this oversight" as one "* * * not [of] the type falling within the scope of Public Law 90–298."

Public Law 90–298, enacted in 1968 to amend section 18(b)(3) of the act, authorizes the Commission to permit a common carrier by water in foreign commerce, or conference of such carriers, to refund a portion of the freight charges collected from a shipper or waive the collection of a portion of such charges where it appears that there is an error in a tariff of a clerical or administrative nature, or where through inadvertence, there has been a failure to file a particular tariff reflecting an intended rate, provided, *inter alia*, that the application for refund is filed with the Commission within 180 days from the date of shipment. This amendment was designed to prevent injustice in situations where it would be inequitable to charge the filed rate as required by law.

While it would indeed appear that Public Law 90–298 would have permitted corrective action in the situation now before us, we are not here deciding the merits of that issue, nor do we need to do so in view of the fact that the issue has been rendered moot by the carriers' failure to file an application for refund within the prescribed time. Suffice it to say that we are somewhat dismayed at respondents' failure to utilize existing Commission procedures to rectify their alleged "oversight" even after having been encouraged to do so by the Commission's own staff.

Respondents have made it known during the course of this proceeding that their refusal to file a so-called special docket application was grounded on the belief that this was not the kind of "oversight" intended to be covered by Public Law 90–298. While we appreciate their uncertainty in this matter, we cannot understand their reluctance to submit an application and allow the Commission to decide for itself whether its "oversight" was one intended to be covered by the "special docket" legislation.

Once having found a violation of the Shipping Act, the Commission is empowered, under section 22 of the act, to "* * * direct the payment * * * of full reparation to complainant for the injury caused by [such] violation." For "immediate and direct" injury allegedly suffered, complainant here requests the Commission to order respondents to pay it an amount based on the difference between the $88 W/M N.O.S. rate actually assessed and the preexisting commodity rate of $52 per long ton.

Respondents, while not abandoning their position that "the reparations issue need (and should) never be reached," argue that, in any event, complainant did not suffer any injury compensable by reparation under section 22. In this regard, they argue that the showing necessary for a reparations award under section 16 "presumably remains as enumerated in the *West Indies Fruit* case, supra, at 70, thus:

> Proof of the *character, intensity* and *effect* of the competitive relationship is necessary to prove the amount of damages and sustain an award of reparations * * * . (Emphasis supplied).

Respondents point out that in this proceeding complainant's "only claim and sole showing of 'injury' was that it paid more dollars for the transportation of * * * [the dried apples] here concerned, than it would have had some other rate applied." This, respondents submit, is insufficient to establish any legally compensable measure of damages.

Were we considering here a request for reparation based on unlawful preference or prejudice in rates based on the kind of transportation factors or commodity characteristics noted above, we would be inclined to agree with respondents. Since in such a case the existence of a "competitive relationship" between the preferred and the prejudiced shipper is an essential element of a violation involving alleged preferential or prejudicial rates or charges, any award of reparation premised on such violation must take into consideration the "character, intensity, and effect" of this competitive relationship. And in cases of this character, it may very well be that the injury sustained by the complainant because of the unlawful discrimination suffered may be greater or lesser than the amount of the difference between the rates charged them and those charged the preferred shipper. As we explained in *Agreement No. 8905—Port of Seattle and Alaska S.S. Co.*, 7 F.M.C. 792, 800 (1964), a case involving alleged "unlawful discrimination and prejudice" in tariff charges, "Past decisions of the Commission and its predecessors make clear that the person claiming illegal prejudice or disadvantage must establish damage *with respect to its ability to compete.*" (Emphasis added). Thus, this Commission has historically recognized that the extent of damages in rate discrimination cases, being dependent largely on competitive factors, is a question of fact which must be clearly demonstrated by substantial proof. *Port of New York Authority* v. *AB Svenska et al.*, 4 F.M.B. 202, 205 (1953).

However, we have already determined that the equality of treatment required here in this case is "absolute" and not conditioned on competition. Therefore, the "character, intensity, and effect" of competition becomes irrelevant and the measure of damages simply becomes the difference between the rate charged and collected and the rate which would have applied but for the unlawful discrimination or prejudice. To the extent that the proper measure of damages is the amount of unlawful excess exacted, it is akin to an "overcharge" and the same principles apply.

Applying these principles to the present situation, the measure of damages is the difference between the amount of freight charges assessed and collected on the basis of the cargo N.O.S. rate of $88 W/M and the amount of freight charges which would have been payable under the preexisting commodity rate on dried apples of $52 per long ton. On this basis, the amount of reparation due complainant on the Grace shipment is $7,882.14. Computed on the basis of the $52 per long ton rate, the total charge on the Westfal-Larsen shipment would have been $1,435.56. Although complainant was ultimately assessed freight charges on this shipment of $5,336.23, or an "overcharge" of some $3,900.67, it has to date only paid $2,429.42, less wharfage and handling. Therefore, the measure of complainant's damage on the Westfal-Larsen shipment is $993.86, the difference between what was actually collected and what should have been paid. Thus, the total amount of reparation to which complainant is entitled on the two shipments combined is $8,876.

On the theory that "the two sections overlap" and that a violation of one is often a violation of both, Valley also alleged that the respondents violated section 17 of the act as well as section 16. We disagree. Unlike section 16, first, which by its terms prohibits "any" unjust preference or prejudice between shippers and commodities "in any respect whatsoever," the first paragraph of section 17 concerns itself only with an unjustly discriminatory "rate, fare, or charge." [10] And as the Commission explained in *North Atlantic Mediterranean Freight Conference*, 11 F.M.C. 202, 213 (1967), to establish unjust rate discrimination within the meaning of section 17:

> * * * 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. 11 F.M.C. 213.

[10] Section 17 also declares it unlawful for a carrier to charge any rate which is "unjustly prejudicial to exporters of the United States as compared with their foreign competitors." This portion of section 17 is clearly not applicable here, however, since the alleged unlawful rate is being assessed complainant as an importer of the United States, not as an

Quite obviously when considered in the light of the above criteria, the present factual situation falls far short of establishing a violation of section 17. Complainant has failed to establish the essential element of a section 17 violation—the existence of another similarly situated shipper. The record is clear that Valley was the only shipper of dried apples in the relevant trade from Buenos Aires to the Pacific Northwest. In fact, there was no other movement of dehydrated apples or other dried fruit commodity in the entire northbound range served by the Conference, other than those of complainant. Manifestly, there can be no discrimination, let alone unjust discrimination, where there is but one shipper involved. By definition, you cannot have discrimination "between" a single shipper. Clearly, no violation of section 17 by respondents has been shown on the present record.

Finally, Valley argues that the N.O.S. rate of $88 W/M as applied to the two shipments of dried apples herein involved was so unreasonably high as to be detrimental to this country's commerce in violation of section 18(b) (5) of the act. Whatever might have been the merits of this contention had that rate been maintained, it is clear that respondents' reinstatement of a specific commodity rate on complainant's product has mooted that issue.

Section 18(b) (5) does not by its terms forbid any specific activity. It merely empowers the Commission to "* * * disapprove any rate or charge * * * which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." This section is purely prospective in nature and, as the court explained in *Federal Maritime Commission* v. *Caragher*, 364 F. 2d 709, 717 (1966):

> * * * simply reflects Congress's awareness that whether a certain rate is "unreasonable" is often a close question and that consequently a regulated carrier should be liable for * * * penalties *only if it continues to charge unreasonable rates after the Commission has determined they are unreasonable.* (Emphasis added.)[11]

We see no reason to distinguish the situation where an allegation of "unreasonableness" under section 18(b) (5) forms the basis for a request for reparation rather than a suit for penalties. Therefore, we find that the court's rationale in the *Caragher* case, supra, applies with equal force to the present situation and conclude that only after the Commission has determined a particular rate to be unreasonable under section 18(b) (5) may a carrier's continued assessment of that rate

[11] This holding is fully supported by the legislative history of section 18(b), which section was added to the Shipping Act in 1961. In fact, the court itself points out that during the course of congressional deliberations on the 1961 amendments, a specific provision making it "unlawful" for a regulated carrier to reduce its rates unreasonably was considered and rejected and thereafter section 18(b) (5) was enacted.

be considered a violation of section 18(b)(5) for which reparation may be awarded. Complainant's reliance on the provisions of section 18(b)(5) in this proceeding is therefore clearly misplaced. Since the alleged "unreasonable" rate is no longer in effect, the Commission has nothing before it to consider for "disapproval" under the provisions of section 18(b)(5).

III. Ultimate Conclusions

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

1. Respondents' failure to retain a commodity rate on dried fruit is unjustly prejudicial to that commodity in violation of section 16 of the act;

2. Respondents' assessment of an $88 W/M N.O.S. rate on dehydrated apples has not been shown to unjustly discriminate in violation of section 17 of the act or so unreasonably high as to be detrimental to the commerce of the United States in violation of section 18(b)(5) of the act; and

3. Reparation for injury caused as a result of the established violation of the act is awarded to Valley in the amount of $8,876.

An appropriate order will be entered.

Commissioners Ashton C. Barrett *and* James F. Fanseen *dissenting:*

After a thorough examination of the law and a most careful and deliberate consideration of the powers delegated by Congress to the Commission, it is our opinion that no award of reparation should be made in this case under section 22 of the Shipping Act, 1916 (the act), for injury allegedly incurred resulting from unlawful rates held to be in violation of sections 16 first, 17, and 18(b)(5) of the act.

We not only concur in the conclusions of the hearing examiner in his initial decision, but would make the additional specific findings that Grace Line, Inc., Westfal-Larsen and Co., and the Pacific Coast River Plate Brazil Conference published and charged rates on two shipments of dehydrated apples from Buenos Aires to Seattle (1) which did not subject complainant, the Pacific Northwest, or the commodity, dehydrated apples, to undue and unreasonable prejudice and disadvantage in violation of section 16 first of the act; (2) which did not unjustly discriminate between shippers from Argentina to the Pacific Northwest, between such shippers and shippers from elsewhere, between Pacific Northwest ports and ports elsewhere, and between foreign ports shipping the same and competing commodities to the Pacific Northwest, and were not unjustly prejudicial to United

States exporters in violation of the first paragraph of section 17 of the act; and (3) which were not so unreasonably high as to be detrimental to the commerce of the United States under section 18(b)(5) of the act.

In finding a section 16 first violation, the majority chooses not to follow the legal precedent of developing a competitive relationship showing alleged preferential or prejudicial rates or charges being charged—a relationship which the complainant has continually tried to establish in its briefs as well as in its oral presentation before the Commission. Instead, the majority attempts to establish prejudice and preference by adopting the approach that the respondents were under an absolute obligation to render a service at a certain rate—a rate resulting from the fact that a "sufficient quantity" of a commodity justified the retention of a commodity rate in the conference's tariff, whether or not a finding of actual impairment to the movement of the commodity in question has been made or whether or not any evidence was introduced showing an advantage to a competitor in the same trade. Cases supporting this manner of treatment were cited; however, the cases presented evolved from those situations in which other factors than commodity rates gave rise to the causes of action; e.g., shoreside services in *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968); free-time terminal demurrage practices in *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966); freight forwarder practices in *New York Foreign Freight F. & B. Association* v. *Federal Maritime Commission*, 337 F. 2d 289 (2d Cir. 1964).

The minority prefers to follow the principle of requiring the development of a competitive relation in proving a section 16 first violation, a time-honored practice firmly established. *Port of New York Authority* v. *A. B. Svenska*, 4 F.M.C., 202, 205 (1953); *Philadelphia Ocean Traffic Bureau* v. *Export S.S. Co.*, 1 U.S.S.B.B., at 541 (1936). As Justice Douglas remarks in *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 314:

> The Maritime Commission's refusal to require a competitive relationship in certain cases, however, has diluted the principle only in those situations in which there are services that are not dependent upon the nature of the cargo and the various charges therefor.

We maintain that the alleged injury resulting from competing manufacturers and importers of dehydrated apples, foreign and domestic, is the cause of action the complainant must prove. We remain convinced that it is only through the development of the competitive relationship that a finding of preference or prejudice existing between shippers, localities, or commodities can be established. As was stated in *U.S.* v. *American Export Lines et al.*, 8 F.M.C. 280, 291:

> If commodity rates are compared, to establish a violation of these sections (sections 16 first and 17 of the act), there must be a showing of the character and intensity of the competition; that the difference in rates has operated to shipper's disadvantage in marketing the commodity; the deferring of one person to another or the preferring of one person to another; and unequal treatment between competing shippers or ports.

The mere allegation of a violation is not enough, and in this case the general representations remain unsupported. The only foreign producer or exporter similarly located and disclosed as offering direct competition to the complainant was a person who not only shipped a different product but shipped his produce in a different trade. No meaningful comparative situation is, therefore, presented. Nor can a showing of prejudice or preference be established from the attempt of complainant to compare dried fruit rates with respondent's rate where the rates being compared apply in different trade routes.

On this record a finding of preference or prejudice could not be supported even if one assumes that the same commodity was being compared in the same trade. As respondents correctly cited in their opening brief to the examiner:

> Existence of different rates on analogous commodities moving in this trade or a showing that respondents' rates on the same commodity are higher than those of other carriers in other trades is of itself insufficient. Evidence as to volume and claims, handling costs, and the type of vessels operated both as to the trade involved and in compared trades, should also have been submitted. *Puerto Rico Rates*, 2 U.S.M.C. 117, 119 (1936).

In this proceeding no data or evidence of probative value substantiating a violation has been introduced.

Even in the domestic trade, proof is lacking for any finding of preference or prejudice; the record shows only that the competitors with whom complainant ultimately competed were either (1) businesses which did no importing or (2) a producer which imported solely from a different hemisphere (Rovigo, Italy).

The case of proving the alleged prejudice against Seattle as a port and locality, all ports on the West Coast and the River Plate area also remains unsupported. There is no showing that the flow of traffic to or from any locality was in any way affected by the level of the commodity rate. There is no showing of a competitive disadvantage or a locality being preferred.

The fact remains that no finding of a section 16 first violation can be made when proof of actual injury is based on mere hypothetical, speculative, or conjectural loss. *West Indies Fruit Co.* v. *Flota Mercante*, 7 F.M.C. 70; *Agreement No. 8905—Port of Seattle and Alaska S.S. Co.*, 7 F.M.C. 792.

If, however, a section 16 first violation be found, we certainly feel that the amount of reparations should be determined only after an exhaustive study of the mitigating circumstances presented here. While all parties acknowledge the "oversight" of the conference, the conference and its members have concern for literally hundreds of rates. As a practical approach to business, the conference had no list or other means of notifying shippers/receivers of general cargo except for those subscribing to its tariff. The cost of such a subscription is currently (and was then) $25 per year, a most inexpensive precautionary measure to employ when one considers the economic facets of a successful business. In contradistinction, a major function of a freight forwarder is to keep its client informed of transportation costs when its services are utilized. The services of freight forwarders were employed, not only in Argentina, but in Seattle as well. Little attempt, if any, was made by the freight forwarders or complainant to ascertain the proper transportation costs prior to shipment—a clear finding of gross negligence.

In summary, no violation has resulted from the failure of respondents to file a commodity tariff similar to one which, as a business judgment, they had once filed and maintained. If complainant had exercised simple ordinary business prudence before the time the two shipments in question were transported, the problem could have been caught before it became an issue, and almost surely the carriers would have responded favorably, just as they did a short time thereafter when the matter was brought to their attention.

Upon hearing oral argument and studying the record before us, we remain convinced that the complaint should be dismissed.

We would, therefore, find no violation of the act or make any award of reparations.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 68–47

VALLEY EVAPORATING CO.

v.

GRACE LINE, INC., ET AL.

ORDER

This proceeding being at issue upon complaint, having been duly heard, and full investigation having been had, and the Commission on this day having made and entered a report stating its findings and conclusions, which report is hereby referred to and made a part hereof;

Therefore, it is ordered, That respondents be, and hereby are, directed to pay to Valley Evaporating Co., on or before 60 days from the date hereof, $8,876, with interest at the rate of 6 percent per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of section 16 first of the Shipping Act, 1916.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 424

AIR AMERICA LTD., HONG KONG

v.

TRANS PACIFIC FREIGHT CONFERENCE OF HONG KONG

August 19, 1970

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

No exceptions having been taken to the initial decision of the examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on August 19, 1970.

It is ordered, That applicant is authorized to refund to Air America Ltd., Hong Kong the amount of $267.14.

It is further ordered, That applicant publish promptly in its appropriate tariff the following notice.

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 424, that effective March 1, 1970, the non-contract rate for Tyres-Aircraft: Returned for Reconditioning, for purposes of refunds or waiver of freight charges on any shipments which may have been shipped during the period from March 1, 1970 to May 3, 1970 is $110.75 W, subject to all other applicable rules, regulations, terms, and conditions of said rate and this tariff."

It is further ordered, That refund shall be made within 30 days of this notice and applicant shall within 5 days thereafter notify the Commission of the date of the refund and of the manner in which payment has been made.

By the Commission.

[SEAL] FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 424

AIR AMERICA LTD., HONG KONG

v.

TRANS PACIFIC FREIGHT CONFERENCE OF HONG KONG

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

Trans Pacific Freight Conference (applicant) seeks permission to refund to Air America, Ltd. (shipper) a portion of the freight charges collected on a shipment from Hong Kong to Los Angeles, Calif. Under its bill of lading dated April 7, 1970, applicant carried cargo for the shipper described as "12 coils Aircraft Tyres." The rate effective at the time of the shipment was $93 per 40 cubic feet (M) or per 2,000 pounds (W), whichever produced the greater revenue. Applying the measurement rate, applicant collected the sum of $325.50 from the shipper, based on 140 cubic feet.

Effective March 1, 1970, applicant's conference filed an amendment to its tariff with the Commission (23–FMC–8). Through typographical error, however, the rate for "Types-Aircraft: Returned for Reconditioning" was left blank. Correction of this error was made by filing effective May 3, 1970, and the noncontract rate of $110.75 (W) was published. Under this rate, which is for weight only, the charges would have been $58.36, or $267.14 less than collected. The shipment weighed 1,054 pounds.

Public Law 90–928, 75 Stat. 764, authorizes the Commission to permit a common carrier by water in foreign commerce to refund a portion of the freight charges collected from a shipper where there is "an error due to inadvertance in failing to file a new tariff." From the evidence presented, it appears that leaving a blank space in the rate column after the commodity description of Aircraft Tyres in the tariff filed on March 1, 1970, was an inadvertent typographical error, and thus this application involves a situation within the purview of Public Law 90–298.

[1] This decision became the decision of the Commission Aug. 19, 1970.

The application was filed within 180 days of the date of the shipment; no other shipments of the same or similar commodity moved on conference vessels during approximately the same time as the shipment here involved; and no other proceedings involving the same rate situation are pending. Good cause appearing, applicant is permitted to refund to the shipper the sum of $267.14. The notice referred to in the statute shall be published in the conference tariff and the refund shall be effectuated within 30 days thereafter. Within 5 days after making refund, applicant shall notify the Commission of the date of the refund and the manner in which payment was made.

HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, *D.C., July 23, 1970.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 69–21

TRANSCONEX, INC.—GENERAL INCREASE IN RATES IN THE U.S. SOUTH ATLANTIC/PUERTO RICO—VIRGIN ISLANDS TRADES

DOCKET NO. 69–29

CONSOLIDATED EXPRESS, INC.—GENERAL INCREASES IN RATES IN THE U.S. NORTH ATLANTIC/PUERTO RICO TRADE

Decided August 20, 1970

Increased rates of Transconex, Inc. and Consolidated Express, Inc., nonvessel operating common carriers in the trade betwen U.S. Atlantic ports, on the one hand, and Puerto Rico and the Virgin Islands, on the other, not shown to be unjust or unreasonable or otherwise unlawful.

Herbert Burstein, *Arthur Liberstein*, and *Morris Kassin* for respondents, Transconex, Inc. and Consolidated Express, Inc.

Edward Schmeltzer, *Mario F. Escudero*, and *Robert A. Peavy* for Commonwealth of Puerto Rico.

Donald J. Brunner, *Paul M. Tschirhart*, and *Paul J. Kaller*, hearing counsel.

REPORT

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

Transconex, Inc. (Transconex) and Consolidated Express, Inc. (Consolidated), nonvessel operating common carriers by water (NVOCCs), individually filed with the Commission increased rates applicable to the domestic offshore commerce of the United States. On April 28 and June 6, 1969, the Commission instituted proceedings to determine the lawfulness of the increases of Transconex and Consolidated, respectively. Although the proceedings were not formally consolidated, the similar nature of the operations of Transconex and Consolidated resulted in the two proceedings being treated together, reference to the record in each proceeding being allowed by stipulation for evidence applicable to either. All parties filed single briefs applicable to both proceedings, and Examiner Herbert K. Greer issued one initial decision, in which he found the increased rates of the two NVOCCs not unjust or unreasonable or otherwise unlawful. Exceptions to the initial decision were filed by the Commonwealth of Puerto Rico (Puerto Rico), which was a party to both proceedings, and by hearing counsel. Replies to exceptions were filed by hearing counsel and jointly by Transconex and Consolidated. There was no oral argument.

FACTS

Transconex is an NVOCC operating between Jacksonville and Miami, Fla., on the one hand, and on the other, Puerto Rico and the Virgin Islands.

Consolidated is an NVOCC operating between New York on the one hand, and on the other, Puerto Rico and the Virgin Islands.

Both Transconex and Consolidated have filed rate increases which vary as to commodity.

The services provided by respondents and included in a single factor rate are the pickup and delivery of cargo at the shippers' or consignees' door in Puerto Rico and on the mainland at terminals maintained by respondents, all necessary documentation, assumption of responsibility for the goods from door to door, and the arranging for water transportation via an underlying carrier. Respondents are usually able to expedite shipments. Respondents collect small shipments, and at a terminal provided for that purpose consolidate them into containers which are delivered by respondents to the underlying carrier.

Many major moving commodities handled by respondents are essential to the economy of Puerto Rico and because the majority of these commodities consist of small shipments, the services of NOVCCs are vital to that economy.

At Jacksonville, an independent company handles the terminal services for Transconex, except that Transconex employees perform the paper work and documentation. Transconex pays this operator from $75 to $80 per trailer and an additional 10 cents per CWT if inland carriers' equipment is unloaded at the terminal. The principal underlying carrier at Jacksonville handles the cargo from the terminal to the port; however, the underlying carrier handling approximately 20 percent of the carriage does not perform this service and respondent arranges for it with independent operators. At Miami, the underlying carrier provides the pickup and delivery service to and from the Transconex terminal and the dock. The terminal in Miami is leased. In Puerto Rico Consolidated represents Transconex, providing pickup and delivery service, stuffing and unstuffing containers, documentation and other services. The contract between these respondents provides for a charge of 20 cents per cubic foot and contains a provisions for adjustment of the rate based on projected cost increases.

Consolidated conducts its business in New York through an agent, Valroy Realty, which is owned by the two principal stockholders of Consolidated, Roy Jacobs and Rudolfo Catinchi. This agency contracts with an independent firm to provide leased trucks, drivers, and dock workers for cartage, stuffing and unstuffing of containers. In Puerto Rico, Consolidated rents terminals and office space in San Juan, Ponce, and Bayamon, and operates a trucking concern to provide cartage and pickup and delivery service. Approximately 30 pieces of inland transportation equipment are owned by this respondent. Additional equipment is leased when needed. An unrelated trucking operation in Puerto Rico provides Consolidated with approximately 10 percent of its gross revenue, which is arbitrarily applied as an offset to reduce the costs of total operations in Puerto Rico.

Approximately 40 percent of Consolidated's gross revenue is paid out for purchasing transportation from underlying carriers.

Labor costs have increased. Consolidated experienced an increase of approximately 34 percent for organized labor and approximately 30 percent for unorganized labor. Transconex has experienced a salary increase of approximately 23 percent in its Miami operation. Cost of living increases in union contracts have contributed to increased costs.

To an undetermined degree, respondents' costs vary with the amount of cargo handled.

The financial data of record represent actual experience and projected income and expenses, based on estimated increases in cargo handled at the increased rates. The value of fixed assets and projected working capital needs are also established in the record. Respondents estimate a 10-percent increase in cargo handled due to the increased rates, giving the following results as computed by the Commission's accountant:

Transconex:	
Fixed assets	$3,888.19
Working capital	36,000.00
Gross revenue	2,190,613.21
Direct expense	1,858,335.10
Gross profit	332,278.11
G & A expense	218,918.55
Net profit before tax	113,359.56
Federal tax (approximately 48 percent)	54,412.59
Net income	58,946.97
Consolidated:	
Fixed assets	148,246.93
Working capital	175,000.00
Gross revenue	3,064,653.00
Direct expense	2,570,351.40
Gross profit	494,301.60
G & A expense	330,248.80
Profit before tax	164,052.80
Insular tax (estimated 28.7 percent)	47,052.80
Net income	117,000.00

Transconex's accountant challenged the item for G & A expense and testified that the following corrections should be made:

Gross profit	$332,278.11
G & A expense	277,330.00
Profit before tax	54,948.11
Federal tax	26,375.09
Net income	28,573.02

Hearing counsel, using a 20-percent increase in cargo handled for its computations for Transconex, and excluding the expenses to the NVOCCs for the underlying transportation, obtain the following results:

Transconex:	
Total revenue	$2,382,474.37
(Less annualized cost of underlying carriage)	811,632.53
Gross revenue	1,570,841.84
Net income	101,124.73

Consolidated:

Total revenue	3,064,653.00
(Less annualized cost of underlying carriage)	1,234,362.00
Gross revenue	1,830,291.00
Net income	114,836.96

Hearing counsel recognize that their computations of net income for Transconex may be subject to a variation between $101,124.73 and $70,750.78 depending on establishing acceptable general, administrative and selling expenses, and summarize their computations as to both respondents as follows:

	Rate base	Gross revenue (adjusted)	Profit (after tax)	Rate of return	Operating ratio
				Percent	Percent
Transconex	$39,888	$1,570,841	$101,124	253.5	93.57
			70,750	177.4	95.5
Consolidated	323,246	1,830,291	114,836	35.5	93.7

Hearing counsel refer to the testimony of their expert witness to the effect that a rate base may be established by adding the value of fixed assets to working capital necessary for 1 month's operation. Using that rate base concept as to Consolidated, fixed assets are valued at $148,246.93 and working capital required is $175,000, the rate base being $323,246.93. As the estimated net profit according to data furnished is $114,836.96, a 35.5-percent return is found. Transconex's fixed assets have a value of $3,888.19 and working capital requirement is $36,000, which provides a rate base of $39,888.19. Questioning the G & A expenses claimed by respondent, hearing counsel arrive at a profit of $101,124.73, which is 253.5-percent of the rate base. The Commonwealth computes a pre-tax rate of return of 72.2 percent for Consolidated and a rate of return in excess of 200 percent for Transconex.

During the past 4 years, cargo handled by Consolidated has increased threefold.

Transconex is the dominant NVOCC carrier in the Florida-Puerto Rican trade.

There is sharp competition among NVOCCs in the Puerto Rican trade. Vessel operators handle small shipments but do not seek this type of business. One vessel operator offers pickup and delivery service in connection with ocean carriage.

Respondents handle large volumes of cargo with comparatively small investments. Transconex, as projected for a 10-percent increase, will handle 2,367,232 cubic feet or, if hearing counsel's projection of a 20-percent increase is applied, 2,507,381 cubic feet. Consolidated will handle 4,800,000 cubic feet. Inasmuch as the dollar amount of cargo is not set forth as to the individual commodities handled, profits on separate commodities cannot be determined.

The Examiner's Decision

The examiner first of all rejected respondents' contentions, embodied in motions to discontinue the proceedings, that the Commission should determine matters relating to the reasonableness of NVOCCs' rates in a rulemaking proceeding and that the Commission has no jurisdiction over rates and charges for pickup and delivery services. Respondents, the examiner contended, misconceive the purpose of these proceedings, which is not to prescribe general formulas for determining the reasonableness of NVOCCs' rates, but merely to adjudicate the reasonableness of particular increases of the respondents, and that respondents' rates and charges for pickup and delivery services are subject to the Commission's regulatory authority, since such services are accessorial service performed by persons otherwise subject to the Shipping Acts.

The examiner then went on to discuss the various factors which are of importance in determining reasonableness of rates and indicated that "a primary view" of the reasonableness of the rates of NVOCCs, who have small investments compared to their gross incomes, may be had by application of the "operating ratio" concept—i.e., the mathematical relationship between gross income and expenses of operation. Applying this concept and assuming, as do respondents, a 10-percent increase in cargo handled due to the increased rates, the examiner found an operating ratio of 97.3 percent and a profit of 2.7 percent for Transconex using the Commission accountant's computation, and an operating ratio of 98.7 percent and a profit of 1.3 percent using Transconex's figures, which reflect a greater G & A expense. He found the operating ratio of Consolidated to be 97.22 percent and the profit 2.78 percent.

Applying hearing counsel's computation using an estimated 20-percent increase in cargo carried by Transconex, and the exclusion of amounts paid out and recovered from customers for underlying inland and ocean transportation, the examiner found Transconex's operating ratio to be 93.57 percent and net profit after taxes 6.43 percent (or utilizing the greater G & A expense, 95.5 percent and 4.5 percent, respectively), and Consolidated's operating ratio to be 93.7 percent and profit 6.3 percent after taxes.

The examiner concluded that all of these figures are reasonable since they fall within the 7-percent range of profit (i.e. an operating ratio upwards of 93 percent) which the ICC seems to have accepted.

The computation of operating ratio on profit before taxes would produce operating ratios of less than 93 percent (based on hearing counsel's figures, 87.62 percent, 12.38 percent profit, for Transconex, and 91.04 percent, or 8.96 percent profit, for Consolidated). The examiner rejected the approach of computing operating ratio on profit before taxes, however, since he maintains that the NVOCCs' "compensation is to be judged by money in hand after all charges against the operation are paid."

The examiner additionally indicated that he felt that in computing operating ratio, expenses should include the costs to the NVOCC of underlying carriage, since the NVOCC has the obligation to provide such carriage and is responsible to the shipper for loss or damage occurring when cargo is in the hands of the underlying carrier. He therefore recomputed the operating ratio for Transconex assuming the 20-percent cargo increase postulated by hearing counsel, but including the cost of underlying transportation. The result is an operating ratio of 95.76 percent or a profit of 4.24 percent, which he found to be "not unreasonable."

Finally, the examiner found the increases not shown to be unreasonable in the light of the cumulative effect of the following findings in addition to the apparent reasonableness of the operating ratio: (1) there had been no showing that the increased rates had adversely affected the Puerto Rican economy; (2) respondents have experienced increased costs of operation; (3) respondents operate efficiently; (4) respondents' operations are increasing; (5) the competition in the trade is sharp and thus tends to hold rates down; (6) the value of respondents' service to small shippers is substantial, since evidence of record shows many small Puerto Rican shippers could not engage in trade with the mainland without their service; (7) hearing counsel did not contend the rates have been shown to be unlawful; and (8) the Commonwealth has not presented evidence to support its contentions that the increases are unlawful.

Positions of the Parties on Exceptions and Replies to Exceptions

Puerto Rico excepts to the examiner's ultimate findings that the rate increases of the respondent NVOCCs are not unreasonable, and maintains that the increases "result in an excessive and unreasonable return to respondents which the shipping public should not be required to bear." In using "operating ratio" as the primary basis for determining the reasonableness of respondents' rate of return, the examiner, Puerto Rico asserts, improperly utilized the carriers' expenses after taxes. If expenses before taxes had been utilized, operating ratios less than the 93 percent generally approved by the Interstate Commerce Commission for its regulated motor carriers would have resulted. Moreover, Puerto Rico maintains, by overly stressing operating ratio, the examiner disregarded two basic matters which must be considered in determining the reasonableness of a carrier's rate of return, and which a purely numerical operating ratio does not reveal: the need for additional revenue and the need for additional capital. Finally, when the extremely large returns on the NVOCCs' rate bases are considered in conjunction with the very low operating ratios, an additional indication appears, Puerto Rico claims, that the rate increases are unreasonable.

Hearing counsel agree with the examiner's conclusion that the rate increases of the NVOCCs here under investigation have not been shown to be unlawful. They except, however, to language in the initial decision which indicates that, generally speaking, an operating ratio of 93 percent or greater is reasonable on the grounds that the record contains no economic evidence supporting adoption of any figure as a reasonable operating ratio for respondents. Hearing counsel support the examiner's use of the carriers' expenses after taxes in computing their operating ratio and agree with the examiner that the Commonwealth must bear the consequences of the failure of the record to reveal what would be a reasonable operating ratio for respondents.

Respondents, although preserving their contentions that the proceedings should have been discontinued because the Commission lacks jurisdiction over pickup and delivery rates and charges and rulemaking would have been the proper vehicle for determining the issues herein, urge that the exceptions be rejected and that the initial decision be adopted. Respondents contend that the examiner properly followed precedents of this and other regulatory agencies in computing operating ratio after allowing for taxes as an expense. Respondents maintain that the examiner would have been justified in relying upon operating ratio alone to determine the reasonableness of the rate increases. Respondents assert, however, that the examiner considered all factors which could be considered relevant, including the need for additional revenue and capital, in determining the reasonableness of the increases.

Discussion and Conclusions

We agree with the examiner that these proceedings clearly fall within the scope of our authority, and that rulemaking is not the method of procedure which we are bound to follow here. All of respondents' rates and charges for their transportation between the U.S. Atlantic Coast, on the one hand, and Puerto Rico and the Virgin Islands, on the other hand, including rates and charges for incidental pickup and delivery services, are subject to the regulatory control of this Commission.[1] Further, while rulemaking may be appropriate in proceedings designed to establish formulas by which the reasonableness of rates may be measured, rulemaking is not necessary to enable the Commission solely to investigate the reasonableness of rates of particular carriers without establishing any such formulas. As the examiner correctly indicated, a determination as to the reasonableness of respondents' rates is the sole concern of these proceedings.

We also agree with the examiner that the NVOCC's rates here under examination have not been shown to be other than just, reasonable and lawful. We find no basis for adopting the approach advocated by Puerto Rico of determining the reasonableness of respondents' rates based upon computations which fail to take into account the income tax expenses which they are required to bear. We have in the past allowed taxes as an expense in determining reasonableness of rates,[2] and feel that the failure to consider taxes as an expense creates an inaccurate picture of the earnings actually available to a corporation for distribution and capital investment and, consequently, its need for additional revenue. Our treatment of taxes as an expense to be considered in determining reasonableness of rates accords, moreover, with the general approach of courts and administrative agencies.[3]

As the examiner and all parties recognized, the considerations with respect to rates of NVOCCs must necessarily be somewhat different from those which are of prime importance in proceedings dealing with the reasonableness of rates of vessel owning carriers. Generally speak-

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[1] See e.g., *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C. 480, 491 (1963); *Certain Tariff Practices of Sea-Land Service*, 7 F.M.C. 504 (1963).

[2] See e.g., *Alaska Seasonal Rate Increases* (1962), 8 F.M.C. 1, 5–7 (1964); *Atlantic & Gulf Puerto Rican General Increase*, 7 F.M.C. 87, 115 (1962).

[3] See e.g., *Georgia Ry. & Power Co.* v. *Railroad Commission of Georgia*, 262 U.S. 625, 633 (1923); *Galveston Electric Co.* v. *City of Galveston*, 258 U.S. 388, 399 (1922); *Washington, Va. & Md. Coach Co., Inc., Cancellation, Tokens*, 54 M.C.C. 317, 324 (1952); *Fares, Motor, Between Northern Kentucky and Cincinnati*, 62 M.C.C. 67, 81–2 (1953). *General Increase, Middle Atlantic and New England Territories*, 332 I.C.C. 820, 837 (1969) is not, as Puerto Rico contends, authority to the contrary. There, the ICC indicated that taxes should not be taken into account in determining the efficiency of carriers' operations, but did not suggest the taxes should not be considered in establishing the reasonableness of a carrier's return.

ing, the reasonableness of the rate of return of equipment owning carriers has been based upon that percentage of their "rate base," i.e., the property devoted to the relevant trade plus sufficient working capital, which is necessary to allow them to earn a reasonable return in light of the peculiar risks of the service involved. See *Alcoa Steamship Co., Inc.—General Increase in Rates*, 9 F.M.C. 220, 238 (1966) ; *Atlantic & Gulf-Puerto Rico General Increase*, 7 F.M.C. 87, 104, 108–109, 116 (1962). Where, as here, however, a carrier has little investment in equipment, the traditional rate base approach is not sufficient to allow a determination of the reasonableness of carriers' rates. It has been usual, therefore, to consider, at least as an important factor, in proceedings relating to the reasonableness of rates of carriers with little capital investment in comparison with their total costs of operation, the "operating ratio" of such carriers; i.e., the margin between revenue and expenses of operation.[4] There is, however, a basic problem inherent in the use of "operating ratio" by itself to determine rate reasonableness: the ratio by itself fails to indicate the existence and degree of need for additional capital and revenue.[5] Consequently, the operating ratio approach, per se, may not give a true picture of the revenue requirements of a carrier.

Evidence of record and the following uncontested findings of the examiner strongly suggest that respondents' increased rates are just and reasonable: Respondents have experienced increased costs of operation; they operate efficiently; their operations are increasing; competition in the trade is sharp, ordinarily a strong control over rates; and the value of the services rendered by respondents to small shippers is substantial. Such findings tend to justify increases in the charges made by respondents for their transportation services, if not the particular dollar increases here under investigation.

We have no basis for concluding, however, that such increased charges are unlawful. Various computations have been made with respect to the operating ratios of the respondents, taking into consideration probable revenues and expenses related to the increases. As will be seen from our discussion of these calculations (at p. 40, supra), no operating ratio derived from any of them, other than that excluding taxes as an expense, which we have found to be improper,[6] exceeds the 93 percent which the ICC appears frequently to have approved when considering rate increases of carriers owning little or no equipment.[7]

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[4] *Middle West General Increases*, 48 M.C.C. 541, 552–3 (1948). *Increased Railway Rates, Fares and Charges*, 264 I.C.C. 695, 712–13 (1946).

[5] See *General Increase, Middle Atlantic and New England Territories*, 332 I.C.C., supra, at 837–838.

[6] See p. 43, supra.

[7] See *General Increases—Transcontinental*, 319 I.C.C. 792, 803 (1963).

We agree with hearing counsel that there has been no showing on this record that a 93-percent operating ratio is necessarily proper or a standard for NVOCCs, and nothing we say here is to be construed as implying that such operating ratio is in fact proper, or a standard.

However, since we feel that the traditional rate base approach cannot be applied to these carriers, at least where, as here, there has been no showing of any relationship between such rate base and the carriers' operating ratios, we cannot disapprove the rate increases. Some indication of need for increases has been shown, and no computation we have been able to make with respect to the increases shows them to be improper. Those challenging rate increases in proceedings where such increases have not been suspended must bear the consequences of the failure of the record to contain adequate support for their disapproval. *Charges, Delivery, Atlantic-Gulf/Puerto Rico Trades*, 11 F.M.C. 222, 229–231 (1967).

These proceedings are hereby discontinued.

By the Commission.

[SEAL]

JOSEPH C. POLKING,
Assistant to the Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-13

NORTH ATLANTIC FRENCH ATLANTIC FREIGHT CONFERENCE—PETITION FOR DECLARATORY ORDER

(*Decided August 20, 1970*)

Conference may not lawfully prevent, under the provisions of section 15 of the Shipping Act, 1916, and the Commission's general order 9, relating to withdrawal from a conference, member line from withdrawing and operating independent service in the trade served by the Conference at any time. Failure of line to comply with notice requirement in approved conference agreement with respect to withdrawal is breach of agreement.

Burton H. White and *Elliott B. Nixon* for North Atlantic French Atlantic Freight Conference.

Howard A. Levy for American Export Isbrandtsen Lines.

Donald J. Brunner and *Ronald D. Lee*, Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman;* James F. Fanseen, *Vice Chairman;* Ashton C. Barrett, James V. Day, *Commissioners*)

On March 12, 1970, we instituted this proceeding to determine whether American Export Isbrandtsen Lines (AEIL) could under any circumstances effectively withdraw from the North Atlantic French Atlantic Freight Conference (Conference). The proceeding was limited to affidavits of fact and memoranda of law. Memoranda have been filed by the Conference and hearing counsel, and the Conference in addition has filed an affidavit. AEIL has filed papers which, pursuant to its request, have been treated as its memorandum of law.[1] We have heard oral argument.

[1] AEIL filed several alternative motions and requests for relief. On April 22, 1970, the Commission denied AEIL's request for evidentiary hearing, its motion to discontinue the proceeding, and its motion for enlargement of time to submit affidavits of fact and memoranda of law, but granted its motion to treat its reply to the Conference's petition for declaratory order as its memorandum of law and its request for oral argument.

The following are the undisputed facts with respect to the withdrawal of AEIL from the Conference:

Article II of the Conference agreement (agreement No. 7770) provides in relevant part:

> Any Member may withdraw penalty from the Conference, effective not less than 90 days after giving written notice to the Conference office, which shall promptly advise the other Members; provided, however, that the retention of security for the payment of outstanding obligations hereunder shall not be considered as a penalty. Notice of withdrawal of any party shall be furnished promptly to the Federal Maritime Commission.

On December 8, 1969, AEIL advised the Conference that it would resign from membership therein, effective January 20, 1970.

On the following day, the Conference chairman advised AEIL that the resignation could not be effective on such date since he interpreted the above-quoted provision of the Conference agreement as requiring not less than 90 days' written notice prior to the effective date of termination of Conference membership.

On or about December 19, 1969, AEIL filed with the Commission its tariff No. 1, FMC 106, effective January 20, 1970, which provided independent rates for transportation in the trade covered by the Conference agreement.

By telex of January 16, 1970, and letter of January 19, 1970, the Conference protested AEIL's independent tariff and requested that it be rejected.

By telegram of January 19, 1970, confirmed by letter of January 20, 1970, the Commission's staff denied the request for rejection, but preserved the right of the Conference to "pursue any remedies it believes available."

On January 23, 1970, the Conference filed a petition for a declaratory order stating that the manner in which AEIL had withdrawn from the Conference was unauthorized by the Conference agreement and was then ineffectual. On February 5, 1970, AEIL replied, maintaining that its manner of withdrawal was authorized by the Conference agreement and that it was presently free to operate as a nonconference carrier pursuant to an independent tariff.

Discussion and Conclusions

The issue for resolution is simply whether under the provisions of section 15 of the Shipping Act, 1916, and the Commission's general order 9, relating to withdrawal from a conference, the North Atlantic French Atlantic Freight Conference may lawfully prevent American Export Isbrandtsen Lines from withdrawing from the Conference and operating an independent service in the trade served by the Conference until the passage of 90 days from the date of notice of intention to resign.[2]

The Conference asserts that, since the withdrawal provision of its agreement is substantially an incorporation of the language contained in section 15 of the Shipping Act and our general order 9, resolution of the issue presented here turns upon ascertaining the intent of the Congress in enacting the withdrawal provisions in section 15 and the intent of the Commission in promulgating its general order 9 to implement them. In requiring conferences to allow their members to withdraw from membership upon reasonable notice without the payment of a penalty, neither the Congress nor the Commission, the Conference contends, meant to imply that a penalty could be imposed for withdrawal upon less than reasonable notice. The Conference further argues that the Commission's own decision in the docket promulgating general order 9 indicates that penalties were never to be assessed for withdrawal from a conference. The requirement of reasonable notice for withdrawal was intended to bar withdrawal on less than such notice, and a failure to give such notice may not be excused by the payment of money. Withdrawal on less than reasonable notice could, the Conference hints, endanger the rights of signatories to dual rate contracts which are guaranteed 90 days' notice of certain changes in such contracts. Although the Conference disclaims the ability to assess penalties with respect to AEIL's withdrawal, it does assert that since the withdrawal was ineffective, it can claim damages from AEIL under the self-policing provisions of the agreement for AEIL's action in filing a separate tariff while still a Conference member.

AEIL, on the other hand, contends that the legislative history of the withdrawal provision of section 15 and the concurrent study of the ocean freight industry by the Antitrust Subcommittee of the Committee on the Judiciary clearly show Congress intended to preserve nonconference competition and the open door policy of conference admission. Essential to both of these goals is the freedom of the shipowner to decide, without economic or legal coercion, whether to operate within or without the Conference system, and the right to change such decision. To construe the withdrawal provisions of section 15 and general order 9 to require notice of withdrawal as a condition to its effectiveness would, AEIL maintains, be contrary to congressional intent. AEIL does not contest the right of the Conference to impose a penalty for its failure to give 90 days' notice of withdrawal.

[2] Section 15, Shipping Act, 1916, provides that "any member may withdraw from [Conference] membership upon reasonable notice without penalty for such withdrawal * * *" and general order 9 (46 CFR 523.2(f)) specifies that "any party may withdraw from the Conference without penalty by giving at least 30 days' written notice of intention to withdraw from the Conference * * *."

Hearing counsel take the position that the legislative history of section 15 of the Shipping Act clearly indicates that AEIL may withdraw from membership in the Conference on less than 90 days after its notice of intent to withdraw, subject to payment of such penalties as may be provided in the Conference agreement for such withdrawal. The purpose of the Congress in enacting the withdrawal provisions of section 15 was, they assert, to preserve the right of conference members to withdraw from conferences without limitation on the power of withdrawal. Additionally, they contend that to require AEIL to remain in the Conference for 90 days following its notice of resignation would render a nullity the phrase "without penalty for such withdrawal" in the provision of section 15 providing that "any member may withdraw from [Conference] membership upon reasonable notice without penalty for such withdrawal." This phrase, they assert, can only be made meaningful by assuming that withdrawal on less than specified notice is possible.

We would agree with the Conference insofar as it contends that the resolution of the issue before us turns solely upon the proper interpretation of the provision of section 15 of the Shipping Act, 1916, relating to withdrawal from a conference and the language implementing this provision in the Commission's general order 9, which imposes upon Conferences the obligation to include in their agreements language "substantially" the same as that set forth therein. (See 46 CFR sec. 523.2.) Thus, nothing is to be gained from examining the terminology and syntax of the Conference's withdrawal provision to see how it might differ from that contained in section 15 and general order 9. We think it unnecessary, however, to dwell at any great length on congressional "intent" since we find the language in question quite free from ambiguity.

Section 15 and general order 9 impose two obligations: On the one hand, the conferences are obliged to allow their members to withdraw from conference membership "without penalty" when the withdrawing member gives "reasonable notice"; while on the other, the withdrawing member, if it desires to avoid penalty, is obliged to give the Conference the required notice of its intention to withdraw. The language clearly presents an either/or proposition: either the withdrawing line gives reasonable notice or he becomes subject to a penalty. The Conference's conclusion that under no circumstances may a withdrawal be effective until the expiration of the notice period completely writes out of the statute and the general order the words "without penalty." If a line could not effectively withdraw from a conference until the expiration of the notice period, it would be impossible for it to breach the agreement by failing to give adequate notice of withdrawal and thus a withdrawing line could never be subjected to a penalty for improper withdrawal.

Although we really think it unnecessary, examination of the legislative history of section 15 and the rulemaking proceeding in which the Commission promulgated general order 9, docket No. 981—*Rules Governing Admission, Withdrawal and Expulsion Provisions of Steamship Conference Agreements*, moreover, reveals no indication whatsoever that the requirement of notice was to act as a bar upon withdrawal on less than such notice. The power to withdraw was necessary to preserve nonconference competition since former conference members, as well as new carriers and presently operating independents, were viewed as necessary sources of nonconference competition.[3] The power to withdraw, moreover, was characterized not simply as a power but as a "right." There is no indication that this right was in any way to be lessened.

An agreement subject to the Shipping Act, 1916, "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 considerations as the effect of the interpretation on commerce and the public. Moreover, the agreement exists legally only because approved by the [Federal Maritime] Board.[4]

We can only conclude that absent the expression by the Congress of an intention to allow parties to conferences to bargain away their historic right to operate in any lawful fashion which they feel to be in their best interests, the legislature, in enacting the withdrawal provision of section 15, preserved the right of members to resign from shipping conferences at will.[5]

To the extent the somewhat sparse legislative history of the notice requirement itself reveals the congressional purpose behind the withdrawal provision, such legislative history supports this interpretation.

[3] Hearings on H.R. 6775 before Merchant Marine and Fisheries Subcommittee of Senate Committee on Commerce, 87th Cong., 1st sess. 597–598 (1961); 107 Congressional Record 19360, 19366 (1961). See also in this regard, testimony before the Senate Committee on Commerce during the hearings on H.R. 6775 indicating that the provisions requiring "conferences to admit or readmit carriers in the trade on reasonable and equal terms and conditions or to provide that any member may withdraw from membership without penalty on reasonable notice" were considered "absolutely essential for otherwise a tight and objectionable monopoly, and the setup as to carriers, especially conference carriers in a given trade, would be frozen and could even result in insufficient service should any substantial increase in commerce develop." Hearings on H.R. 6775 before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce, 87th Cong., 1st sess., p. 535 (1961).

[4] *Swift & Company v. Federal Maritime Commission*, 306 F. 2d 277, 281 (D.C. Cir. 1962). See also *In Re: Pacific Coast European Conference*, 7 FMC 27, 37 (1961).

[5] Nothing we say here should be construed as in any way negating or casting doubt upon the obligations of a member line fully to perform strictly in accordance with the Conference agreement so long as it remains a member of a conference.

The withdrawal language first appeared in draft revision No. 2 of H.R. 4299, published April 13, 1961. At that time, it read, "* * * any member may withdraw from membership without penalty upon reasonable notice." If the bill as then worded had been enacted into law, it would have been extremely difficult to read it as preventing the withdrawal of a conference member until the expiration of a specified notice period since to so construe it would appear to render the words "without penalty" mere surplusage. If withdrawal were only permitted "upon reasonable notice" why were the words "without penalty" put into the provision? The logical implication, albeit a negative one, from the statutory language as it then read was that if one could withdraw without penalty upon reasonable notice, one could withdraw with penalty absent reasonable notice.

On August 8, 1961, the Senate subcommittee print of H.R. 6775, as the bill embodying this provision which passed the House was denominated, contained the following language, identical to the present provision of section 15: "* * * any member may withdraw from membership upon reasonable notice without penalty for such withdrawal." The addition of the words "for such withdrawal," although the reason nowhere clearly appears in the legislative history of the withdrawal provision, can only be explained as intended to relate back to withdrawal upon reasonable notice, and hence the conclusion is inescapable that a penalty was to be permissible for withdrawal on other than reasonable notice. Virtually the sole concern of those deliberating on the withdrawal provision appears to have been the protection of the absolute right of withdrawal. When the notice requirement was mentioned at all, it was alluded to in a fashion which indicates it was intended to establish a right on the part of the conference membership to be informed, but was not intended to detract in any way from a line's absolute right to withdraw. Thus, for example, during the Senate debate on the withdrawal provision, Senator Engle of California, the Senate sponsor of H.R. 6775, in response to indications by the Justice Department of the necessity of allowing unfettered withdrawal from conferences, stated:

> The common carrier can get out of it. All it need do is to serve notice within the framework of the bill. They can get out of it if they want to. A common carrier can get out it it wants to do so." (107 Congressional Record 18157, Sept. 13, 1961).

The reference to the "service of notice within the framework of the bill" as sufficient to get a carrier out of a conference is inconsistent with the Conference's contention that withdrawal cannot be effective until the end of the notice period, but is completely in accord with the position that withdrawal may be made whenever a carrier wishes to withdraw subject to penalties for withdrawal on less than reasonable notice. The "service of notice" accomplishes the withdrawal, but the "framework of the bill" allows for a conference to impose penalties if the withdrawal has been made on less than reasonable notice.

In our general order 9, we gave content to the abstract statutory requirement of "reasonable notice" by specifying "at least 30 days" as the notice period and providing that "any party may withdraw from the Conference without penalty by giving at least 30 days' written notice of intention to withdraw from the Conference * * *" The Conference's contention that this provision of general order 9 was intended to forbid the assessment of any penalty for withdrawal has the same defect as the contention that no penalties were to be assessed under the general withdrawal authority set forth in section 15—it reads the language "without penalty" out of the provision.

There is no necessary relationship, as the Conference appears to suggest, between the 90-day notice provision for withdrawal in its agreement and the 90-day notice which is required under section 14b of the Shipping Act and the Commission's general order 19 for certain changes in rates and charges subject to dual rate contracts. To the extent that rights of shippers under dual rate contracts could be affected by a carrier's withdrawal from a conference, they are protected by the specific requirements of the provisions of section 14b and general order 19. The Conference in fact itself acknowledged in our docket 981, the proceeding which formulated general order 9, that there is no necessary correlation between the notice provisions for withdrawal from a conference and changes under dual rate contracts.

The Conference's suggestion that any conclusion which leaves lines free to withdraw from a conference on less than reasonable notice upon payment of a penalty amounts to excusing the failure to perform a contractual duty by the payment of money is without merit since it rests upon an incorrect assumption. It assumes that there has been a failure on the part of AEIL to perform in accordance with the terms of the conference agreement, i.e. that AEIL had a duty to remain in the Conference, or at least not to operate an independent service, for 90 days following its notice of intention to withdraw.[6] Rather, the

[6] *Montana-Dakota Utilities Co.* v. *Federal Power Commission*, 169 F. 2d 392 (8th Cir. 1948); *Shain* v. *Washington National Insurance Co.*, 308 F. 2d 611 (8th Cir. 1962); and *All States Service Station* v. *Standard Oil Co.*, 120 F. 2d 714 (D.C. Cir. 1941), which the Conference cites for the position that withdrawal cannot be effective until the expiration of a notice period, are all inapposite. *Montana-Dakota* involved the attempted withdrawal of a tariff filed with the Federal Power Commission in a manner not authorized by the Commission's regulations. It did not, strictly speaking, involve the question of a notice period at all. To the extent the case is relevant, it is distinguishable from the instant

duty of the withdrawing line is to give notice under section 15 and general order 9, and if the line fails to give reasonable notice, here 90 days as stated in the Conference's approved agreement, the line has breached its agreement and is liable to a penalty.[7]

The question of whether or not a penalty should be imposed for AEIL's breach of the Conference agreement is outside the scope of the present proceeding. One consequence, however, does flow from our determination that AEIL was authorized by the statute, regulation and Conference agreement to withdraw at any time: once it had withdrawn from the Conference, i.e., as of January 20, 1970, it was free to operate as an independent carrier, and nothing in connection with its operations from that date may be considered in setting a penalty for breach of the withdrawal provision in the Conference agreement. Important considerations in assessing a penalty would appear to include, inter alia, the amount of notice actually given and any adjustments that were required within the Conference as a result of the withdrawal. We also note in passing that the assessment of penalties for breach under the Conference's position could result in the kind of actions which we feel Congress could not have intended. If all of the activities of AEIL prior to the expiration of the 90-day period constituted breaches of the agreement, as appears logically to follow from the Conference's position, the Conference could treat each shipment made under an individual bill of lading as a separate breach. The penalties flowing from such approach could be so astronomical as to be confiscatory and result in driving a carrier from the trade to the detriment of our commerce and contrary to the public interest. Although in fairness to the Conference we readily acknowledge that there is no indication that such course would, even had the Conference prevailed, have been followed here,[8] the possibility of such approach under the Conference's position lends added support to our conclusion that it cannot be the one to have been intended by Congress. An appropriate order will be entered declaring that AEIL was lawfully without the Conference

proceeding since here, as we have seen, the manner of withdrawal was fully authorized by section 15 and general order 9. The language of the contracts involved in the latter two cases, unlike the withdrawal provision here under consideration, clearly indicated that the contracts were to remain in effect until the expiration of the notice period—there was no problem of interpreting words like "without penalty." These two cases, moreover, dealt with private contractual arrangements under which the parties were free to bind themselves to the expiration of certain notice periods as a condition to the termination of their agreements. Here, however, the language and legislative history of the withdrawal provisions of the statute controlling the parties' conduct show that conference members are not free to enter into such arrangements.

[7] Although free to do so, no party challenged the reasonableness of the 90-day notice period.

[8] Counsel for the Conference, in fact, indicated in oral argument that "it isn't a ghastly case as far as penalties are concerned."

as of January 20, 1970, and that its failure to give 90 days' notice of its withdrawal constituted a breach of the Conference agreement.

Commissioner George H. Hearn, concurring and dissenting:

The majority states the issue to be whether a conference may lawfully prevent a member line from withdrawing from the conference and operating as an independent in the trade served by the conference. I think this statement of the issue, although consistent with our order initiating this proceeding, misses the point. We are not dealing here with principles of ordinary contract law. It is not argued that a conference can compel the specific performance of a member line. Some principles of contract law may apply, but agreements entered into pursuant to section 15 are in the nature of public, not private, contracts. In re: *Pacific Coast European Conference*, 7 FMC 27 (1961).

The primary issue is not what remedy a conference has against a member line which contravenes the agreement's withdrawal notice provision. Rather, we must decide what authority the Federal Maritime Commission may and should exercise in such a situation to preserve the public service the conference agreement was approved to insure.

The resolution of this question depends upon the interpretation to be given the provision in section 15 of the 1916 act relating to withdrawal from conference membership. The majority report reads the statutory language as "an either/or proposition" permitting withdrawal on reasonable notice without penalty or imposition of a penalty if withdrawal is not on reasonable notice. This assumes that a conference may impose a penalty for withdrawal under certain circumstances. I do not agree. As I read section 15 and the Commission's general order 9, a penalty may not be imposed for withdrawal.

The majority argument is that, if a member line cannot withdraw from a conference until the expiration of the reasonable notice period, the line cannot commit a breach of the notice provision and can never be liable for a penalty. This reasoning is supported by and logically follows from the majority's assumption that penalties for withdrawal are not completely forbidden. However, that assumption presupposes that the impossibility of withdrawing on less than the notice period is itself impossible because otherwise there could be no penalty for withdrawal. This is merely a combination of circular reasoning and bootstrap argumentation.

The illogic of the majority's argument can be solved and sense made of the matter by use of the alternative assumption: that no penalty may be assessed merely for withdrawal. First, however, it must be recognized that in many instances, if a person can and is determined to violate the law or commit a civil wrong regardless of the penalty, such action often cannot be prevented. Such is the situation here. If a conference member wants to withdraw, it can do so. Perhaps there may be a way to compel its continued "technical" membership until the specified time to which it contractually agreed. However, a carrier cannot be compelled, under the legal principles here involved, to provide service in the particular trade until such time or at all.

Thus, as a practical matter, it is true as the majority concludes, that a conference cannot prevent a member from withdrawing. And it is conceded, I think, that if a member is in violation of the conference agreement when he "withdraws" on a lesser period of notice than provided in the agreement, the conference then may seek redress against the withdrawing member. No penalty is necessary to compensate the conference. The conference may have an action at law for breach of contract. Also, there may be a remedy under the conference's self-policing system if, for example, the withdrawing member fails to provide service within the scope of the conference trade.

The remaining question is whether the withdrawing member line may offer an independent service in the trade served by the conference prior to the expiration of the conference's notice period. I conclude that the line may not legally do so. The line, for this purpose, remains a member of the conference until its notice period expires, and the Commission was in error in not rejecting AEIL's independent tariff. If a penalty is not necessary to make the conference whole, it could be for the purpose only to act as a deterrent to prevent conference members from withdrawing on less notice than agreed to contractually. Recognizing that a conference agreement is "impressed with the public interest" (In re: *Pacific Coast European Conference*, 7 FMC 27, 37 (1961)), it would have to be concluded that a withdrawal penalty was established to preserve the public interest in the maintenance of stabilized conference service, and that Congress saw something wrong in withdrawal on less than reasonable notice.

The majority seems to argue, however, that in these circumstances the right of carriers to operate independently outweighs the need for stability of rates and service. I think it a more sound contention that we must balance those two interests. *Swift & Company* v. *FMC*, 306 F. 2d 277 (D.C. Cir. 1962). Surely the majority view is a little narrow when it sees the notice provision in section 15 as establishing no more than "a right on the part of the conference membership to be informed." If that were so there would have been no need for Congress to have included the requirement of "reasonable notice" in the statute.

The legislative history cannot be read so as to impute to Congress the inclusion of the words "reasonable notice" without purpose. The majority contends that the conference's interpretation of section 15 reads the language "without penalty" out of the statute. The same analysis applies if the provision for "reasonable notice" may be avoided with impunity (on payment of a penalty).

What is clear about the legislative history is that it is not persuasive for either position. Consequently, we should read the statutory language in such manner as to impute to Congress the intention of having given meaning to all the words and so as to further the aims of the 1916 act as a whole. As I have said, we must balance the right of and need for independent service (which I think is very important and necessary) on the one hand, and on the other the right of conferences to prevent actions destructive of their system and the need for stable conference service. *Mediterranean Pools Investigation*, 9 FMC 264, 288–290 (1966); *Rate Agreement United States/Persian Gulf Trade*, 8 FMC 712, 723–724 (1965); *Agreement 8765—Gulf/Mediterranean Trade*, 7 FMC 495, 499 (1964). The withdrawal provision of section 15 can be read to give effect to this policy by interpreting it to establish two elements regarding withdrawal. One is that a member line must give the conference reasonable notice before the line may operate independently. Thus, there must be at least 30 days' notice (general order 9, 46 CFR 523.2(f)), or a longer period may be freely agreed to by the contracting parties if approved by the Commission. Second is that there may not be a penalty for withdrawal whether tendered before or after the expiration of the agreed-to notice period. The conference may seek redress under available means such as its self-policing system.

Consequently, I conclude that the operations of American Export Isbrandtsen Lines as an independent prior to the expiration of the 90-day withdrawal notice period in agreement No. 7770 is a breach of that agreement and in violation of the Shipping Act, 1916; and American Export Isbrandtsen Lines breached that agreement by failing to give 90-days' notice and in any other way it may not have performed its conference obligations before the expiration of the 90 days.

[SEAL]

JOSEPH C. POLKING,
Assistant to the Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-13

NORTH ATLANTIC FRENCH ATLANTIC FREIGHT CONFERENCE—

PETITION FOR DECLARATORY ORDER

ORDER

Full consideration having been given to the matters involved in this proceeding, and the Commission on this day having made and entered of record a "Report" stating its findings, conclusion and decision thereon, which "Report" is hereby referred to and made a part hereof;

Therefore, it is ordered and declared, That

(1) The operations of American Export Isbrandtsen Lines on and after January 20, 1970, did not constitute a breach of approved agreement No. 7770 of the North Atlantic French Atlantic Freight Conference from which American Export Isbrandtsen Lines had effectively withdrawn as of that date; and

(2) The failure of American Export Isbrandtsen Lines to give 90 days' notice prior to the effective date of its withdrawal constituted a breach of article II of agreement No. 7770.

By the Commission.

[SEAL]

JOSEPH C. POLKING,
Assistant to the Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 68–10

INTER-AMERICAN FREIGHT CONFERENCE—CARGO POOLING AGREEMENTS NOS. 9682, 9683, AND 9684

Decided August 20, 1970

Where two signatories withdraw from pooling agreements pending prior to Commission approval under section 15, Commission jurisdiction terminates since section 15 grants jurisdiction only over agreements between persons subject to the Shipping Act, 1916.

Marvin J. Coles and *Neal M. Mayer* for Companhia De Navegacao Loide Brasileiro, *John Robert Ewers* and *Ira L. Ewers* for Moore-McCormack Lines, Inc., *Renato C. Giallorenzi* for Companhia De Navegacao Maritima Netumar, *Elmer C. Maddy* and *Baldvin Einarson* for Norton Line and Ivaran Lines, *Thomas K. Roche* for Columbus Line, Inc., Brodin Line, and Holland Pan-American Line A/S, *Seymour H. Kliger* for Empresa Lineas Maritimas Argentinas (E.L.M.A.), respondents.

Stephen J. Gross for U.S. Department of Transportation and *John R. Vaughan* for National Coffee Association and Green Coffee Association of New York, interveners.

Richard W. McClaren, *Roland W. Donnem*, *Joseph J. Saunders*, and *John H. Dougherty* for the Department of Justice.

Paul J. Fitzpatrick and *James L. Malone*, hearing counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; James F. Fanseen, *Vice Chairman*; Ashton C. Barrett, *Commissioner*)

This proceeding is before us upon exceptions to the supplemental initial decision of Examiner Clarence W. Robinson in which he would approve agreement No. 9683.[1]

[1] Agreement No. 9682 expired by its own terms prior to the issuance of a decision by the examiner, and in an earlier initial decision the examiner disapproved agreement No. 9684. Moore-McCormack Lines (Mooremack), a signatory to all three agreements, took exception to the examiner's refusal to approve No. 9684. In view of our decision here, there is no need to discuss those exceptions.

Agreement No. 9683 is a pooling arrangement between some of the members of the Inter-American Freight Conference (IAFC) for the carriage of green coffee from Brazil to Atlantic ports in the United States. The parties to the agreement are grouped by the flag their vessels fly:

National flag lines:	
Companhia De Navegacao Loide Brasileiro (Loide).	Brazilian flag.
Companhia De Navegacao Maritima Netumar (Netumar).	Do.
Moore-McCormack Lines, Inc. (Mooremack)	American flag.
Nonnational flag lines:	
(1) *Pan-American flag lines:*	
Empresa Lineas Maritimas Argentina (E.L.M.A.).	Argentine flag.
Montemar Sociedad Maritime (Montemar)	Uruguayan flag.
(2) *Other flag lines:*	
Brodin Line	Swedish flag.
Columbus Line	West German flag.
The Holland Pan-American Line (Hopal)	Netherlands flag.
Ivaran Line	Norwegian flag.
Norton Line	Swedish flag.

The agreement further calls for a minimum number of sailings to be made by each line within each 6-month period for the life of the agreement. Under the agreement each line is given percentage quotas of coffee which it may carry without penalty. Again, the allocation is by flag grouping. Thus, under the first year of the proposed 10-year life of the agreement the national flag lines (Loide, Netumar, and Mooremack) would divide 65 percent of the coffee carryings; the nonnational lines would divide the remaining 35 percent with the Pan-American flag lines (E.L.M.A. and Montemar) taking 9 percent and the other flag lines taking the remaining 6 percent.[2] These percentages are adjusted each year under the agreement until in the 10th and final year, the national flag lines would divide up 80 percent, leaving 20 percent to the other or third flag lines. Other provisions of the agreement restrict membership in the pool to members of the Inter-American Freight Conference; allow further tonnage, sailing and further rationalization among lines in a given grouping; provide for

[2] Of the 65 percent allocated to the national flag lines, Loide and Netumar would take 32.5 percent and Mooremack would take 32.5 percent. The Pan-American flag lines would split 9 percent, and the third flag lines would variously divide the remaining 26 percent, ranging from 6.1 percent for Brodin, Columbus, Ivaran, and Norton, to 1.6 percent for Hopal.

membership pledges, adherence to tariff locations of pool headquarters and other provisions more or less standard to agreements of this type.[3]

Subsequent to the issuance of the supplemental initial decision, two of the signatories to Nos. 9683 and 9684 (Loide and Netumar) withdrew from those agreements. Thus, we have presented the threshold issue of whether there remains before us that kind of agreement over which we may exercise jurisdiction. This jurisdiction must come from section 15 of the Shipping Act, 1916 (the act), which provides in relevant part:

> * * * every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act * * *. The term "agreement" in this section includes understandings, conferences, and other arrangements.

In a situation analogous to the one here, *Hong Kong Tonnage Ceiling Agreement*, 10 FMC 134 (1966), a party to the original agreement pending our approval telegraphed the Commission that even though it had voted for the agreement, it was now opposed to its approval. The agreement in question was actually a modification to a basic conference agreement which required a unanimous vote of all parties to modify or amend it. The repudiation by one of the parties of the proposed amendment obviously destroyed the required unanimity, and we were faced with the question of whether there remained any agreement over which we could exercise jurisdiction. We concluded that in order for jurisdiction to exist under section 15 there must be:

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

It has been suggested here that the *Hong Kong* case is distinguishable because we have before us now a new agreement, not a modification to an already approved agreement, which requires unanimity for its approval. According to this view, the real ratonale of our decision in the *Hong Kong* case was that we could not force a carrier to participate in an agreement to which that carrier did not voluntarily adhere

[3] Agreement No. 9684, an arrangement for the pooling of cocoa carryings in the trade from Brazil to United States Atlantic ports, is basically the same as No. 9683.

and that to condition our jurisdiction on the continued adherence of all parties to the terms of a proposed new agreement is to deny our power to modify agreements, which power is specifically spelled out in section 15.

This argument misconceives the nature of our duties and responsibilities when approving agreements under section 15. For as the court said in *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954); cert. denied sub nom. *Japan-Atlantic & Gulf Conference* v. *United States*, 347 U.S. 990 (1954):

[T]he Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under antitrust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure 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.

And in scrutinizing the agreement to make sure that the conduct legalized by our approval does not "invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes" of the Shipping Act, our function is to insure that:

* * * restraints which interfere with the policies of the antitrust laws will be approved only if [those seeking to impose the restraints] can bring forth such facts as would demonstrate that the [restraint] was required by a serious transportation need, necessary to secure important public benefits or in the furtherance of some valid regulatory purpose of the Shipping Act. [*FMC* v. *Svenska Amerika Linien*, 390 U.S. 238, 243 (1968)]

Virtually every agreement filed for approval under section 15 alters the competitive relationships, and whether our decision is to approve, disapprove, cancel, or modify the agreement, that decision is necessarily reached in the light of the new set of relationships created by the agreement. Thus, when prior to our approval of an agreement one of the parties thereto repudiates or withdraws from the agreement, a completely new set of relationships arises, and normally a new beginning is required. Should the remaining parties to the agreement desire approval even without the withdrawing party, it is incumbent upon them to reformulate the terms of the agreement so that it may be tested under the criteria of section 15.

Here we are concerned with the approval of agreements for the pooling of certain cargoes carried from ports in Brazil to ports on the Atlantic Coast of the United States. The agreements include virtually all common carriers active in that trade and purport to allocate certain percentages to each of those carriers. It seems unnecessary to point out that the withdrawal of even one party to the agreement presents a whole new picture and requires that the remaining parties present the Commission with the new agreement representing the readjustments made necessary by the change in relationships. The present agreements stand repudiated in one form or another by all the parties thereto except one.[4] Thus, we do not have even a semblance of an agreement before us, and failing this we simply have no jurisdiction under section 15.

This is in no way inconsistent with our power to modify agreements under section 15. The power to modify is not the power to compel acceptance of the modification. When a new agreement filed for approval comports with the requirements of section 15, save in one or even a number of its provisions, we are empowered to modify the objectionable provisions and condition our approval of the agreement upon the acceptance of those modifications. Thus, while the parties to the agreement, should they desire to act in concert, must accept the conditions imposed upon their concerted action by the modifications, they are always free to reject the modifications and continue their operations as before. It should be clear that this proceeding presents us with nothing upon which we could exercise the power to modify simply because we have no agreement remaining before us.

At this point we could simply discontinue this proceeding for lack of jurisdiction, but we have been urged to do more. There is, we are told, a need for "guidelines" in order that future agreements of this kind may avoid the pitfalls encountered by those in this case. We are, quite naturally, reluctant to make pronouncements in the abstract and would prefer to await specific cases. However, because we are acutely aware of the problems encountered in this proceeding, and because we are equally aware that those problems are not unique to this case, we will attempt to draw together our past decisions and formulate those principles which must perforce guide our deliberations in cases like the one here. We would offer a preliminary caveat, however.

Guidelines are nothing more than broad canals within which future action may be channeled with some reasonable assurance of its validity. As such, guidelines do not decide specific cases. Time, circumstance and the facts of the individual case can and probably will alter the "guidelines" to some greater or lesser extent. We offer this fact of administrative life only because our past experience has been that all too frequently broad and necessarily flexible policy statements have been played back as narrow and ironclad precedents which are said to dictate a particular conclusion in a given case.

In order to place the problems presented by the agreements here in

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[4] As noted above, Loide and Netumar have withdrawn all other parties except Mooremack have excepted to the approval of the agreements.

issue in their proper perspective. it is necessary to deal at some length with the background and circumstances leading to their formulation. The background statement which follows is essentially that of the examiner, as it appeared in his initial decision of June 24, 1969.

For some time now the Government of Brazil has, by the issuance of decrees, bulletins, and resolutions, made it clear that it intends to strengthen its merchant marine and develop its commerce.

Brazil's efforts began with SUMOC [5] 181, of April 22, 1959, which required imports with subsidies to be carried on Brazilian flag vessels. SUMOC 181 was followed on November 12, 1959, by Decree No. 47.225, which ordered the movement on Brazilian flag vessels of imports benefiting from certain governmental favors. Then, on October 13, 1960, SUMOC 202 limited shipments to lines associated with Brazilian flag lines under approved agreements. Bulletin No. 401 of the Brazilian Maritime Commission (CMM), effective August 28, 1964, decreed that up to 40 percent of coffee to the United States must be carried by Brazilian flag vessels. Decree No. 60.739, effective May 24, 1967, set up a reciprocity system whereby, under certain circumstances, cargo to be carried on Brazilian flag vessels could be carried by vessels of the other nation involved; third flag vessels (those flying the flags of neither the importing nor exporting countries) could carry the cargo if vessels of neither of the national flag carriers were available. CMM Resolution 2995, effective June 5, 1967, provided that the vessels of the exporting and importing countries should "predominate" in the handling of cargo; this mandate was to be implemented after a meeting of vessel owners. Effective July 13, 1967, Decree 60.994 permitted conference or other agreements only if Brazilian flag lines were parties thereto. Resolution 3022 of August 1, 1967, limited exports to the United States and Canada to member lines of IAFC. Conference and pooling guidelines set forth in CMM Resolution 3131 of November 10, 1967, put a ceiling of 35 percent on the amount of cargo which could be carried by third flag lines.

As of June 1967, agreement No. 5450 (the basic agreement of the Brazil/United States-Canada Freight Conference) was in effect. The Conference embraced the transportation of all cargo, except passengers' baggage and refrigerated cargo, from Vitoria and ports south thereof in Brazil to United States Atlantic and Gulf ports and ports in Eastern Canada. All the parties to the present pooling agreements, except Netumar, were members of that conference (Netumar was not operating as a common carrier in that trade at the time).

[5] "SUMOC" is a grouping of letters denoting Superintendency of Currency and Credit, an agency of the Brazilian Government.

In an effort to implement CMM Resolution 2995, as provided thereby, Loide, entirely owned by the Brazilian Government and acting on behalf of CMM, called a meeting of the conference principals for June 26, 1967, in Rio de Janeiro, to discuss a pooling agreement for the carriage of coffee. The meeting lasted until the 30th. Loide at first took the position that the provision of No. 2995, which stated that "shipowners who are nationals of the countries exporting and importing the goods must *predominate*" (italic supplied), meant that those owners must be allotted 90 percent of the available traffic. Eventually, Loide reduced the figure to 80 percent, but as the 9 nonnational lines felt this was wholly unrealistic in view of their past carryings, no agreement was reached. The meeting culminated in the resignation from the Conference of the Brazilian lines, followed shortly by the resignations of the other lines except Brodin, Columbus, Ivaran, Norton, Hopal, and North Pan-American Lines A/S (Nopal), the latter six being European lines.

Invitations later were extended by Loide to all of the conference lines (resignations had not yet become effective) to meet in its office and continue negotiations. On July 5, 1967, Loide, Netumar, E.L.M.A. (Argentine flag), Montemar (Uruguayan flag), Mooremack and Delta Steamship Lines, Inc. (an American Gulf line) signed a memorandum of intent to form a new conference to be known as IAFC. A formal agreement and a pooling guidelines agreement were executed on July 28, and filed on July 31, for the approval of this Commission (given numbers 9648 and 9649, respectively).[6] The European lines were not members of the new conference, and since Resolution 3022, effective August 10, 1967, excluded from the trade any carriers not members of IAFC, the European lines henceforth could not lift cargo northbound.

During the summer of 1967 the members of IAFC discussed the matter of coffee and cocoa pools, and on August 16 the lines serving the Atlantic ports of the United States signed a coffee agreement and a cocoa agreement and submitted them to this Commission for approval (Nos. 9649–A and 9649–C, respectively).[7] The European lines thereupon filed a complaint with the Commission against the parties to those agreements (docket No. 67–47) and also instituted actions against the parties in the U.S. District Court for the Southern District of New York for violation of the antitrust laws. The Commission itself instituted an investigation into the matter (docket No. 67–48).

[6] See footnote 8.
[7] See footnote 8.

In late September 1967, the European lines approached the CMM in an effort to have the entire problem reconsidered. On October 23 a meeting of the principals was called for the purpose of getting the lines to agree to a coffee pool. It was generally understood that the CMM would not permit a line to join IAFC unless it participated in a pool. Furthermore, the lines were informed that only the Brazilian lines would handle the negotiations with the European lines, and that if agreement was reached and then approved by the CMM, the other lines would be urged to adopt the results, nine agreements of various kinds were signed on October 28.

One of the agreements was a "proposal" by Loide and Netumar, acting on behalf of the CMM and in accordance with "other applicable Brazilian decrees," and was accepted by the European lines. As far as here pertinent, the main provisions of that agreement were: (1) the European lines would join IAFC; (2) the coffee and cocoa traffic was allotted in percentages for 6 years, split among the national flag lines as one group (even though Mooremack had not participated in the negotiations), the European lines as a second group, and E.L.M.A. and Montemar as a third group (like Mooremack, Montemar, and E.L.M.A. did not participate in the negotiations); and (3) the European lines were to be "guaranteed percentages [set forth in the document] of the total freight revenues derived from the carriage of all cargoes (excluding bulk cargoes) transported *from* United States Atlantic ports to Brazil" (italic supplied). A substantially similar document provided: (1) the Brazilian Government would immediately remove "all restrictions upon the transportation by [the individually named lines] of Brazilian export commodities to the United States of America"; and (2) the European lines would withdraw both the complaint before the Commission (docket No. 67–47) and the court antitrust actions. The proposals were not submitted to this Commission for approval, although they were approved by the CMM.

The loading ban against the European lines on northbound traffic was lifted, and these lines affixed their signatures on November 21–22 to an amended IAFC agreement. The document was filed on November 22 for the approval of this Commission, with the request that it be substituted for the original filing. Substitution was granted.[8] Hearing in docket No. 67–48 on the IAFC agreement, as amended, resulted in its conditional approval, on February 16, 1968, for a period of 18 months (11 FMC 332).

In the meantime, as previously noted, CMM Resolution 3131 of November 10, 1967, established new guidelines for flag participation in

[8] Agreements 9649, 9649–A, and 9649–C were withdrawn.

the Brazil import-export trades, limiting to 35 percent the traffic that could be handled by nonnational lines, to be reduced to 20 percent within 10 years. Some of the Brazilian lines were of the opinion that the resolution in effect vitiated the agreements of October 28. The resolution provided that all conferences, "upon the request of the authorized Brazilian shipowners, will proceed to adapt their agreements and cargo and freight pools" in accordance with the terms of the resolution. Failure to do so within 15 days of the official publication of the resolution "will imply the automatic cancellation of the Merchant Marine Commission's ratification of these agreements and cargo or freight pools, thus voiding their effect." November 29 was the deadline for Conference action.

A meeting of the Conference was held in Loide's offices on November 20. Other meetings followed, but up to November 29, the expiration date, no progress had been made. A stern warning from the CMM was read to the members on that day, exhorting them to come to terms. If, at midnight, nothing had been accomplished, Loide would "retire from these discussions, the Brazilian Government taking into its own hands the destiny of regularizing this traffic, abolishing, if necessary, all Freight Conferences and exercising the most rigorous control of shipments from Brazilian ports." The present pooling agreements were signed several minutes before midnight on the 29th, and were filed on December 11, 1967, for the approval of this Commission. Mooremack, Montemar, and E.L.M.A., who had not participated in the negotiations leading up to the agreements of October 28, as previously seen, were signatories to the two pooling agreements.

On the day before the pooling agreements were signed, the question of southbound compensation, incorporated in the October 28 agreements, was brought up in Loide's office by representatives of the European lines, and the commercial director of Loide stated that the commitments would be respected. Upon being asked why the subject matter could not be included in the coffee and cocoa pools, he replied that it was a southbound matter and would have to be handled separately. Within a week following November 29, there was a discussion with the commercial director in his office, but the parties were advised to come back inasmuch as the October 28 documents must be adapted to reflect the new 10-year period in the pooling agreements. A new document was prepared and signed at a meeting of the European principals in New York in April 1968. This document, containing the southbound guarantees and the new 10-year percentages, was delivered to Loide's president on April 9, with the request that it be studied, approved and signed by the CMM. The matter was again discussed in

June and later, but nothing happened. The presidency of Loide having changed subsequently, a meeting was held with the new official on January 14, 1969, and copies of the document were handed to him on January 17, he having stated that the original could not be found. The original letter was located, and the president promised to study the situation and contact the representatives. As of the time of the hearing (January 21–31), no word had been received from Loide, and as far as is known, no action has been taken as yet.

In a letter dated April 22, 1970, counsel for Loide advised the Commission:

> We have just been instructed by Loide to inform the Federal Maritime Commission that because a majority of the membership of the Inter-American Freight Conference opposes the pools, Loide now withdraws its support of both the coffee and cocoa pooling agreements on the 40–40–20 percentage basis.

This was followed by a letter from counsel for Netumar, stating:

> Please be advised that my client Companhie De Navegacao Maritima Netumar (Netumar) hereby withdraws its support of both the coffee and cocoa pooling agreements which are the subject of the above proceeding.

Finally, the Brazilian Government in May 1970, issued Resolution 3669, which divides coffee and cocoa shipments northbound for Brazil to the United States between Brazilian and United States flag vessels on a 50–50 basis. Brazil has advised that it will implement this decree by granting 40 percent to United States flag vessels; 40 percent to Brazilian flag vessels, and 20 percent to third flag carriers. Thus, it would appear that Brazil is unilaterally allocating the carriage of coffee between flags on the percentage basis which would have applied in the 10th year of the agreements, had they been approved.

Before dealing with what we conceive to be the basic difficulty presented by this case we think it useful to again allude briefly to the bedrock of our authority and responsibility under section 15.

Section 15 was enacted at a time when the economics of the steamship industry seemed inevitably to lead to anticompetitive cooperation between carriers and the ultimate cartelization of almost every trade in the foreign commerce of the United States.[9] The history of the conference system is far to well known to go into here,[10] but one point stands in need of remaking. The problems with which section 15 sought to deal were created by private (as opposed to governmental) arrangements between the lines themselves. A country's efforts to

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[9] Hearings before the House Committee on Merchant Marine and Fisheries *Investigation of Shipping Combinations*, 62d Cong., 2d sess. (1913).

[10] See report of Antitrust Subcommittee of House Committee on the Judiciary, H. Res. 56, 87th Cong., 2d sess., 5–17 (1962).

foster the well-being of its merchant fleet did not at that point in history take the form of overt governmental intervention designed to acquire a given percentage of a country's import and export traffic for carriage by its own lines. This was left to a later and different era. Thus, from its inception, section 15 presupposed an absence of overt governmental intervention into the otherwise private and economically motivated arrangements between competing steamship lines operating in this country's foreign trade. At the time of the Shipping Act's passage, the problems presented by "emerging nations" and such concepts as "national flag interest" and "bilateralism" were two world wars and almost half a century away.

These problems are now upon us, most acutely in our trades with the Latin American countries. These nations, for a variety of reasons, find themselves unable to garner for their nationalized and growing merchant fleets any substantial portion of their own export and import traffic—a situation not unknown to our own merchant marine. In recent years these countries have taken steps to secure for their merchant fleets a "predominant" share of their export and import traffic. It is the form which some of these efforts have taken that presents the overriding difficulties presented here.

A whole new set of concepts has arisen. The language of government-to-government dealings in foreign commerce now includes such terms as "emerging nations," "the national interest factor" and "bilateralism." [11] The "national interest factor" is that concept which would give to the exporting and importing countries at either end of the trade route a "predominate" share of the water-borne traffic between the two countries. "Bilateralism" is the shorthand expression used to denote the result of the application of the national interest factor. Ultimately, bilateralism would exclude third flag carriers, or so-called cross traders, from the trade, leaving all the traffic to be divided between the national flag lines.[12]

The first pooling agreements posing problems of bilateralism were at issue in *West Coast Line, Inc.* v. *Grace Line Inc.*, 3 FMB 586 (1951). There the Chilean Government, through a system of import licensing, sought to garner 50 percent of its ocean trade with the United States for its national flag carrier. Subsequently its aspirations were reduced to splitting 50 percent of the trade between Chilean and so-called "associated vessels—in practical effect the only vessels who could be

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[11] No attempt will be made here to define an "emerging nation" which seems to present much the same problem as attempts to define "time"—everybody is sure they know what it is until they are asked to explain.

[12] The national flag line is the line flying the flag of the country at either end of the bilateral trade route.

"associated" were those flying the U.S. flag. Two agreements were filed for approval, the effect of which was to split non-free list cargo [13] (about 50 percent of the total traffic) between United States and Chilean flag vessels. Complainants (third flag lines operating in the trade) sought access to the pools and were denied. They then charged that the pools, together with Chilean Governmental policies, were designed to achieve a monopoly for the national flag lines and thereby exclude all other carriers from the trade.

The Federal Maritime Board, our predecessor, approved the agreements. In doing so, the Board expressly found that the Chilean fleet was capable of carrying the proposed allocation and that:

> The evidence shows that the pooling agreements have been followed by a relaxation of Chilean import regulations in a manner which is deemed to be satisfactory to Grace [the U.S. flag carrier] and at the same time are not shown to have resulted in reducing the participation of complainants in the trades nor are they shown to have operated in other respects to the detriment or prejudice of complaints.

A later case, *Alcoa S.S. Co., Inc.* v. *Cia Anonima Venezolana*, 7 FMC 345 (1962), involved what ultimately took the form of "equal access agreements." By a series of decrees the Government of Venezuela sought to insure that a greater share of the traffic between the United States and that country was carried by its national flag line Cia Anonima Venezolana (CAVN). Grace Line, the dominant U.S. flag carrier in the trade, sought to counteract these measures by requesting the issuance of rules and regulations under section 19(1)(b) of the Merchant Marine Act of 1920 (46 U.S.C. 876).[14] These regulations were never issued, but they were communicated to the Venezuelan Government by the State Department.

Under Public Resolution 17, 73d Congress, when loans are made by the Export-Import Bank to foster the exportation of agricultural or other commodities, provision shall be made that all such commodities shall be carried exclusively in U.S. flag vessels unless the Maritime Administration grants waivers.[15] In a statement of policy the Maritime Administration announced that it would issue such waivers on up to 50 percent of such cargo to vessels of the recipient nation, provided that nation accorded U.S. flag vessels "parity of treatment."

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[13] Chile established a "free list" of cargoes which were not subject to the licensing system and thus could be carried by anyone.

[14] Section 19 authorizes the Commission to make rules and regulations which affect shipping in the foreign trade, not in conflict with law, in order to adjust or meet conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally, and which arise out of or result from foreign laws, rules or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country.

[15] These cargoes are generally known as "Government controlled cargoes."

Under the system of Venezuelan decrees, Grace Line was not accorded parity of treatment. Subsequently, Grace became an "associated" line which association made it eligible to carry cargoes otherwise reserved to Venezuelan lines.

By way of formalizing the situation, Grace and CAVN entered into a pooling agreement to cover the "freighting operations" southbound from the United States to Venezuela. The third flag lines in the trade complained that the agreement would prefer Grace and CAVN over them to the extent that the agreement would be unjustly discriminatory as between ports, unfair as between carriers and detrimental to the commerce of the United States.

In approving the agreement we, much like the Board in the *West Coast Line* case, supra, found that even if the third flag lines' predictions about the percentage of the total trade to be carried by Grace and CAVN were correct, that percentage would bear a reasonable relationship to their past operating experience in the trade. We further said:

> * * * This proceeding lies under section 15 of the Shipping Act, 1916. This section sets out standards for approval and disapproval according to its terms. We apply those standards and no others. We are not concerned here with any promotional provision of law and our action is not affected by and does not affect decisions under section 19 of the Merchant Marine Act of 1920.
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> We are wholly unable to conclude that the reasonably probable operations under the agreement will, or are likely to, cause Alcoa, Netherlands or Viking [third flag lines] to withdraw from the trade or any part of it * * * or to take other action which might be considered a detriment to the commerce of the United States, or contrary to the public interest.

At this point the efforts of the Latin American countries to gain a predominate share of the traffic had centered around the consummation of so-called equal access agreements with the United States. These agreements generally sought to insure that each national flag line had equal access to the carriage of Government controlled cargoes. These agreements were normally between the cognizant agency of the particular Latin American country and our Maritime Administration and Department of State. But by 1960, the efforts of Brazil to achieve bilateralism had resulted in a different kind of pooling agreement.

In *Nopal* v. *Moore-McCormack Lines*, 8 FMC 213 (1964), the Commission had before it agreement 9040, which purported to "pool" the carriage of coffee from Brazil to United States Gulf and Atlantic ports. The agreement was the result of Brazil's long effort to secure for its national flag line (Loide) either 50 percent of the coffee carryings or a share of the revenue therefrom.[16] While the agreement covered the carriage of coffee to both Atlantic and Gulf ports in the United States, the complainant, Nopal, was a member of only the Gulf pool, and the case involved the agreement only as it applied to U.S. Gulf ports. The main bone of contention was the use of the so-called national interest factor in allocating quotas under the pool. Under national interest, Brazil apparently felt that because it was the exporting country it was entitled to greater preferment than even the other national flag lines. In any event, Nopal alleged that the agreement was unjustly discriminatory and unfair as between carriers in violation of sections 15 and 16 of the act and that it had signed the agreement because under SUMOC 202 (see p. 7, supra) the only alternative was complete exclusion from the trade. In refusing to approve the agreement we had the following to say:

Every maritime nation in the world is, of course, intensely and legitimately interested in the economic well-being of its merchant marine. Thus, national interest plays an important part in the overall policies of the maritime nations. But it is of overriding importance to properly distinguish between promotional policies and regulatory policies. The Commission, of course, is a regulatory agency charged by Congress with the administration of this country's regulatory policy as expressed in the Shipping Act, 1916. And, while as an arm of the U.S. Government we are of course interested in the growth and economic well-being of our own merchant marine, we are bound by the Shipping Act to scrupulously insure that all carriers regardless of flag are accorded equal treatment under the laws we administer.

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The Shipping Act, 1916, imposes no burden and grants no privilege on the basis of a carrier's nationality. To the contrary it seeks to insure that all carriers operating in our foreign commerce regardless of flag do so as equals. Thus, we are prohibited under the law from approving such an agreement just as we would be prohibited from using our regulatory powers to attempt to insure that U.S. flag carriers received a given percentage of this country's export trades. We think it clear that a pooling agreement which allocates percentages or any portions thereof on the basis of flag or national interest is discriminatory as between carriers within the meaning of section 15 [8 FMC at 229].[17]

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[16] While the events leading to agreement 9040 are far too extensive and complex to repeat here, they do provide an interesting and informative backdrop to the present case. (See our opinion in *Nopal*, supra, pp. 213–227.) Brazil's insistence on 50 percent of the coffee carryings was made in the face of the established fact that Loide could not possibly carry that percentage, and had in fact proved unable to carry its previously allocated percentage of 19.41 percent under the predecessor pool, agreement 8505–1. Recognizing this, Loide eventually agreed to a reduction of its share, but in no event would it accept a lower percentage than complainant Nopal, a third flag carrier whose past actual carryings had averaged some 32 percent.

[17] For an earlier expression of this concept see *Alleged Rebates of Mitsui S.S. Co. Ltd.*, 7 FMC 248 (1962).

We thus arrive at the present case and we will now attempt to express the principles which we are bound by law to apply to future agreements of this kind when determining whether to approve, disapprove or modify them under section 15.

Although we have not yet alluded to the fact, the record establishes that the third flag lines signed the agreement at issue here only under "duress." These lines could either accept the quotas granted to them by the Government of Brazil or carry no coffee or cocoa at all. This accounts for the strange situation we have here wherein a party to an agrement whose signature thereon would ostensibly signify his accord with the agreement's provisions nevertheless protests its approval when it is filed with us. In such a situation we have to agree with the Department of Justice that where a party gives its "assent" to an agreement to avoid governmental exclusion from the trade, there is ab initio no "agreement" of the kind over which we may exercise jurisdiction under section 15. There is simply no room under section 15 for the approval of a pooling agreement which embodies discriminatory or unfair quotas dictated by governmental law regulation, decree, ukase or fiat.

Pooling agreements are the ultimate in anticompetitive combinations. Traditionally, they are proposed when a given trade is disrupted by real or suspicioned malpractices—usually rebating—on the part of carriers in the trade. It is thought that by assigning each carrier in the trade a percentage of the traffic which bears some reasonable relationship to his past carryings and by penalizing carriage over that quota, the incentive to rebate is removed since the rebate is designed to secure more business. Here the incentive to agree is obvious—the elimination of unfair and ruinous competition.[18] Thus, in theory at least everyone benefits from such a pool. The injection of national interest, however, only further disrupts a trade since its sole aim is the preferment of one group of carriers (the national flag lines) over another group of carriers (the other flag lines). National interest is not grounded on economic or commercial reality; it pays no deference to shipper desires and does not take into account the efficiency of the operator or the worth of the service he renders. In short, national interest seeks to nullify virtually all of the only valid considerations which are relevant to our deliberations under section 15. All of which inevitably destroys that equality of treatment, regardless of flag, upon which our regulatory laws are based.

[18] We have had occasion to note, however, that "* * * an effective system of self-policing rather than the complete elimination of all competition is the solution to rumored malpractices and alleged rebates." (8 FMC 232.)

Lest we be thought out of sympathy with the efforts of our neighbors to the south to secure for themselves a greater share of their waterborne commerce, let us say that just as we are ever mindful of the plight of our own merchant marine, we can easily understand the concern they have for theirs. But it must always be remembered that we are charged with the impartial administration of a regulatory statute in the enactment of which Congress has determined that the foreign commerce of the United States is best served by treating as equals all who participate in that commerce. We are not free, whatever our inclination, to alter that conclusion. Just as we are not at liberty to "promote" our own merchant marine we cannot, in the guise of approving agreements under section 15 acquiesce in the efforts of other nations to do the same when those efforts run counter to the laws we administer. Thus, so long as any nation attempts to utilize an "agreement" under section 15 as vehicle for the enhancement of its own national fleet to the detriment of other carriers serving our foreign commerce, we shall, whatever our individual views, be compelled to disapprove those agreements.

Bilateralism, if it is to become the maritime policy of this country, must do so as a result of efforts other than our own. Our position as a quasi-judicial agency charged with the administration of a regulatory statute precludes us from participating in the kind of government-to-government negotiations which lead to the adoption of bilateralism as a national policy. We must be ever mindful of our judicial responsibilities to the people we regulate, and one of the most important of these responsibilities is that of making our determinations in controversial cases under section 15 only on the record after an opportunity for hearing has been afforded to all who would be affected by our decision. We are simply not free to negotiate with other governments on matters which may require us later to sit in judgment on their validity under the Shipping Act. Our role in cases such as this is confined to applying the criteria of section 15 to agreements between persons subject to our jurisdiction and taking such action as is called for under the applicable criteria.

Since, as we have already noted, our jurisdiction fails for lack of an agreement upon which we can act, this proceeding is hereby discontinued.

Commissioner JAMES V. DAY, concurring and dissenting:

The subject agreements have been repudiated and our jurisdiction has hence terminated.

However, giving parties some guidelines for formulating future agreements is worthwhile.

Pursuant to section 15 of the Shipping Act we would disapprove a pooling agreement if it is unjustly discriminatory or unfair as between carriers, operates to the detriment of our commerce, is contrary to the public interest, or violates some statutory provision.

In deciding, for instance, if a pooling agreement is "contrary to the public interest" we would recognize that such an agreement is inherently difficult to justify unless it is required by a serious transportation need, or necessary to secure important public benefits, (etc.).[19] Just what constitutes "serious transportation need" (etc.) depends on the attendant facts and circumstances.[20]

The fact that "national interest" (national flag preference) was not envisioned by the original drafters of section 15 as "synonymous with public interest" or "serious transportation need" (etc.) does not mean that such a factor (or any other new element) could not be included among the justifications for any agreement before us for approval.

Let us not be overwhelmed by any sort of "bilateral" bogey. Envisioning a concept in its ultimate extreme is no reason not to countenance a reasonable application of a principle.[21] Granting preferred status to national flag carriers solely on the basis of the flag flown is, of course, not a valid factor for determining the pool percentages in an agreement.[22] But some preference for national flag carriers might possibly be permitted as providing a better chance for lower rates, the development or maintenance of more dependable and efficient services, and general trade stability—according to the circumstances! [23]

Nor should we here suggest an agreement should be automatically barred merely because a flag preference principle was urged by government decrees rather than carrier demands in formulating the provisions of the agreement. The real test is whether the agreement is unjustly discriminatory, unfair, adverse to our commerce, or against our public interest.

In conclusion, let us emphasize that all such guidelines as here set

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[19] By its very nature a pooling agreement is a considerable restraint on the actions of the parties thereto which runs against the very grain of our antitrust laws. See *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238, 244 (1968). Hence we require that serious need for such arrangement be shown.

[20] As the majority would say—"time, circumstances, and the facts of the individual case can and probably will alter * * *" a situation.

[21] "Ultimately, bilateralism would exclude third flag carriers, or so-called cross traders, from the trade, leaving all the traffic to be divided between the national flag lines." Majority opinion at p. 68.

[22] As we so said in *Nopal* v. *Moore-McCormack*, 8 FMC 213, 229 (1964).

[23] I would not want parties to possible future agreements to infer that any "national interest" aspect would undoubtedly kill the agreement when submitted for approval. How can we say that "national interest" inevitably destroys the fairness of treatment that carriers receive under our laws? We must judge on the facts and projections as and when presented to us.

forth should be correctly read for what they really are—direction signposts and not unalterable restrictions.

Commissioner GEORGE H. HEARN, *concurring and dissenting:*

I concur in the conclusion of the majority that there is no agreement before us which is subject to our jurisdiction. Also, I agree with the majority's desire to offer some guidelines for subsequent action in the trade. However, I depart from the majority report in the nature of the guidelines. The administrative process, by its nature, may sometimes seem to move slowly and to react rather than act. Consequently, we should demonstrate that our laws and procedures can be forward looking and made flexible enough to adapt to changed conditions.

With no agreement to act upon, our primary concern should be how this case can help overcome the undesirable conditions prevailing in the trade. We should extend our efforts toward preventing events from continuing along their present course of confusion, instability, and animosity. Stabilization of the trade will serve the best interests of the parties and the commerce of the countries involved. It is to that end that I offer these comments. Within the limits of the Commission's authority and discretion to offer guidelines, I think it should be made known what action this Commission may be prepared to take to help resolve the underlying conflicts and issues of this case.

We cannot, of course, offer iron clad guidelines or prejudge future cases. Conditions and circumstances can change rapidly. In fact, our experience under the shipping statutes is indicative of the radical changes which have occurred in ocean commerce just in the last few years. Thus we should strike a balance here between avoiding formulation of strict guidelines and adapting our statutory provisions to the exigencies of current times. Under appropriate circumstances and conditions, what may be unlawful conduct in one instance may be lawful in another; and what may not have been approvable under section 15 yesterday, may be approvable tomorrow. And it should be added that activity which this Commission may be powerless to approve under section 15 may be permissible or noninterdictable when such approval is not sought.

Thus, when agreements proffered for approval under section 15 are entered into by carriers at the insistence (by decree or otherwise) of any nation, we should be wary lest there result national flag aggrandizement to the unlawful detriment of our or other flag carriers. In fact, it may well be that agreements entered into under threat of exclusion from the trade are not approvable under section 15. It does not follow, however, that the same results cannot be achieved in other ways, or that this Commission can or should tell any carrier that it cannot or should not agree to a limitation on its service in return for continued participation in the trade.

We can offer no rule as to the proper role of "national interest" in particular trades. And we cannot say that implementation of a "national interest factor" is generally good or bad. Many countries, including our own, utilize it in one form or another. When the principle is held above all other considerations, it can be destructive of efficient and reliable ocean service. But national interest when properly utilized can produce lower rates, fully laden ships, regular service and overall stability; and this can occur even when the nation at one end of a trade route tries to exercise considerable control over it. That such stabilization or rationalization may be achieved also by decree should not bring condemnation from our system which accomplishes things differently.

Consequently, we should not now decide when the implementation of national interest may render an agreement or other action unapprovable. I would say only that when a nation seeks to promote its merchant marine in a manner which contravenes the principles and provisions of fairness of our shipping laws, we cannot give such action our stamp of approval. However, when a group of carriers freely enter into an agreement we should not deny approval solely because the national interest of another country is a key factor of the agreement.

I consider it very unfortunate that the agreements before us did not survive to this point in the decisional process. I find no factor inherent in such pools or these particular ones which would render them unapprovable if they were still before us. And further, based upon my present knowledge of the situation, I would approve the pools were they still before the Commission. Such approval would presuppose, of course, that all the original parties to the pools remained willing signatories. If carriers are agreeable to certain conditions, we should not disapprove their agreement because we think they would be better off with another or none at all, or because the pools resulted from such factors as negotiations between governments and carriers. If the commerce of the United States is not adversely affected, such action may not be violative of our laws and may be approvable. A very apropos phrase is: There is more than one way to skin a cat. If the carriers and governments do not solve their trade problems one way, they will do so another way. And the result then may be even more unsavory to us.

What I had hoped for in this case, which has taken so long to reach this stage, was a settlement of the problems in the trade. The pools might have achieved that result; or perhaps better pools can be written which are more acceptable to all parties. It may be noted that pools have been entered into in the southbound trade between the United States and Brazil. The decision as to them is pending so there is nothing I can say on their merits. Suffice it to say that the pending southbound pools and the government action taken by Brazil as to the northbound trade may be indicative of the future course of events. I am loath to let speculation be my guide; but I urge this Commission to recognize the practicalities of the situation. We can no longer sit atop our perch of platitudes and espouse principles which have lost their relevance. In equal measure must the participants in ocean commerce—especially shippers and carriers—realize that they cannot forestall the changes in technology and politics which are radically altering traditional rights and prerogatives.

In summary, I think the parties to this case particularly, and the shipping industry generally, should be able to leave with something more than an abandoned agreement. We should indicate that an agreement willingly entered into by the carriers and not unlawfully detrimental to our commerce would have been approved if not otherwise contrary to law. At the very least we should offer the parties an indication that they should not despair of receiving a positive response from this Commission and that whatever solutions they may arrive at will be considered in light of the guidelines I have set forth above.

JOSEPH C. POLKING,
Assistant to the Secretary.

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 421

RAYTHEON CO. ANDOVER

v.

STATES MARINE-ISTHMIAN AGENCY, INC.

September 28, 1970

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

No exceptions having been taken to the initial decision of the examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on September 28, 1970.

It is ordered, That States Marine-Isthmian Agency, Inc., is authorized to refund to Raytheon Co., Andover the amount of $1,372.36.

It is further ordered, That applicant publish promptly in the appropriate tariff the following notice:

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 421, that, effective March 1, 1969 the heavy lift provision of the Hawk Missile Project Rate—Jeddah, for purposes of refunds or waiver of freight charges on any shipments which may have been shipped during the period from March 1, 1969 to June 2, 1969 is: 'Heavy Lift shall commence for pieces or packages in excess of five (5) long tons; forty percent (40%) reduction in Heavy Lift Charges,' subject to all other applicable rules, regulations, terms, and conditions of the said rate and this tariff."

It is further ordered, That refund shall be made within 30 days of this notice and States Marine-Isthmian Agency, Inc. shall within 5 days thereafter notify the Commission of the date of the refund and of the manner in which payment has been made.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 421

RAYTHEON CO. ANDOVER

v.

STATES MARINE-ISTHMIAN AGENCY, INC.

States Marine-Isthmian Agency, Inc., permitted to refund freight charges on heavy lifts of specially fabricated parts for Saudi Arabia Hawk Program from New York, N.Y., to Jeddah, Saudi Arabia.

William L. Hamm for applicant.

INITIAL DECISION OF RICHARD M. HARTSOCK, PRESIDING EXAMINER [1]

States Marine-Isthmian Agency, Inc. (States Marine, applicant), a member of the U.S. Atlantic and Gulf-Red Sea and Gulf of Aden Rate Agreement, has filed an application for permission to refund $1,372.36, the entire freight charges collected from Raytheon Co., Andover, for heavy lift services in the movement of 439,216 pounds, 35,594 cubic feet of specially fabricated parts for the Saudi Arabia Hawk (missile) program from New York, N.Y., to Jeddah, Saudi Arabia, on April 11, 1969, in applicant's vessel SS *Steel Fabricator*. The 34 heavy lifts involved individual lifts of 5 tons or less.

The U.S. Atlantic and Gulf-Red Sea and Gulf of Aden Rate Agreement is a steamship freight conference duly organized and existing pursuant to section 15 of the Shipping Act, 1916, as approved by the Commission. As originally constituted, the geographical scope of the agreement did not include the Port of Jeddah. Subsequently members agreed to amend the scope of agreement to include Jeddah and this amendment was approved by the Commission on October 10, 1968. However, prior to Commission approval for the inclusion of Jeddah, the members of the conference including applicant here had on file with the Commission a project rate for material, equipment and supplies destined to Jeddah for the construction and erection of a missile defense system. As part of the project rate, an exemption was given

[1] This decision became the decision of the Commission Sept. 28, 1970.

from heavy lift charges for lifts which weighed up to and including 5 tons.

At a rate agreement meeting held on February 18, 1969, the members of the conference agreed to publish a project rate in the rate agreement tariff for the same missile defense system on the same terms and conditions as had been in effect for the individual lines. Unaware of the fact that the individual member lines' filings had contained an exemption for heavy lifts up to and including 5 tons, the conference staff proceeded to publish a reduction of 40 percent on all heavy lift charges. The rate agreement tariff filed lists heavy lift charges beginning at two long tons. The oversight here resulted in a 40 percent reduction on heavy lift charges between 2 and 5 tons rather than a complete exemption from heavy lift charges up to 5 tons. The project rate was filed with the Commission with an effective date of March 1, 1969. Prior to this date, on October 15, 1968, the rate agreement had put into effect a general increase on a level 10 percent higher than that which had been in effect for the individual lines both as applicable to rates and heavy lift charges. On February 19, 1969, the conference advised Behring Shipping, the freight forwarder for Raytheon, of the establishment by the conference of the project rate. In so advising the conference stated that there would be a 40 percent reduction in heavy lift rates "subject to usual exceptions." While the phrase "usual exceptions" was intended by the conference to refer to specific commodities, it was nevertheless subject to the interpretation that the exemption from heavy lift charges up to 5 tons was a "usual exception."

Subsequent to the April 11, 1969, shipment of the involved commodities the shipper realized that heavy lift charges had not been accorded full exemption for lifts under 5 tons but only on a 40 percent reduction. The conference agreed to exempt the project shipments from heavy lift charges up to 5 tons but had no means of correcting the tariff retroactively.

Public Law 90–928, 75 Stat. 764, authorizes the Commission to permit a common carrier by water in foreign commerce to refund a portion of the freight charges collected from a shipper where there is "an error due to inadvertence in failing to file a new tariff." In the circumstances here it is found that the conference of which applicant is a member under its existing procedures would have promptly filed a new rate providing exemptions on heavy lift charges up to and including 5 tons to be used in the Saudi Arabian Hawk (missile) program had they been aware of the exemptions in heavy lift charges up to and including 5 tons as filed by individual members of the rate agreement. It is further found that the conference's staff's inadvertence in providing exemption from heavy lift charges up to and including 5 tons in the conference agreement was an error which prevented the timely filing of a new rate.

The application was timely filed and no other shipments of the same or similar commodities moved on conference vessels during approximately the same time as the shipment here involved. There are no special docket applications or other proceedings involving the same rate situation now pending.

It appearing that the application involves a situation within the purview of Public Law 90-928, and good cause appearing, the applicant is permitted to refund to the shipper the sum of $1,372.36. The notice referred to in the statute shall be published in the conference tariff. The refund will be effectuated within 30 days after publication of the notice and within 5 days thereafter applicant shall notify the Commission of the date of the refund and the manner in which payment was made.

RICHARD M. HARTSOCK,
Presiding Examiner.

WASHINGTON, D.C., *September 8, 1970.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 70–17

AMERICAN EXPORT ISBRANDTSEN LINES, INC., ORDER TO SHOW CAUSE

Decided September 28, 1970

Agreement concerning operating differential subsidies for military carryings as agreed to during an operating differential subsidy hearing before the Maritime Subsidy Board, Maritime Administration, provides at least for a cooperative working arrangement; constitutes a special privilege or advantage; and controls or regulates competition, and is thereby subject to filing and approval requirements under section 15 of the Shipping Act, 1916.

Ronald A. Capone, and *Stuart S. Dye*, United States Lines, Inc.
Robert N. Kharasch, States Marine Lines.
Joseph A. Klausner, American Maritime Association.
Richard W. Kurrus, and *Howard A. Levy*, American Export Isbrandtsen Lines, Inc.
Ronald D. Lee, *Donald J. Brunner*, hearing counsel.

REPORT

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

On December 17, 1969, American Export Isbrandtsen Lines, Inc. (AEIL) filed with the Federal Maritime Commission a petition for a declaratory order requesting that the Commission declare an existing stipulation between United States Lines (USL), States Marine Lines (SML), and the American Maritime Association (AMA) to be an agreement within the scope of section 15 of the Shipping Act, 1916. The Commission subsequently denied the petition for a declaratory order on March 26, 1970, and simultaneously instituted this proceeding by order to show cause to determine whether the stipulation between USL, SML, and AMA is an agreement which must be filed with and approved by the Commission under section 15 of the Shipping Act, 1916. USL, SML, and AMA were made respondents in this proceeding and AEIL was designated petitioner. Hearing counsel also entered an appearance. Oral argument before the Commission was held on June 9, 1970.

FACTS

The Merchant Marine Act, 1936 (46 U.S.C. 1101 et seq.), provides under title VI for the payment of operating differential subsidies (ODS) to contracting U.S. flag steamship lines operating U.S. flag vessels on essential trade routes under terms, conditions and for the purposes prescribed in the act. Such subsidies are payable by the Maritime Subsidy Board under the Maritime Administration and are designed to equalize U.S. flag operating costs of the recipient line with foreign flag costs. Pursuant to section 605(c) of the 1936 act (46 U.S.C. 1175(c)), a statutory hearing is required prior to the execution of a subsidy contract, at which opponents of the applicant may raise a number of issues bearing on the justification for awarding the subsidy.

In accordance with the above act, USL in September 1969, applied to the Subsidy Board for the continuation of ODS payments on its vessels serving essential trade route No. 12. The Subsidy Board ordered a public hearing on the application in a proceeding designated MSB docket No. S–241.[1]

Subsequently, SML and AMA as well as other parties, including petitioner AEIL, intervened in docket S–241 in opposition to the grant of subsidy. Both SML, as an unsubsidized U.S. flag service on trade route 12, and the AMA, as an association whose membership includes unsubsidized American flag operators, objected to the application only insofar as it encompassed operating differential subsidies for the carriage of U.S. military and other preferential cargo. Military cargo is reserved by law exclusively for U.S. flag ships, and therefore not subject to foreign competition. For other such cargo, the preference is not less than 50 percent, section 901(b) Merchant Marine Act, 1936, 46 U.S.C.A. 1241(b).

During the hearing before the examiner in Maritime Administration docket No. S–241 (December 12, 1969), USL, SML, and AMA entered into the following stipulation:

> (1) United States Lines does not seek, nor will it accept operating differential subsidy for military carryings whether on break

[1] United States Lines, Inc., application for a new 2 year operating differential subsidy agreement upon the termination of contract No. FMB–19 on Dec. 31. 1969. on trade route No. 12.

bulk or containerships. It will seek to have included in any new operating differential subsidy agreement granted as a result of the pending application a formula for abatement of operating differential subsidy similar to that for domestic intercoastal service.

(2) On the basis of the first paragraph, the AMA and States Marine Lines withdraw from this proceeding with respect to ODS for both break bulk and containership service.

(3) Also on the basis of (1) above, the first paragraph, neither AMA nor States Marine Lines will oppose any use by United States Lines of any nonsubsidized vessel in any nonsubsidized service except that both reserve the right to oppose charter of any CDS built or priced vessel to the military.

(4) States Marine Lines and AMA may continue to participate in docket S-244.

SML and AMA then withdrew from further participation in docket S-241. Petitioner AEIL (a subsidized common carrier by water which competes for military cargo with USL, SML, and members of AMA in trade Route 12) continued to oppose all aspects of USL's application for subsidy in docket S-241 and initiated the petition for declaratory order.

Discussion and Conclusions

The issue before us is whether the above stipulation constitutes a section 15 agreement subject to the filing and approval requirements of the Shipping Act, 1916. It is our opinion that the agreement is subject to section 15 and Commission approval.

That section provides that there be filed with the Commission "every agreement" among persons subject to the act:

> * * * fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential or cooperative working arrangement.[2]

On the basis of a literal interpretation of this language, any agreement falling within any one of the seven categories of activity enumerated therein would be subject to filing and approval, notwithstanding the degree or extent of its involvement or the subjective intent of the parties in entering into the agreement. In 1968 the Supreme Court in *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968), held, in accordance

[2] 46 U.S.C. sec. 814.

with the literal construction, that "Section 15 requires filing of 'every agreement' in any of seven categories * * *" [3]

The legislative history of the language supports its literal interpretation. The following history from the Alexander Report, 1914, confirms the congressional purpose to insure broad regulation and control of agreements between and affecting members of the shipping industry:

Nearly all the steamship line representatives * * * expressed themselves as not opposed to government supervision * * * and approval of all agreements or arrangements which steamship lines may have entered into with other steamship lines, with shippers, or with other carriers and transportation agencies. On the other hand, the shippers who appeared as witnesses * * * were in the great majority of instances favorable to a comprehensive system of government supervision * * * [and] the approval of contracts, agreements, and arrangements, and the general supervision of all conditions of water transportation which vitally affect the interests of shippers.

* * * * * * *

[Recommendation] That all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements hereinafter referred to, be required to file for approval * * * a copy of all written agreements (or a complete memorandum if the understanding or agreement is oral) entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade, or (2) with American shippers, railroads or other transportation agencies.[4]

The Commission itself has spoken in conformity with the Alexander Report when in docket No. 948 the Commission concluded:

This philosophy took shape and was enacted as section 15 of the Shipping Act, 1916, confiding to the agency administering the Act extensive powers of supervision and control as the condition precedent to any of the concerted activities covered by the section's rather all-inclusive language.

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Only recently in Public Law 87–346 (75 Stat. 762), amending the Shipping Act, 1916, Congress has reasserted the original philosophy that exemptions from the antitrust laws must be accompanied by effective governmental supervision and control of the concerted activities covered by section 15.[5]

Again in docket 882 the Commission elaborated on the comprehensive nature of section 15 wherein it said:

Congress was fully aware, furthermore, that its plan for "effective government supervision" would be largely frustrated unless the [Shipping] Act were made broadly applicable to *all* agreements, understandings and arrangements includ-

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[3] *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 275, n 23 (1968).

[4] House Committee on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations, H.R. Doc. No. 803, 63d Cong., 2d sess. (1914), p. 418, 419–20.

[5] *In Re: Pacific Coast European Conference*, 7 FMC 27, 32–35 (1961).

ing particularly the kind of informal arrangement which existed among the respondents here. [emphasis added]

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* * * The language of the section thus clearly embraces every agreement, understanding, or arrangement, whether formal or informal, written or oral, detailed or general.[6]

In 1968, the Supreme Court in *Volkswagenwerk* confirmed the above analysis of the legislative history:

Nothing in the legislative history suggests that Congress, in enacting § 15 of the Act, meant to do less than follow this recommenadtion cited [cited above] of the Alexander Report and subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry.[7]

Therefore, under the facts before us, the predominant question is whether the stipulation infringes upon any of the areas set forth in section 15 as requiring Commission approval.

The subject agreement actually consists of four promises between USL, AMA, and SML. USL, for its part, promised that it (1) would not seek or accept operating differential subsidy for military carryings whether on break bulk or containership, and (2) would seek to have included in any new operating differential subsidy agreement granted as a result of the pending application of a formula for abatement of operating differential subsidy similar to that for domestic intercoastal service. SML and AMA, for their part, agreed that they (3) would withdraw from docket No. S–241 with respect to operating differential subsidy for both break bulk and containership service, and (4) would not oppose any use by USL of any nonsubsidized vessel in any nonsubsidized service.

In our opinion the promises as enumerated above collectively cause the stipulation to be an agreement which, at least, provides for an exclusive, preferential, or cooperative working arrangement; constitutes a special privilege or advantage; and controls, regulates, prevents, or destroys competition.

Without question we have a mutual agreement or understanding between USL, SML, and AMA concerning operating differential subsidy for military carryings. The factors of continuing and coordination of effort are present. The objective is the elimination of USL's receipt of ODS for its military carryings. The parties through cooperative arrangements attain that objective, and thereby are engaged in a section 15 working arrangement.

In addition, AMA and SML's promise not to oppose any use by USL of any nonsubsidized vessel in any subsidized service accords

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[6] *Unapproved section 15 agreements—South African Trade,* 7 FMC 159, 189–191 (1962)
[7] *Volkswagenwerk* v. *FMC,* 390 U.S. 261, 276 (1968).

USL a "special privilege or advantage" which is not currently available to others. The value of that privilege or its future availability to others is not in issue. The purpose of section 15 is simply to place before the Commission information which the Commission may review and analyze to determine if the actions are in compliance with the rest of section 15 and the act in general.[8]

Finally, the subject agreement comes within the provision on competition. That provision speaks to those situations which have not merely a limiting effect on competition, but an effect in general. USL's promise that it will not seek or accept operating differential subsidy for military carryings "affects" competition for military cargoes in the trade between the U.S. East Coast and the Far East. Under the agreement the competitive positions of both subsidized and unsubsidized carriers would be restructured to some extent. The agreement would have an impact on USL's rates for carrying military cargo. Also, to the extent the agreement would direct the flow of military cargo away from USL and to its competitors, it would affect the volume and character of the cargo carried by USL and their competitors. Quite possibly USL will carry less military cargo than under prior operations and will be inclined to make up the loss by increasing its carriage of commercial cargo.

The exact effect of USL's promise cannot be predicted. However, what USL has foregone has a value and is an element of its competitive viability. Thus the agreement is within the scope of section 15.

The respondents contend that section 15 applies only to those agreements so enumerated which are restrictive, anticompetitive operating arrangements. In their opinion, both the literal language and legislative history reflect that the purpose of section 15 was to insure that the Commission would have an opportunity to approve or disapprove any anticompetitive operations or devices employed by persons subject to the act. Though the agreement in question can be said to have competitive consequences as explained above, to so narrowly interpret section 15 is neither in acccrdance with the literal language of the section nor recent judicial interpretations. As the Supreme Court said in *Volkswagenwerk:* "To limit section 15 to agreements that 'affect competition' * * * simply does not square with the structure of the statute."[9]

The respondents further allege that the stipulation is constitutionally exempt from Commission control or interference on the basis

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[8] *Oranje Line, et al.* v. *Anchor Line Ltd., et al.,* 6 FMB 199, 208–209 (1961).

[9] *Volkswagenwerk,* 390 U.S. 261, 275 (1968); see also *Marine Space Enclosures, Inc.* v. *FMC,* No. 22936 (D.C. Cir., July 30, 1969); *Port of Boston Marine Terminal Association* v. *Boston Shipping Association,* 420 F. 2d 419 (1st Cir. 1970).

that such stipulation is joint or several representation to the government. SML and USL argue that section 15 cannot be constitutionally read to apply to an "agreement" (by way of settlement or otherwise) which involves nothing but "the making of representations to the Government—the speaking of words to the Congress or any agency." As authority for their position, respondents cite *Eastern Railroads Presidents' Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965); and *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963). These cases advance the proposition that concerted political activity designed to influence and promote valid governmental action is a constitutional right exempt from any government control or interference. The respondents, therefore, equate the taking of certain positions before a government agency, i.e. that SML and AMA will stop litigating and that USL will stop asking for something, with protected concerted political activity designed to influence governmental action.

Their argument of constitutionally protected "representations to government" under the facts of the subject proceeding is tenuous at best. The cases cited as precedent by the respondents all speak in some form either to the constitutional right to petition or to inform representatives in government of specific desires with respect to the passage or enforcement of laws or, as in the *N.A.A.C.P.* case, to the vindication of constitutionally guaranteed civil rights through litigation. The object and emphasis is on protecting concerted political activity designed to influence and promote valid governmental action.

Notwithstanding respondents' assertions, the subject stipulation does not involve the "concerted action" envisioned in the constitutional right to petition the government or its representatives. Neither does it involve the right to joint together for the purposes of obtaining judicial redress of constitutionally guaranteed rights. It involves instead individual understandings or agreements which were not submitted to the government or any official with any specific intent of exerting influence to obtain an objective from the government. Respondents' attempt to refer to the stipulation as the mere "making of representations to government" results in an exercise of semantics which losses sight of the intent of the original grant of constitutional protection.

Respondents also contend that the subject stipulation involves only matters within the sole jurisdiction of the Maritime Subsidy Board—that is the granting or denial of a subsidy and the conclusion of Maritime Administration docket No. S–241. Respondents argue that, under these facts, settlements of issues by agreement are within the exclusive province of the Maritime Subsidy Board under the Merchant Marine

Act of 1936 and are governed by the Board's rules. Specifically cited are subpart J, section 201.103, "Opportunity for Agreement of Parties and Settlement of Case," of the rules of practice and procedure of the Maritime Administration which provides for "submission to and consideration by the presiding officer of offers of settlement or proposals of adjustment in all hearings" and the Administrative Procedure Act, 5 U.S.C. 554(c) requiring such a provision of all agencies.

At the same time, however, the respondents agree with petitioner and hearing counsel that a Subsidy Board settlement of litigation incorporating an agreement intended to be within the scope of the Shipping Act, 1916, would not be immune from review and approval by the Federal Maritime Commission. The distinction they make is that the subject stipulation, as part of a settlement of litigation before the Subsidy Board, deals exclusively with litigation before that Board and is therefore solely within Subsidy Board jurisdiction.

As we have indicated we reject respondents' analysis of the stipulation and hold that its effect extends beyond the Subsidy Board proceeding and into those areas under section 15 jurisdiction. It is, in our opinion, a settlement agreement subject to section 15.

In addition, it is well settled that two separate government agencies may each have jurisdictional interests in the same event or transaction or series of events or transactions.[10] The Commission, by exercising jurisdiction over the instant agreement, will in no manner impede the exercise of the Maritime Subsidy Board's jurisdiction to grant or withhold ODS to USL.

Contrary to respondents assertions, our holding also is not in conflict with the policy of encouraging out of court settlements between litigants. We hold only that a settlement agreement involving section 15 issues must be filed with the Commission independently of its effect on any administrative proceeding before the Subsidy Board. In reaching this result we are mindful of the need for expenditiousness in administrative proceedings. We are not bent on prolonging them, and we are not unwittingly strengthening the arsenal of delaying tactics used by parties from time to time. Speed should not be sought for its own sake; and, when proper surveillance of the industry requires it, this Commission should take the action necessary to promote fair dealing. We should not permit parties to bypass the requirements of the shipping laws through the use of stipulations, settlements or other devices.

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[10] *California Stevedore & Ballast Co.* v. *Stockton Port District,* 7 FMC 75 (1962) and *Greater Baton Rouge Port Commission* v. *United States,* 287 F. 2d 86 (5th Cir. 1961).

We have considered all the arguments of respondents, and any which are not specifically dealt with are rejected as without merit or as immaterial to our decision. Accordingly, for the reasons set forth, we hold that the agreement between USL, SML, and AMA is a section 15 agreement and accordingly subject to appropriate filing and approval requirements.

We reach this decision fully aware that in light of United States Lines' recent decision to terminate all government subsidies, the questions presented in this case may, in fact, be no longer of substantive import. However, since the agreement in question involves promises which remain valid regardless of their current practical effect, and, since similar agreements may present similar questions, we have decided this case on the basis of the facts as presented.

Chairman HELEN DELICH BENTLEY *dissenting:*

I dissent from the decision of the other members of the Commission that the subject stipulation is a section 15 agreement and therefore subject to filing and approval by the Commission.

I agree with my colleagues that section 15 confers a broad jurisdictional basis for review by the Commission and that an agreement falling within any one of the seven categories enumerated within the section is subject to our jurisdiction. However, I do not agree that the rather all inclusive language of section 15 should be extended to the agreement in question. It is my opinion that the subject stipulation deals solely with pending and prospective litigation before the Maritime Subsidy Board. The stipulation does nothing but agree upon a settlement of litigation over matters peculiarly within the Merchant Marine Act, 1936, and the authority of the Maritime Administration. The mutual promises of USL, AMA, and SML do not in the least result in any restrictions of their operations. Petitioner and hearing counsel have pointed to no assured commercial effect from the agreement other than speculative assertions that the nature of USL operations vis-a-vis its competitors will change. To the contrary, USL's promise to seek and accept less subsidy payments in the case of military cargo does not restrict or inhibit its rights to solicit or carry such cargo wherever and whenever it chooses and at the rates it chooses. Neither do the promises of SML and AMA restrict or regulate their sailings, rates or charges.

Furthermore, no cooperative working arrangement survives the settlement agreement. No highly sophisticated plan of operations has resulted from the stipulation. Nothing exists requiring coordinated activity which could only be accomplished by a policy of cooperation followed by arrangements made at the managerial level among the participating parties. Carriers are not going to be dividing cargo or costs. At most, the parties exhibited a "cooperative spirit" of a nonoperational nature in order to settle the proceedings before the Subsidy Board. A cooperative spirit does not achieve the status of a cooperative working arrangement that would be included within the scope of section 15.[11] This is true particularly in light of the Administrative Procedure Act and the Commission's and the Maritime Administration's rules emphasizing the right of the parties to adjudicatory proceedings to resolve their differences by settlement or compromise. These rights have their basis in a fundamental public policy favoring settlement of litigation and controversy by the parties themselves.

The danger I fear from an indiscriminate broadening of the types of agreements which require approval by this Commission under section 15 is that it will open wider the doorway of delay in the adjudicatory process. Administrative proceedings are particularly susceptible to tactics of delay or expansive adjudication which, in effect, hinders efficient regulation and is contrary to the public interest. Within our own area of regulation, the Commission is well aware of the serious difficulties encountered in international trade and, hence, the shipping industry because of the narrowing of geographic distances in the world with the advent of the fast moving age of containerization and house-to-house transportation. Hence, the Commission cannot continue to perform its regulatory functions in a manner suitable only to slow break-bulk freighters; it must move judiciously but rapidly in its decisionmaking process and cut through the road blocks of irrelevant and obsolete legal procedures. For many years the chief and most severe criticism of regulatory agencies in the fields of transportation and communications has been the charge of overregulation, which discourages and inhibits managerial initiative and in certain areas may have made a substantial contribution to bankruptcy or other financial disasters.

Therefore, it is my opinion that the Commission should invoke its jurisdiction only when the settlement involves an agreement with a definitive and assured commercial effect on the operations of the parties subject to the act. When no operational effect is evident, as in the subject agreement, to require Commission approval is an unwarranted extension of our jurisdiction under the guise of the expansive language employed within section 15.

[11] See unapproved section 15 agreements—West Coast South America, 7 FMC 22, 25 (1961).

Certainly, with reference to the current proceeding, it was not the intention of Congress to place the Federal Maritime Commission in a position of reviewing every stipulation, settlement agreement, or position taken with respect to participation in a particular proceeding under the Merchant Marine Act, 1936, before the Maritime Subsidy Board. My point is simply that section 15 should not be interpreted to grant jurisdiction which does not serve the essential purpose of the Shipping Act, 1916.

With regard to the question of concurrent jurisdiction raised by the respondents, it is well settled that two separate government agencies may each have jurisdictional interests in the same event or transaction or series of events or transactions. However, the multiple regulation generally occurs in the operational aspects of the business in question and not in a factual situation similar to the subject proceeding. In reference to the Maritime Administration and the Federal Maritime Commission, there exists recent law both from the Commission and the courts which distinguishes to some extent our overlapping jurisdictional interests. In a case involving Grace Line and Prudential, the Commission replied to a question on subsidies that the question of who should get subsidies was not within its jurisdiction but one properly addressed to the Maritime Administration.[12]

At the same time the second circuit was deciding the *Sapphire* case, wherein it held that the Maritime Administration must be bound by the decision of its "sister agency," the Federal Maritime Commission, finding certain now withdrawn rates unfair. That decision has since been affirmed on appeal.[13]

Both of the above cases indicate that certain limits to the exercise of jurisdiction by the two agencies on the same subject are in order.

Moreover, if the Commission assumes jurisdiction, its action amounts to the rendering of an advisory opinion to the Maritime Subsidy Board as to the award of subsidy and conduct of its hearings. The stipulating parties would be required to suspend 605(c) proceedings and come before the Commission to resolve the legality of the stipulation and then resume section 605(c) hearings. The result would create difficult administrative problems in the practical administration of subsidy proceedings. Therefore, where, as here, the question involves the

[12] Agreement No. 9810—Stock purchase agreement between Prudential Lines, Inc. and W. R Grace & Co., and sale and transfer of Prudential assets and obligations to Grace Lines, Inc., 13 FMC 156 (1969).

[13] *Safir* v. *Gibson*, 432 F. 2d 137 (1970) [U.S. Ct. of Appeals, 2d Cir Slip Opinions 1967, Feb. 26, 1970]; *Safir* v. *Gibson*, 417 F. 2d 972 (1969), reversing and remanding *Safir* v. *Gulick*, 297 F. Supp. 630 (1969); *Rates on U.S. Government Cargoes*, 11 FMC 263 (1967).

granting of subsidies and the conditions under which they are granted and, where section 15 interests are at the most uncertain, it appears to me that an assumption of jurisdiction over the agreement by the Commission is not in accordance with its primary interest in regulation. Section 15 is not intended to, and does not, regulate the subsidy program.

Finally, I concur with my colleagues in their rejection of respondents' argument that the subject stipulation is constitutionally protected under *Noerr* and related cases. In addition, I also recognize that resolution of the questions presented may have limited effect in light of United States Lines' decision to forego any further government subsidies.

In summary, then, my position is that section 15 does not speak to an agreement with which we are concerned. The Commission's jurisdiction under section 15 does not extend, in my opinion, to settlement agreements before other agencies involving solely nonoperational matters of pending or prospective litigation before that body.

FRANCIS C. HURNEY,
Secretary.

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET No. 69-57

AGREEMENT No. T-2336—NEW YORK SHIPPING ASSOCIATION COOPERATIVE WORKING ARRANGEMENT

Initial decision adopted November 18, 1970

Agreement No. T-2390 of the New York Shipping Association, providing an assessment formula to meet certain obligations in collective bargaining agreements with the International Longshoremen's Association, AFL-CIO, when subjected to certain modifications, found not to be unjustly discriminatory nor unfair as between carriers, shippers, exporters, or importers, nor to be otherwise unlawful in violation of the Shipping Act, 1916. Agreement No. T-2390, as modified herein, is hereby approved.

Alfred Giardino, *C. P. Lambos*, and *Gerald A. Bodner* for respondents, the New York Shipping Association and its members.

Edward D. Ransom for intervener, the Pacific Maritime Association.

Stanley O. Sher and *Joseph Adams* for interveners States Marine Lines, Inc., Isthmian Lines, Inc., A/B Atlanttrafik, Barber Lines, Concordia Lines, Hellenic Lines, Ltd., Hoegh Lines, Meyer Line, Moller Steamship Co., Inc., Nedlloyd Lines, Norwegian America Line, Blue Sea Line and Marchessini Lines.

Ronald A. Capone, *John Williams*, and *Russel T. Weil* for intervener, Transamerican Trailer Transport, Inc.

Neal M. Mayer and *Marvin J. Coles* for interveners, Seatrain Lines, Inc. and United States Lines, Inc.

Alan F. Wohlstetter and *Ernest H. Land* for interveners, the United Fruit Co. and Wallenius Line.

Herbert Rubin and *Cecelia H. Goetz* for intervener, Wolfsburger Transport-Gesellschaft m.b.H.

Robert M. Vorsanger and *Frederick M. Porter* for interveners, American Sugar Co. and the American Sugar Refining Co. of New York.

Walter E. Maloney, *Gerald A. Malia*, and *Bradley R. Coury* for interveners American Export Isbrandtsen Lines, Inc., Atlantic Container Line, Dart Steamship Co., Moore-McCormack Lines, Inc., Sea-

Land Service, Inc., Hamburg America Line and North German Lloyd.

William Warner for intervener, Wilford & McKay, Inc.

William F. Giesen for interveners, Universal Terminal & Stevedoring Corp., International Terminal Operating Co., Inc., Pittston Stevedoring Corp., Maher Stevedoring Co., Inc., John W. McGrath Corp., Bay Ridge Operating Co., Inc., Nacirema Operating Co., Inc. and Northeast Stevedoring Co., Inc.

Samuel H. Moerman, Arthur L. Win, Jr. and *F. A. Mulhern* for intervener, the Port of New York Authority.

Mario F. Escudero, Dennis N. Barnes, Edward Aptaker, and *Robert A. Peavy* for intervener, the Commonwealth of Puerto Rico.

Robert Foerster and *Aaron Silverman* as hearing counsel for intervener, Maritime Administration, U.S. Department of Commerce.

Norman D. Kline and *Donald J. Brunner* as hearing counsel for the Federal Maritime Commission.

REPORT

BY THE COMMISSION (Helen Delich Bentley, *Chairman;* James F. Fanseen, *Vice Chairman;* Ashton C. Barrett, James V. Day, George H. Hearn, *Commissioners.*)

We instituted this proceeding pursuant to section 22 of the Shipping Act 1916, to determine whether an agreement (T–2390), providing for assesment at a combined man-hours/tonnage basis for raising money for fringe benefit obligations of the New York Shipping Association, Inc. (NYSA) to the longshoremen of the Port of New York, should be approved, disapproved, or modified pursuant to section 15 (46 U.S.C. 814). Numerous parties, many of whom actively participated in the proceeding, intervened. In an initial decision served August 13, 1970, examiner Charles E. Morgan concluded that agreement No. T–2390, with certain modifications, should be approved.

Exceptions were filed by NYSA, Transamerican Trailer Transport, Inc. (TTT), Seatrain Lines, Inc. (Seatrain), and United States Lines, Inc. (U.S. Lines), Wallenius Line (Wallenius), Wolfsburger Transport-Gesellschaft m.b.H. (Wobtrans), 13 breakbulk carriers,[1] the Commonwealth of Puerto Rico, and hearing counsel. All of these parties replied to the exceptions including United Fruit Co. (United Fruit), who seek affirmation of the examiner's decision insofar as it

[1] A/B Atlanttrafik, Barber Lines, Blue Sea Line, Concordia Lines, Hellenic Lines, Ltd., Hoegh Lines, Isthmian Lines, Inc., Marchessini Lines, Meyer Line, Moller Steamship Co., Inc., Nedlloyd Lines, Norwegian America Line, and States Marine Lines, Inc.

relates to the assessment of bananas under the agreement. Oral argument was held on October 14, 1970.

We have considered the exceptions of the parties and find that they are essentially a reargument of positions and issues which were fully briefed and treated by the examiner in his initial decision. Upon careful examination of the record, and the briefs and argument of counsel, we conclude that in the main the examiner's disposition of these positions and issues was well founded and proper. We find ourselves in disagreement, however, with the examiner's treatment of automobiles, trucks, and buses and his placement of only the northbound trade from Puerto Rico to the Port of New York in the "excepted cargo" category of the agreement.[2]

Generally, few exceptions were taken to the findings of fact upon which the examiner based his conclusions with respect to agreement No. T–2390.[3] Furthermore, a careful analysis and consideration of all exceptions reveal that there is no meaningful disagreement between the parties as to the facts concerned. Differences go, in the main, to the conclusions to be drawn therefrom and the interpretation of the law applicable thereto. Accordingly, we adopt the examiner's statement of facts and we further conclude that the examiner's decision, which is attached hereto and made a part hereof, is well founded and proper and, except for his conclusions with respect to automobiles and the Puerto Rico trade, we hereby adopt it as our own.[4]

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[2] The examiner's conditions numbered 2 and 5.

[3] For example, the breakbulk carriers state:

> As is apparent from the above exceptions, we take issue with some of the examiner's conclusions; we are virtually in complete agreement, however, with his comprehensive and accurate statement of the facts.

NYSA, in its preliminary statement, notes:

> Other than with respect to the limited exceptions set forth above, NYSA fully endorses the examiner's ultimate findings and conclusions in this complex and critical case involving some 2,255 transcript pages and 69 detailed exhibits entered by NYSA and 14 separate intervenors. The examiner has lucidly and fully set forth in his factual findings the history and necessity for T–2390.

Wobtrans observes:

> So far as automobiles are concerned, the critical facts for the most part are not in dispute, although many find no reflection in the initial decision.

On the other hand, the exceptions of Seatrain and U.S. Lines announce:

> Basically, Seatrain and U.S. Lines except to the entire decision from the first page listing appearances to the last page.

[4] At this point, the examiner's initial decision, a copy of which is attached hereto, should be read in full, since the discussion of our conclusions which differ from the Examiner's assumes, to some extent at least, a prior reading of his decision.

THE PUERTO RICAN TRADE

The examiner would require that cargoes northbound from Puerto Rico to the Port of New York be treated under the "excepted cargo" [5] provision of the agreement. He concluded that the "facts and circumstances of record" provide "some considerable justification" for placing a portion of the trade into the preferred status. We agree that the facts and circumstances of record provide justification for special treatment of this trade but would extend the excepted status to the entire trade, not merely the northbound segment.

Generally, those opposing any special treatment for this trade argue that any modification of the agreement would create an undesirable trade approach to the industry-wide assessment problem, that the trade is neither marginal nor subjected to land transportation competition or diversion, and that a substantial additional burden would be required of other carriers in the industry.

Those parties supporting the view that the entire Puerto Rican trade be treated at the reduced rate of assessment claim that the trade is unique in that it is dependent upon low-cost transportation and any increase in costs would have an adverse effect upon its exporting industries, the increased burden of $0.93 per ton for shortfall costs under the present agreement is unwarranted and unfair, that if relief were granted to the entire Puerto Rican trade, the added costs in other trades would be no greater than $0.07 or $0.09 per ton and there is no evidence concerning the net impact of this increase upon any breakbulk or other foreign trade carrier.

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[5] The examiner described the term as follows:

"Excepted cargo" under agreement No. T–2390 is all domestic cargo (limited to that moving in the domestic, coastal or intercoastal trade of the United States, but not including cargo moving "to" Puerto Rico, Hawaii, Alaska, or any other point outside the continental limits of the United States), all lumber at lumber terminals, bulk cargo (including scrap and sugar), and passengers and their personal baggage.

Excepted cargo is excepted from the regular man-hour and tonnage assessments (described herein below) of No. T–2390, and in place thereof, payments or assessments on excepted cargo shall be made on the basis of the then-existing man-hour assessment in effect for pension ($0.70), welfare and clinics ($0.415), guaranteed annual income (GAI) ($0.555), and NYSA administration ($0.04), but not any payment for "shortfall," or a total of $1.71 per man-hour, for the contract year through Sept. 30, 1970. Thereafter in the next contract year excepted cargo would pay or be assessed additional amounts per hour in accordance with the collective bargaining agreement escalations effective Oct. 1, 1970. Excepted cargo shall also continue to pay any royalty which may be applicable.

The figure above of $1.71 per hour plus $0.699 per hour for vacations and holidays (the vacations and holidays are not directly in issue herein) results in a total for excepted cargoes of $2,409 per hour for the contract year 1969–70. This figure of $2.409, or $2.41, is often referred to in the record as the total man-hour assessment for that year for "excepted cargo." For the 1970–71 year, the man-hour assessments for "excepted cargo" would total $1.84, plus $0.719 for vacations and holidays, or a total of $2,559. These so-called "excepted cargo man-hour assessment totals do not include certain assessments for "shortfall."

It is our view that while the examiner was justified in granting special treatment to a portion of the Puerto Rico trade, he did not go far enough and that the very factors which lead him to grant his limited relief require similar treatment for the entire trade.

This trade, fully containerized now and almost completely so well before the 40 million man-hour basis was implemented, has provided a steady growth for years resulting in increased work opportunities.[6] Tied to this is the fact that the assessment under excepted cargo status provides for rate of reimbursement to the ILA for every item of increased labor costs with the exception of "shortfall." [7]

Evidently, the examiner's decision to limit special treatment of this trade was influenced by his conclusion that:

> Some trades may appear to be more responsible than other trades, for example, for segmented problems, such as the shortfall of hours worked. But, for the industry benefit in not having to stuff and strip all containers, and for many other benefits to NYSA as an industry, the conclusion must be made that on the whole we are dealing with overall industry problems, with industry benefits, and with industry obligations and liabilities.

But here in our view lies the critical area of dispute; i.e., treatment of the segmented problem of shortfall [8] as applied to this particular trade. The record establishes that this trade, while responsible for

Fiscal year	Short tons	Assessable tons	Man-hours
1959	566,000	808,600	(1)
1960	602,000	860,000	(1)
1961	677,000	967,100	(1)
1962	802,000	1,145,700	(1)
1963	897,000	1,281,400	504,500
1964	1,126,000	1,608,600	633,300
1965	1,166,000	1,665,700	655,800
1966	1,356,000	1,937,100	762,600
1967	1,455,000	2,078,600	818,300
1968	1,697,000	2,424,300	954,400
1969	1,841,000	2,630,000	1,003,700

1 N/A=Not Applicable.

6 Exhibit show the following:

7 "Shortfall" is that item of annual expense attributed to the failure of the Port of New York to obtain a total of 40 million man-hours of labor. The examiner found:

> For a number of contract years, from October 1963 through September 1968, there were at least 40,000,000 or close to 40,000,000 man-hours per year of longshore labor in the Port of New York. For the contract year, Oct. 1, 1968, to Sept. 30, 1969, there were 33,935,416 man-hours, a substantial decline, but included in this period were 56 days of the longshoremen's strike.

8 The examiner also concludes that "shortfall is only one small part of the overall picture herein, and shortfall has been greatly exaggerated as a controlling factor in determining the proper assessment herein."

other items of labor costs, did not cause the shortfall. If we approved the agreement without the modification, then the increased burden placed upon the Puerto Rican trade would amount to a shortfall "tax" of $0.93 per ton. Technological advances should bear only their appropriate share of the costs they impose on labor and other aspects of the trades in which the advances are implemented. Where pioneering innovators are no longer responsible for such costs, they should not be burdened with costs properly allocable elsewhere. To require otherwise would place a penalty rather than a premium on innovation.

In partially exempting the trade the examiner was quite obviously concerned with the employment and economy of Puerto Rico and with the "Fomento" industrialization program fully described by him in his initial decision.[9] We think the examiner's consideration of these factors was proper, but we are compelled to view these factors and the record as a whole as clearly establishing the adverse effect the present agreement would have upon the entire trade, both northbound and southbound.

We have in the past recognized the peculiar status of the Puerto Rican economy and its dependence upon low-cost ocean transportation, as hearing counsel and the Commonwealth of Puerto Rico have pointed out in their support for "excepting" the entire trade. We ourselves have said:

> Puerto Rico is dependent upon the United States, not only for basic consumer goods, but also for the raw, intermediate, and finished products required in connection with Operation Bootstrap. In order to keep the cost of living within the limited means of its people and to insure the growth of Operation Bootstrap, Puerto Rico must have ocean rates maintained at the lowest reasonable levels. *Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico*, 8 F.M.C. 404, 409 (1965). (See also *Reduced Rates on Machinery and Tractors from United States Atlantic Ports to Ports in Puerto Rico*, 9 F.M.C. 465 (1966)).

Accordingly, we believe that all cargoes[10] to and from Puerto Rico and the Port of New York should be treated under the "excepted cargo" status provided under the excepted cargo provision of the agreement.

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[9] For example, the examiner found: Of particular interest in this Puerto Rican trade is the commonwealth's so-called "Fomento" program of industrial promotion. Principal products of Fomento plants in Puerto Rico are apparel, and fabricated metal and electrical products. These items, when transported to the Port of New York, then sell in highly competitive markets, vulnerable both to import as well as to domestic competition.

[10] Our decision here includes automobiles, trucks, and buses moving in this trade for the same reasons set out above.

AUTOMOBILES, TRUCKS AND BUSES

The examiner concluded that "Agreement No. T–2390 should be amended in its tonnage definition of tons of automobiles, trucks, and buses to specify calculation at 18 percent instead of 20 percent of the cubic measurement of the vehicles".[11] After a detailed recitation of the facts, positions and the actual costs involved under the agreement, he stated:

Based on all the facts herein, and using our best judgment of the charges and benefits, which cannot be finely and precisely related, a fairer assessment herein on automobiles would be one based on 18 percent of measurement tons. This would reduce the cost of the tonnage portion of the formula under No. T–2390 by 10 percent, or by 21.4 cents per automobile, and there is testimony of record that in volume carriage of automobiles, cents per auto are important. The resulting costs would be, as estimated herein, $2.86 per auto for lift-on/lift-off ships and $2.38 per auto for ro-ro ships.

Wobtrans, in their exceptions, contend that "changing the tonnage definition of automobiles from 20 percent to 18 percent of measurement tonnage in no way cures the basic inequities in T–2390. It still leaves fringe labor costs for automobiles substantially higher than breakbulk." Wallenius [12] submits that:

* * * should automobiles moving in the Puerto Rican trade by excepted from the T–2390 formula, automobiles moving in the European trade should likewise be so excepted and furthermore, that should the Puerto Rican trade be excepted on the basis that it has not contributed to the shortfall the application of this standard also requires that automobiles be excepted since they have not contributed to the shortfall either.

NYSA and the breakbulk carriers contend that the automobile assessment definition contained in the agreement should be approved. NYSA point out that both Wallenius and Wobtrans have assessment ton productivity "between 3½ to more than 7 times that of the average breakbulk operators". The breakbulk operators claim that the examiner's reduction from 20 percent to 18 percent of cubic measurement results in a per ton charge to Volkswagen at the low end of the scale under T–2390. They point to the following costs per ton comparisons:

T–2390—Measurement ton cost

Breakbulk	$3.02
Container	1.60
Ro/Ro	1.54
Volkswagen	.35
Volkswagen (as modified by examiner)	.33

[11] Agreement No. T–2390 limits the assessment of these commodities to tons defined as 20 percent of cubic measurement.

[12] Wallenius Line has already passed on to its shippers the additional costs under the agreement by use of tariff amendments which provide for refunds appropriate to relief granted by us.

Our review of the record here leaves us unconvinced that the 20 percent of measurement tonnage used to assess automobiles is unfair. The considerations prompting our treatment of automobiles in the Puerto Rican trade are simply not the same as those involving the assessment of automobiles in other trades. The prime factor here is the significantly higher productivity in the handling of automobiles vis-a-vis breakbulk operations. Furthermore, the additional costs to both Wallenius and Wobtrans under the agreement are not substantial in our view and are, in any event, offset by the substantial benefits applicable to automobile carriers. We have carefully viewed each of the arguments put forth by the parties, and on the basis of this record we believe that automobiles, trucks, and buses as treated under Agreement No. T–2390 should be approved as submitted.

ALASKA AND HAWAII, AND BANANAS

A review of the exceptions taken to the examiner's treatment of the Alaska and Hawaii trades and the banana interests reveals them to be nothing more than a reargument of contentions rejected by the examiner in his initial decision. Our analysis and consideration of the record convinces us that the examiner's conclusions on these issues were well founded, proper, and solidly based upon the evidence of record.

The examiner also concluded that approval of the agreement is subject to the condition that it be modified "to provide that bananas be calculated at 55 percent of cubic measurements of the boxes in which the bananas are shipped as part of the tonnage definition of the agreement." United Fruit, representing the only banana interests participating in this proceeding, although seeking "excepted" status, concluded that the "* * * Examiner's approach of modifying the tonnage definition for bananas under T–2390 constituted an equitable resolution of the controversy." We conclude that the examiner's treatment of this commodity is correct and our review of the record shows it to be well founded and proper.[13]

[13] The examiner also treated in the last few pages of his decision a number of contentions styled as "miscellaneous arguments" advanced in this proceeding. Most of the exceptions dealing with this portion of the decision were raised in the joint briefs of Seatrain and U.S. Lines. We are in complete accord with the examiner in his treatment of each of these contentions.

The only "new" argument was raised by Seatrain and U S. Lines concerning our decision in docket 68–10, *Inter-American Freight Conference Cargo Pooling Agreements Nos. 9682, 9683, and 9684, 14 FMC 58 (8/20/70)*. They claim that since the agreement is opposed by three lines the Commission lacks jurisdiction *ab initio*. We have already rejected this contention on Mar. 11, 1970, and find nothing in our recent decision to alter our views. In that proceeding, we did not even have a semblance of an agreement before us as all parties except one either withdrew or opposed the agreements. Here, the by-laws

For the foregoing reasons, and with the exceptions noted herein, we will adopt the examiner's decision as our own. An order will be issued approving Agreement No. T-2390, appropriately modified as required herein.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

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of the NYSA provide that a majority vote is sufficient to support the adoption of the agreement, as was fully discussed by the examiner.

We find the examiner's conclusions well founded and proper, and accordingly we adopt them as our own. One further comment is needed that the examiner treated a petition for a declaratory order which procedurally may only be decided by us (46 CFR 502.68). In any event, we agree with his disposition of that order. All pending motions (including those submitted after the rendering of the initial decision) are hereby denied for the same reasons set forth by the examiner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-57

AGREEMENT NO. T-2336—NEW YORK SHIPPING ASSOCIATION, COOPERATIVE WORKING ARRANGEMENT

ORDER

The Federal Maritime Commission having instituted this proceeding to determine whether we should approve, disapprove, or modify a certin assessment agreement adopted, in accordance with the by-laws of, and by the membership of, the New York Shipping Association, Inc. (NYSA), and the Commission having this date made and entered its report adopting the examiner's initial decision (except as to certain modifications of the subject agreement), which report and initial decision are made a part hereof by reference;

Therefore, it is ordered, That pursuant to section 15, Shipping Act, 1916, Agreement No. T-2390, as modified herein, is approved effective October 1, 1969.

It is further ordered, That NYSA within thirty (30) days from the date of service of this order, submit to the Commission a report containing the manner and method adopted by NYSA to accomplish such adjustments, if any, in the assessments, as are made necessary by the terms and conditions of the approval of T-2390 granted herein.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69–57

AGREEMENT NO. T–2336—NEW YORK SHIPPING ASSOCIATION, COOPERATIVE WORKING ARRANGEMENT

Agreement No. T–2390 of the New York Shipping Association, providing an assessment formula to meet certain obligations in collective bargaining agreements with the International Longshoremen's Association, AFL–CIO, when subjected to certain modifications, found not to be unjustly discriminatory nor unfair as between carriers, shippers, exporters, or importers, nor to be otherwise unlawful in violation of the Shipping Act, 1916. Agreement No. T–2390, as modified, approved.

Alfred Giardino, *C. P. Lambos*, and *Gerald A. Bodner* for respondents, the New York Shipping Association and its members.

Edward D. Ransom for intervener, the Pacific Maritime Association.

Stanley O. Sher and *Joseph Adams* for interveners, States Marine Lines, Inc., Isthmian Line, Inc., A/B Atlanttrafik, Barber Lines, Concordia Lines, Hellenic Lines, Ltd., Hoegh Lines, Meyer Line, Moller Steamship Co., Inc., Nedlloyd Lines, Norwegian America Line, Blue Sea Line, and Marchessini Lines.

Ronald A. Capone, *John Williams*, and *Russel T. Weil* for intervener, Transamerican Trailer Transport, Inc.

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Herbert Rubin and *Cecelia H. Goetz* for intervener, Wolfsburger Transport-Gesellschaft m.b.H.

Robert M. Vorsanger and *Frederick M. Porter* for interveners, American Sugar Co. and the American Sugar Refining Co. of New York.

Walter E. Maloney, *Gerald A. Malia*, and *Bradley R. Coury* for interveners, American Export Isbrandtsen Lines, Inc., Atlantic Container Line, Dart Steamship Co., Moore-McCormack Lines, Inc., Sea-Land Service, Inc., Hamburg America Line, and North German Lloyd.

William Warner for intervener, Wilford & McKay, Inc.

William F. Giesen for interveners, Universal Terminal & Stevedoring Corp., International Terminal Operating Co., Inc., Pittston Stevedoring Corp., Maher Stevedoring Co., Inc., John W. McGrath Corp., Bay Ridge Operating Co., Inc., Nacirema Operating Co., Inc., and Northeast Stevedoring Co., Inc.

Samuel H. Moerman, *Arthur L. Winn, Jr.*, and *F. A. Mulhern* for intervener, the Port of New York Authority.

Mario F. Escudero, *Dennis N. Barnes*, and *Robert A. Peavy* for intervener, the Commonwealth of Puerto Rico.

Robert Foerster and *Aaron Silverman* as hearing counsel for intervener, Maritime Administration, U.S. Department of Commerce.

Norman D. Kline and *Donald J. Brunner* as hearing counsel for the Federal Maritime Commission.

Initial Decision of Charles E. Morgan, Presiding Examiner[1]

By order of investigation served November 28, 1969, this proceeding was instituted pursuant to section 22 of the Shipping Act, 1916 (the act), to determine whether the Commission should approve, disapprove, or modify a certain new assessment agreement adopted, in accordance with the by-laws of, and by the membership of, the New York Shipping Association, Inc. (NYSA).

Hearing in this proceeding was held in February and in March 1970, in New York City, and in May 1970, in Washington, D.C. Numerous interveners entered the proceeding from time to time both before and after the commencement of the hearing. For example, the Commonwealth of Puerto Rico petitioned to intervene on March 4, 1970, and Wallenius Line on March 9, 1970. Most of the direct testimony is in the form of written statements or exhibits. All of the record has been considered carefully, with a view open to all possible solutions of this assessment problem consistent with the requirements of the law.

There were three NYSA assessment agreements subject to this proceeding since the inception of this case, but the assessment agreement now in issue (Agreement No. T–2390), to which the testimony of record substantially all is directed, provides a combined man-hours/tonnage basis for raising the moneys for certain fringe benefit obligations of NYSA to the longshoremen of the Port of New York. When the hearing had started, the agreement then in issue, No. T–2364, provided a tonnage basis of assessment, rather than the combination basis now in issue.

[1] This decision became the decision of the Commission Nov. 18, 1970.

The need for this new combined man-hours/tonnage basis of assessment largely was brought on by containerization, at least indirectly if not directly. As containerization increased in the Port of New York, the old method of assessment on a man-hours basis became outmoded by the needs of the International Longshoremen's Association, AFL-CIO (ILA or the Union), and by the resulting needs of NYSA.

Prior to the present three agreements of NYSA, none of the older man-hours based assessment agreements or none of the cooperative working arrangements regarding assessments has been filed for approval of the Commission because until the decision of the Supreme Court in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261 (1968), it had been believed generally that assessment agreements of the nature of the one here in issue were not subject to section 15 of the act.

The necessity for a change in the assessment method was recognized unanimously by the membership of NYSA on October 1, 1968, by a resolution which provided that the old system of allocation of the expenses of pensions, welfare, and clinics, guaranteed annual wage, and NYSA operating expenses, solely on the man-hours basis, would be discontinued, and that a new system would take effect as of October 1, 1968.

Whereas the present labor contract of NYSA with the ILA provides that payments, or contributions paid by the employers, to the Welfare Fund, to the Medical and Clinical Services Fund, and to the Pension Trust Fund, will be at set rates in cents per man-hour and at a set minimum of 40 million hours, there is nothing in the labor contract restricting NYSA in its method of collection of the needed moneys from its members. In other words, except for past customs, NYSA is free to use any appropriate and lawful method which it chooses to assess its members to obtain the necessary moneys for fringe benefit payments. The Union also held the view that NYSA could assess its members on any basis, man-hours, tonnage, or otherwise.

When the 1968–71 labor contract was ratified unanimously by the members of NYSA on February 14, 1969, it was done with the general understanding of the membership, the Labor Policy Committee, and the Board of Directors of NYSA that there would be some reallocation of the fringe benefits assessment in order to transfer some of this cost from the breakbulk operators to the innovators. During the course of contract negotiations, on many occasions, the Union had stated a desire to become involved in the question of assignability of costs among the members of NYSA. Also, the Union, at the time of ratification of the labor contract, and later, recognized that the man-hours burden on the breakbulk segment of the NYSA industry should be eased. When the first year of the new contract ended on September 30, 1969, the Union took a stronger and more insistent position, and in effect said:

> You told us during the negotiations that you were going to make your own allocations, that when we raised the issue of what we considered to be necessary protection for breakbulk carriers that you would take care of that reallocation among yourselves and we should let you do it.

However, after the labor contract was signed the atmosphere within and among the segments of NYSA changed, and the reallocation or change in the man-hours method of assessment was low in being realized.

In fact, for the entire first year of the new contract, and for part of the second year of the contract, the old man-hours basis of assessments was continued. It was not until some time after the Commission on March 11, 1970, gave its conditional approval of Agreement No. T-2390, that a new method of assessment began to be implemented. The Commission stayed its conditional approval on April 9, 1970, but lifted the stay on April 14, 1970.

Containerization began to be a problem in the labor relations affecting the Port of New York in the late 1950's. The ILA's complaints began in 1958 when there was arbitration involving Railway Express containers to Europe. Containerization was an important issue in the 1959 labor negotiations with the ILA. During the period 1960–68, containerization of cargo increased every year. There were many labor disputes resulting from the threat to longshore job opportunities, many grievances, work stoppages, and arbitrations, and much litigation caused by containerization. Strikes and strife were interposed during the whole period between 1958 and 1968.

Containerization has increased substantially over the years. In 1968 it represented 8,500,000 tons out of about 25 million tons of general cargo moved in the Port of New York. By the end of the present labor contract on September 30, 1971, it is evident that more tons will be moved in the Port of New York by containerization than by the breakbulk method. In the last year of the contract it is estimated that 12,880,000 tons will move by containerships carrier, out of a total of 28,591,517 tons, with 11,624,439 tons moving by breakbulk carriers. The balance of the tonnage is estimated as 3,427,078 tons by unitized carriers and 660,000 tons by roll-on/roll-off carriers (ro-ro).

Unitized carriers are those using pallets and other similar means, which are somewhat more efficient or more productive in loading and unloading tons per man-hour, than are the conventional breakbulk carriers. Ro-ro ships are those on which motorized vehicles are driven on and off usually under their own motive power, or are rolled on and off using their own wheels, rather than being lifted on and lifted off the ship. Vehicles, etc., transported on the very advanced ro-ro ship, the Ponce de Leon, of Transamerican Trailer Transport (TTT), include not only automobiles, trucks, and buses, but also such equipment on wheels as construction cranes, bulldozers, and agricultural vehicles. This ship handles a very substantial number of wheeled cargo trailers, which are pulled on and off the ship by the cab-tractors parts of the trailer-trucks. The tractors do not go on the deep sea voyages. Different tractors are utilized on the New York and Puerto Rican ends of a voyage.

As each month passes, more containerships are entering the Port of New York, and more jobs for longshoremen are lost. As an example, United States Lines is converting a number of ships from breakbulk vessels to full container vessels, with an estimated loss of a million man-hours of longshore labor per year.

The New York-Pueto Rican trade in 1958 was entirely breakbulk, and generated 1,250,000 man-hours of longshore labor per year (based on 650,000 revenue or assessable tons divided by an estimated average productivity on breakbulk cargoes of 0.52 tons per man-hour for loading or discharging). Today this trade is fully containerized, and generates substantially less man-hours (about 1,003,700 man-hours estimated for 1969). This, of course, is not the whole Puerto Rican story. So-called assessable tons in this trade have grown tremendously from 650,000 in 1958 to 2,630,000 in 1969, and the man-hours have increased in recent years. The man-hours figures of record in exhibit 15 for the years 1963 through 1968 are somewhat underestimated because the containership estimated average productivity of 2.54 tons per man-hour was used in the calculations, despite the fact that some breakbulk carriers remained in the trade in these years. But, the general trend of the figures is correct, in that man-hours are increasing in recent years because of the increased tonnages. In any event, it is improper to ignore the history of this trade, and for proper perspective we must look back as far as 1958.

Any single carrier may say that it entered this Puerto Rican trade in May 1968, and was not responsible for any shortage or "shortfall" of man-hours worked in the trade because such hours increased from 1968 onwards. This overlooks the fact that longshoremen are industry employees (they may work 2 days in a week for one carrier and 3 days for another carrier), and the fact that the labor negotiations and labor problems of NYSA–ILA at the Port of New York have been and must be dealt with on an industry, rather than on a carrier-by-carrier basis. Also a few years cannot be isolated from the many years over which the labor problems have developed.

Bull Line, a breakbulk carrier, was the dominant carrier in this Puerto Rican trade until 1961, and discontinued service in 1962. Alcoa, a breakbulk operator, discontinued its services in 1965, and American Union Transport (AUT) ceased its breakbulk operations in 1968, when its principal owner became the principal owner of TTT, and TTT commenced its roll-on/roll-off operations in this trade. Motorships of Puerto Rico, which had conducted a breakbulk operation northbound and handled automobiles almost exclusively southbound, discontinued its services in the Puerto Rican trade in 1968. With containerized carriers replacing these breakbulk carriers, the result was, as seen above, fewer longshore hours in 1968 than in 1958.

In Puerto Rico this problem of reduced man-hours caused by the switch to containerships, or the problem of a potential loss of man-hours in other Puerto Rican trades, has been recognized in another way, in that the wages for discharging and loading containerships ($4.25 per hour), are substantially higher than the wages for discharging and loading breakbulk ships ($2.71 per hour). Breakbulk ships still operate to and from Puerto Rico in other trades. Of course, loaders and unloaders of containerized cargoes may tend to be more skilled laborers than those loading or unloading breakbulk cargoes.

Also pertinent to the equities of the New York-Puerto Rican trade, is the fact that for the 12 years since 1958, despite substantial increases in wages and other costs of operation of ocean carriers, there have been no general increases in the freight rates of the ocean carriers. It may reasonably be assumed that in more recent past years, because the New York-Puerto Rican trade was fully containerized and thereby enjoyed high productivity ratios of tonnages loaded and discharged to man-hours of labor used, that perhaps this trade was in the past underassessed for certain fringe benefit labor costs levied on the man-hours basis alone, in relation to other trades not fully containerized and not enjoying the same high productivity ratios. Therefore, any new assessment, such as in No. T–2390, cannot be considered solely on the basis of its relation to past assessments, but must be considered on the basis of whether the new assessment is reasonable considering all factors which are pertinent. Even though in the 1964 labor contract, there may have been less emphasis on the effect of the containerization, there was so much stress on this factor in the 1968 negotiations, that we must consider the entire history of containerization in the Puerto Rican trade.

In each of the ILA–NYSA labor contract negotiations between 1959 and 1968, the ILA demanded that all containers be stuffed and stripped on the piers by ILA labor. By other concessions, the NYSA was able to forestall this demand, but by 1968, containerization had grown to such an extent that the ILA had to be satisfied in some way on this issue. The ILA had seen the breakbulk operators in the Puerto Rican trade almost completely disappear; the ILA was witnessing the springing-up of many new container services in the North Atlantic; and it saw many new large container and ro-ro ships arrive in the Port of New York, to be worked by one-fifth or less of the man-hours of labor used by the ships which were displaced. To the ILA and its members, this meant that the 1968 negotiations had to be utilized to obtain full protection from the effects of containerization on job opportunities.

The 1968 demands of the ILA included many designed to blunt the effect of containerization on longshoremen's jobs, including:

(*a*) All containers to be stuffed and stripped on the piers by ILA labor.

(*b*) All containers to be unloaded from vessels before a single container could be loaded on vessels (contrary to the existing practices, and thereby cutting productivity about in half).

(*c*) A minimum of three gangs of longshoremen to be employed on containerships (in lieu of the existing freedom of the employer to use as few as men as he needed, probably only one or two gangs).

(*d*) The $1 a ton container royalty to be increased to $4 a ton.

In addition to the demands above, the ILA also demanded in 1968 that there be increased pensions, an early retirement and a 40-hour guaranteed workweek every week of the year. In justification for these additional demands, the ILA also insisted that the effect of containerization on job opportunities made these demands necessary.

The ILA also demanded that the container lines pick up a greater share of the costs of labor benefits than before, in order to assure the continuance of sufficient contributions to meet the obligations of the ILA to the longshoremen. On this matter, NYSA took the position that the problem of meeting the costs of the labor benefits and the resultant allocations of assessments as between breakbulk and container operators was an internal concern for NYSA, and that the Union should not interfere. NYSA felt, among other reasons, that if there were to be two labor contracts negotiated, or if there were carrier-by-carrier labor contracts, that the Union would be in a position to whipsaw the carrier members of NYSA to their great disadvantage. Finally, the ILA after raising this assessment allocation issue many times withdrew its demand, and thereby allowed NYSA to handle and settle the matter internally. Needless to say, internal NYSA settlement of the problem of allocation of assessments did not come easily, and this proceeding was the ultimate result.

The NYSA industry was able to trade off each of the ILA's demands which specifically would have restricted containers. However, the resulting 1968–71 labor agreement contained the following new industry obligations, which were to be imposed on all carriers, whether containerized, ro-ro, breakbulk, unitized, or otherwise:

(*a*) A greatly increased pension.
(*b*) An early retirement.
(*c*) A guaranteed annual income (GAI) based on 2,080 hours a year.
(*d*) A 40-million hour basis of guaranteed contributions to the pension, and to the welfare and clinics funds.

To meet these new expenses, it was only natural that NYSA should come up with some new method of assessment which would fairly distribute the burden of the new contract, and as seen, the NYSA membership unanimously agreed on October 1, 1968, to come up with a new method not so based on man-hours. This action was taken even prior to the unanimous ratification by NYSA members of the ILA labor contract, which ratification occurred on February 14, 1969. Of course, after the ratification of the labor contract, and with assessments "temporarily" being collected on the old man-hour basis, at least some containership carriers presumably were not unhappy with any delays in reaching a permanent assessment formula on some basis other than a sole man-hours basis. Contrary-wise, the Breakbulk carriers were unhappy with the delay in agreeing to a new formula.

In the same 1968–71 labor contract, the NYSA industry obtained certain benefits from the ILA in return for the increased NYSA obligations. The NYSA benefits were:

(*a*) Rules on containers which permitted most containers (other than those containers with less-than-truckloads or with consolidated loads) to move freely without stuffing or stripping.

(*b*) An assured labor supply (by agreement to open the longshoremen's register).

(*c*) Mobility of the work force (between Port areas, etc.).

(*d*) Prior day ordering, of certain men to report for work.

(*e*) Control of the work force (better disciplinary arrangements).

(*f*) A labor contract of 3 years (instead of one year or two).

NYSA and its members are respondents in this proceeding. Also, some of the members of NYSA are interveners and are represented by their own counsel herein. In the present posture of this proceeding there are three member interveners vigorously opposing approval by the Commission of the combined man-hours/tonnage assessment agreement in its present form, namely, TTT, Seatrain Lines, Inc. (Seatrain), and United States Lines, Inc. (U.S. Lines). There are other opposing interveners not members of NYSA, but affected by the terms of any assessment agreement adopted by NYSA, inasmuch as these interveners directly or indirectly pay for certain costs of loading and discharging vessels, including costs which are affected by the assessment agreement herein. These interveners are the United Fruit Co. (United Fruit), an importer of bananas, Wallenius Line (Wallenius) an ocean carrier of motor vehicles, and Wolfsburger Transport-Gesellschaft m.b.H. (Wobtrans), also a carrier of motor vehicles.

The Commonwealth of Puerto Rico opposes approval of the agreement insofar as it believes that the new assessment formula discriminates against member carriers of NYSA operating between New York and Puerto Rico. The Commonwealth supports the so-called "excepted cargo" treatment (see below) for the Puerto Rican trade. There are only three carriers in this Puerto Rican trade, namely, TTT, Seatrain, and Sea-Land Service, Inc. (Sea-Land). The principal carrier in this Puerto Rican trade (about 60 percent of cargoes), which carrier is Sea-Land, does not oppose the assessment agreement presently filed for approval.

The order of investigation provided that any modification of the assessment agreement first filed herein, or any further temporary or permanent assessment agreement to be filed herein, would be subject to this investigation. There were two prior filed agreements subject to this proceeding, namely this proceeding's title agreement, Agreement No. T–2336, adopted by NYSA members on September 29, 1969, a so-called "temporary" agreement, and Agreement No. T–2364, adopted by NYSA members on December 19, 1969, a so-called "permanent" agreement. But these two earlier agreements were superseded by Agreement No. T–2390, the present permanent agreement, adopted by NYSA members on February 26, 1970, which provides an assessment formula on the combined man-hours/tonnage basis.

The temporary No. T–2336 was largely on a man-hour basis, except that so-called "shortfall" of contributions to certain funds, not caused by strike or economic recession, was to have been assessed only against container cargo tonnage. Agreement No. T–2364, the first permanent agreement, provided a tonnage basis as the sole method assessment on most cargoes, measuring automobiles at 25 percent of cubic tons. This agreement placed in an "excepted cargo" status other cargoes such as bulk scrap and sugar, and coastwise and intercoastal cargoes (on a man-hour basis, plus royalty where applicable).

When Agreement No. T-2364 with its tonnage assessment of $2.07 per ton, as estimated for the October 1, 1969, to September 30, 1970, contract year, was the agreement of NYSA filed for approval herein, it was opposed by the containership operator segment of NYSA membership virtually unanimously. Agreement No. T-2364 was adopted by a 35-17 vote. Agreement No. T-2364, with its tonnage assessment basis, had been supported vigorously by the conventional breakbulkship operators segment of NYSA members.

But, when the combined man-hours/tonnage formula of Agreement No. T-2390 became the outstanding agreement filed for approval herein, most of the containership members of NYSA ceased their opposition. At that time, interveners Sea-Land, American Export Isbrandtsen Lines, Inc., Atlantic Container Line, Dart Steamship Co., More-McCormack Lines, Inc., Hamburg America Lines, and North German Lloyd withdrew from active participation in this proceeding.

Almost all of the breakbulk members, as well as most of the containership members of NYSA granted their support, though reluctantly, to Agreement No. T-2390, when the membership vote was taken. Agreement No. T-2390 was adopted by a 58-3 vote. The three noes were TTT, Seatrain and U.S. Lines. Two breakbulk lines, Hellenic and Marchessini, abstained from voting. Although no segment of NYSA was delighted with No. T-2390, the majority of the NYSA membership felt that No. T-2390 was the best type of compromise assessment agreement acceptable to the membership as a whole. The breakbulk segment of the NYSA industry was somewhat unhappy because the old man-hour assessments had been continued over a year past the resolution date of October 1, 1968, which date was also supposed to be the effective date of a new assessment method. After some days of hearing, this combined man-hour/tonnage basis of assessment agreement (No. T-2390) was conditionally approved by the Commission on March 11, 1970, subject to further hearing and subsequent judgment by the Commission.

On brief, a number of the breakbulk members of NYSA, interveners Atlanttrafik, Barber Lines, Blue Sea Line, Concordia Line, Hellenic Lines, Hoegh Lines, Isthmian Lines, Marchessini Lines, Meyer Line, Moller Steamship Co., Inc., Nedlloyd Lines, Norweigian America Line, and States Marine Lines continue to support the whole tonnage formula of No. T-2364 as the fairest method of assessment, although alternatively they would in the spirit of compromise support the combined man-hours/tonnage formula of Agreement No. T-2390 if it were to be applied retroactively to the first year of the labor contract as well as to the last 2 years of the contract, and if No. T–2390 does not afford special treatment to any interests such as to the Puerto Rican trade.

Other parties, the lumber interests (Wilford & McKay, Inc.) and the sugar interests, are interveners, but are satisfied apparently with the so-called "excepted cargo" treatment given to them by Agreement No. T–2390, and they have not actively participated in this proceeding since that agreement was filed.

"Excepted cargo" under Agreement No. T–2390 is all domestic cargo (limited to that moving in the domestic, coastal or intercoastal trade of the United States, but not including cargo moving "to" Puerto Rico, Hawaii, Alaska, or any other point outside the continental limits of the United States), all lumber at lumber terminals, bulk cargo (including scrap and sugar), and passengers and their personal baggage.

Excepted cargo is excepted from the regular man-hour and tonnage assessments (described herein below) of No. T–2390, and in place thereof, payments or assessments on excepted cargo shall be made on the basis of the then-existing man-hour assessment in effect for pension ($0.70), welfare and clinics ($0.415), guaranteed annual income (GAI) ($0.555), and NYSA administration ($0.04), but not any payment for "shortfall," or a total of $1.70 per man-hour, for the contract year through September 30, 1970. Thereafter in the next contract year excepted cargo would pay or be assessed additional amounts per hour in accordance with the collective bargaining agreement escalations effective October 1, 1970. Excepted cargo shall also continue to pay any royalty which may be applicable.

The figure above of $1.71 per hour plus $0.699 per hour for vacations and holidays (the vacations and holidays are not directly in issue herein) results in a total for excepted cargoes of $2.409 per hour for the contract year 1969–1970. This figure of $2.409, or $2.41, is often referred to in the record as the total man-hour assessment for that year for "excepted cargo." For the 1970–1971 year, the man-hour assessments for "excepted cargo" would total $1.84, plus $0.719 for vacations and holidays or a total of $2.559. These so-called "excepted" cargo man-hour assessment totals do not include certain assessments for "shortfall."

Of course, cargoes which benefit from being treated as "excepted" are those cargoes which have high productivity, that is, they incur relatively few man-hours of longshore labor per ton of cargo loaded or unloaded. The theory of "excepted cargo" is that it is marginal cargo, because, among other reasons, of competition with rail and truck operators, and because of the possibility of diversion to other ports. Presumably, if an assessment on excepted cargoes were too high these cargoes would fail to move to and from the Port of New York, thereby ceasing their limited or marginal support of labor fringe benefit costs, such as pensions, etc.

Agreement No. T–2390 defines a ton as a measurement ton of 40 cubic feet, or as weight ton of 2,240 pounds, whichever is greater, that is, whichever of the weight or measurement produces the most tons. Such a ton has been referred to by NYSA as a revenue ton or more accurately as an assessable ton.

United Fruit asks that bananas be treated as excepted cargo, or alternatively that the ton on which the assessment for bananas is made under Agreement No. T–2390 be defined as a weight ton of 2,240 pounds provided that in no event the assessment for bananas shall be lower than that imposed upon excepted cargo. Bananas measure more in tons than they weigh.

Wallenius Line, a common carrier of foreign cars to New York and of American cars from New York, asks: first, that autos be treated as excepted cargo; alternatively, second, that an interim assessment of $2.73 per man-hour be continued (this is the figure of $2.409 above plus $0.321 for shortfall for 1968–1969 and 1969–1970; the $2.73 is composed of $0.70 for pensions, $0.415 for welfare and clinics, $0.555 for GAI, $0.14 for 1968–1969 shortfall, $0.181 for 1969–1970 shortfall, $0.04 for NYSA support, and additionally $0.699 for vacations and holidays); third, that if the man-hour/tonnage formula of No. T–2390 is applied to autos, that the autos be assessed not on this agreement's basis for autos of 20 percent of measurement tons, but on 50 percent of weight tons of 2,240 pounds; and fourth, that in any event that no less favorable treatment be granted to Wallenius for its autos than is to be granted to Wobtrans for its autos or to autos moving in the Puerto Rican trade. Wallenius utilizes ro-ro ships to a large extent, whereas Wobtrans utilizes lift-on/lift-off ships mainly.

Wobtrans, a wholly owned subsidiary of the German manufacturer of Volkswagen autos, and an operator by long-term charter of over 60 vessels engaged in the transport of Volkswagen products from Germany to the United States and to other places, asks, first, that autos be placed in the "excepted cargo" category; second, that autos be assessed by weight (100 percent of weight), rather than by measurement (the measurement tons of autos are greater always than are the weight tons); and third, alternatively, that autos be assessed on 10 percent of measurement. Wobtrans also suggested, but does not press the suggestion that 5.85 percent of measurement tonnage would be proper for vehicles limited to those handled on conventional ships only.

Hearing counsel for the Federal Maritime Commission support special treatment as "excepted cargoes" for automobiles and bananas, the Puerto Rican trade, and in addition, the trades between New York and Hawaii and between New York and Alaska. Hearing counsel for the Maritime Administration did not actively participate in this proceeding after the adoption by NYSA of Agreement No. T–2390.

The other interveners not specifically mentioned in the body of this report, but shown in the list of appearances herein, participated to a relatively minor extent in this proceeding, and have not filed briefs. The eight intervening stevedores at one time were greatly concerned with the fact that as employers of longshoremen they would have been required to collect certain assessments including delinquent accounts, but under Agreement No. T–2390, it is the vessel operator member of NYSA, or agent of a nonmember, that is "responsible" for the per-ton assessments in the event that such assessments have not been paid through the hands of the stevedore, direct employer of the longshoremen. The Port of New York Authority (PNYA), another intervener, furnished considerable data as to tonnages to NYSA, in connection with NYSA committee studies. Since PNYA has filed no brief, presumably it does not oppose No. T–2390.

NYSA is an association of ocean carriers, operators of vessels calling at the Port of New York, of ocean carriers' agents, and of contracting stevedores, watching agencies, marine carpenters, etc., employers of deep-sea longshoremen and of other labor generally associated with the loading, unloading and handling of ocean-going ships and their cargoes in the Port of New York. These carriers and their agents are voting members, and the stevedores and others are associate nonvoting members of NYSA. One of the main functions of NYSA relates to the conducting of negotiations with labor representatives regarding collective bargaining agreements.

The agreement in issue, No. T–2390, is a resolution of NYSA, mainly providing its method or formula of assessment for the 2-year period of October 1, 1969, to September 30, 1971. The assessments for this 2-year period include some obligations of "shortfall" which arose in the contract year 1968–1969. The agreement is designed to raise from NYSA member carriers or from member agents of nonmember carriers, the moneys necessary to meet certain obligations arising under the collective bargaining agreements between the members of NYSA and the International Longshoremen's Association.

Specifically, the assessments are to meet the costs, or obligations, or liabilities of NYSA to the longshoremen of: (*a*) pensions, (*b*) welfare and clinics, (*c*) guaranteed annual income (GAI), (*d*) "shortfall" of actual total hours worked in the Port of New York under a 40 million-hour a year guarantee with respect only to pensions and to welfare and clinics, and (*e*) administrative support or expenses of NYSA. The above five items have been described under a general category of so-called "fringe benefits." All of these assessments are for the two-contract years 1969–1970 and 1970–71, except additionally there is the "shortfall" which was caused by the shortage of man-hours worked in the contract year 1968–1969. The "shortfalls" anticipated for the years 1969–1970 and 1970–1971 would be built into the calculations of total liabilities for these years. (See below the manner of calculating the tonnage portion of the assessment under No. T-2390.)

The fringe benefits above are considerable when stated in dollar amounts. For example for the NYSA-ILA contract year, October 1, 1969, to September 30, 1970, pensions payments must be made to the NYSA-ILA Pension Trust Fund in the minimum (probably in practical effect also the maximum) amount of $28 million in accordance with the contract with the Union on the basis of a minimum of 40 million hours at $0.70 per hour. The record of actual experience for part of the 1969–1970 year, projected for the whole year, shows that the hours worked in this year will amount to about 33 and a fraction million. For a number of contract years, from October 1963 through September 1968, there were at lease 40 million or close to 40 million man-hours per year of longshore labor in the Port of New York. For the contract year, October 1, 1968, to September 30, 1969, there were 33,935,416 man-hours, a substantial decline, but included in this period were 56 days of the longshoremen's strike.

Similarly, the minimum for welfare and clinics for the same 1969–1970 contract year is $16,600,000 based on the same 40 million hours, at $0.415 per hour, to be paid in total to the NYSA-ILA Welfare Fund and to the NYSA-ILA Medical and Clinical Services Fund. The Trustees of these two funds will allocate the $16,600,000 as they see fit between these two funds in accordance with their needs.

GAI is not a firm figure under the labor agreement, but depends on how many longshoremen entitled to 2,080 hours per year of work, vacations, etc., fail to meet this goal, and must have their differences paid for out of the GAI fund. GAI has been calculated, collected, or both, at $0.12 per hour under the old contract for the year 1967–1968, at $0.22 per hour for 1968–1969, and at $0.555 per hour on a temporary basis for a part of 1969–1970. An estimate of GAI for the year 1969–1970 is $15,600,000.

Thus, adding pensions of $28 million, welfare and clinics of $16.6 million, and GAI of $15.6 million, we get a total of over $60 million to be assessed for 1969–1970. These total "industry liabilities" of NYSA to the ILA exist notwithstanding any factor of "shortfall." There is considerable reference in the record and in the briefs to the dollar amounts of shortfall, and to who may or may not have caused shortfall, but shortfall is only one small part of the overall picture herein, and shortfall has been greatly exaggerated as a controlling factor in determining the proper assessments herein.

For the contract year October 1, 1970, to September 30, 1971, total liabilities for pensions, welfare and clinics, GAI (estimated), and NYSA support are $66,300,000. The pensions, welfare and clinics, and GAI are industry problems at least in part, because the liabilities for these benefits cannot be totally and directly attributed to any particular ocean carrier or carriers, or for that matter to any particular trade. Some trades may appear to be more responsible than other trades, for example, for segmented problems, such as the shortfall of hours worked. But, for the industry benefit in not having to stuff and strip all containers, and for many other benefits to NYSA as an industry, the conclusion must be made that on the whole we are dealing with overall industry problems, with industry benefits, and with industry obligations and liabilities.

Pension, and welfare and clinics assessments, once collected, are turned over to trustees of so-called "joint funds" administered by both representatives of the employers (NYSA) and of the longshoremen (ILA). Vacations and holiday, GAI, and NYSA support assessments are turned over to so-called "management funds," administered solely by NYSA.

The principal expenses of an ocean carrier connected with the employment of longshoremen, of course, are the basic wages (including overtime payments) of the longshoremen. On general cargo for the contract year 1969–1970, wages are $4.25 per hour, and overtime is $6.375 per hour. Rates for other cargoes are higher, ranging to as much as $8.50 for wages and $12.75 for overtime for explosives and for damaged cargo under certain conditions. Wages are paid on actual hours worked, and continue on the man-hour basis, not being affected by Agreement No. T–2390. Likewise, unaffected by Agreement No. T–2390, is the expense of vacations and holidays which continues on a man-hour basis. For 1969–1970 it is $0.699 per hour. Generally speaking, the breakbulk carriers pay more in the form of wages and vacation and holiday expenses, because they use more man-hours of labor per ton of cargo, than do the containership operators. To the extent that containerization caused increases in wage costs, and in vacation and holiday costs, this is in no way reflected in Agreement No. T–2390, which relates to other labor benefits.

In the shipping industry in the Port of New York, longshoremen necessary do not work everyday for the same ocean carrier. For example, three gangs of longshoremen may be employed by one carrier, such as TTT, on Thursdays and Fridays each week, and these same gangs will work for another carrier on other days of the week. Gangs of longshoremen should be available whether there are many or few ships in port, whether the ships are at one pier or another pier in a particular area, whether there are needs for longshoremen in one area or other areas of the port, etc. Naturally no system of availability and mobility of longshoremen works perfectly, so at times there may be underemployment and at times shortages of longshoremen. There have been such shortages of labor in the past in Brooklyn, Staten Island, and New Jersey. Presumably the new labor contract with the open register will help in this regard, and it would help all of the industry, including containerized lines.

In the circumstances, the longshoremen as a whole, of necessity, become "industry" employees, rather than merely employees of a particular ocean carrier or stevedore. It is true that some individual longshoremen may work full time for a single ocean carrier, as for example in the case of certain employees who work in a terminal, rather than on the ships when they are in port. But, longshoremen must look to the industry for many of their benefits, such as pensions, welfare and clinics, and guaranteed annual income, and also vacation and holiday pay. As individual ocean carriers leave the shipping business, and consequently leave behind them pension and other obligations, the continuity of industry benefits becomes essential to the longshoremen.

As seen above, various cargoes are unloaded and loaded from ships at various rates of "productivity" depending upon both the type of cargo and the type of vessel. For example, a containership, with an average or estimated productivity of 2.54 tons per man-hour of longshore labor may be loaded or unloaded about 5 times as fast as a conventional ship with a productivity of 0.52 tons per man-hour. Average estimates of record of productivity used by NYSA in this proceeding, and generally accepted by all parties herein with the understanding that productivity varies from carrier-to-carrier and from ship-to-ship, are, 0.52 for breakbulk, 0.75 for unitized, 2.54 for containerships, and

3 for ro-ro ships. Bulk cargoes, bananas, and automobiles are in special categories of their own.

Agreement No. T–2390 provides specifically that the method of assessment on all cargo, not including "excepted cargo," for the 2-year period from October 1, 1969, to September 30, 1971, inclusive, *shall have two parts. First*, Agreement No. T–2390 provides *a man-hour assessment of 93.1 cents* (which was intended to cover certain expenses in the old NYSA–ILA contract which expired on September 30, 1968, namely pension of 47 cents, welfare and clinics of 31.5 cents, GAI of 12 cents, and NYSA support of 2.6 cents). *Second*, Agreement No. T–2390 provides a *tonnage assessment of an amount* (bookkeepers might call this *a "plugged amount"* because it is an amount necessary to strike a balance between two other amounts) which is *to be calculated by the Board of Directors of NYSA* in a specified manner as follows:

First, estimate "total liabilities" for the contract years 1969/1970 and 1970/71: for pension; for welfare and clinics; for GAI; for the 40 million hour guarantee for pensions, welfare and clinics (shortfall); and for NYSA support; also 1968/69 shortfall. Second, deduct the estimated total revenue to be derived from the man hour assessment of 93.1¢ and the continued man-hour revenue assessment provided from "excepted cargo" from the total liabilities next above to secure a total estimated "net liability." Third, compute the assessment per ton by dividing this "net liability" by the total estimated "non-excepted tonnage" to be loaded or discharged in the Port of New York during the period October 1, 1969 to September 30, 1971.

The assessment for the tonnage portion of this formula was first estimated by NYSA to amount to $1.23 per ton.

Agreement No. T–2390 requires the Board of Directors of NYSA not to modify the 93.1 cents per man-hour portion of the assessment formula, but that the Board modify the tonnage portion of the assessment from time to time on the basis of experience. In other words, the $1.23 per ton is a plugged but also a flexible figure dependent upon changes in estimates of the "total liabilities" and the "net liability" referred to above for the fringe benefits.

Exhibit 10 of record shows the underlying calculations made by a NYSA assessment committee, and this Committee's estimate of various liabilities. This exhibit includes also a prediction that the cost per ton of the tonnage portion of the combined man-hours/tonnage assessment under the T–2390 assessment formula would be $1.23 per ton. The assessment committee's estimates, calculating the man-hour portion of the combined assessment as a per ton figure, by dividing the 93.1 cents per man-hour assessment by the productivity factors of tons per man-hour, resulted in the following *total costs per ton* for fringe benefits:

Man-hour assessment		*Tonnage assessment per ton*		*Total per ton*
Breakbulk:				
$\frac{\$0.931}{.52} = \$1.79$	+	$1.23	=	$3.02
Unitized:				
$\frac{\$0.931}{.75} = \$1.24$	+	1.23	=	2.47
Containers:				
$\frac{\$0.931}{2.54} = \$0.37$	+	1.23	=	1.60
Ro/Ro:				
$\frac{\$0.931}{3.00} = \$0.31$	+	1.23	=	1.54

Of course, the above general estimates must be adjusted for the variations in productivity of individual carriers. Seatrain's productivity is higher than 2.54. TTT's productivity is 3.35 or 3.36, or higher than the above 3.0 ro-ro productivity. On this basis, for example, TTT's comparable costs would be $1.51 per ton instead of $1.54 per ton.

As seen above, the cost per ton of breakbulk tonnage for fringe benefits is $3.02, compared with $1.60 for containerized tonnage under the T–2390 formula, using the $1.23 per-ton tonnage factor. But regardless of whatever tonnage factor is to be used, breakbulk operators would pay a total per ton more than the total per ton paid by containerized operators. For example, if the per ton factor were $1.13, breakbulk would pay $2.92 and containerized would pay $1.50 as totals under T–2390. This is true because the man-hour portion of the combined assessment would remain weighted against the breakbulk operator to the extent that his productivity of tons per man-hour is less than the productivity of a containerized operator. Also, the 93.1 cents per man-hour portion of the assessment in Agreement No. T–2390 remains constant.

To repeat a point, the unfairness of using only a man-hours basis of assessment was recognized and acknowledged by all members and segments of NYSA on October 1, 1968. On that date at a special membership meeting of NYSA, the resolution adopted unanimously read:

> Resolved that the past and present system of allocating expenses of pension, welfare and clinics, and guaranteed annual wage under the collective bargaining

agreement, and NYSA expenses, solely on the basis of man-hours worked, shall be discontinued and a new system shall be devised and ratified by the membership, such new system to take effect as of October 1, 1968.

The problem herein is not with this resolution; but, how to implement it. A straight man-hours assessment is patently unfair, but the problem remains how do you modify this old assessment basis, and yet encourage innovators to invest large sums of moneys in modern containerships, containers, cranes and shoreside equipment. Such investments for modern containerships, ro-ro ships, containers, cranes and shoreside equipment have run into many millions of dollars.

The above costs for fringe benefits, for example, for containerships of \$1.60 per ton, do not include the additional costs for the so-called "container royalty,"[2] which amounts to \$1.00 a royalty ton for containers on fully containerized ships, to \$0.70 a royalty ton for containers on partially containerized ships, and to \$0.35 a royalty ton for containers on breakbulk ships. A royalty ton is a gross ton, which is estimated by the assessment committee of NYSA to amount to 1.6 measurement tons. Thus, there are more revenue or assessable tons to 1 gross ton. Accordingly, we cannot use the figures of 35 cents, 70 cents, and \$1 as added costs per assessable ton, but must use lower figures, as adjusted by the 1.6 ratio, or by some other ratio suitable to a particular ocean carrier. Various figures of record are 28 and 47 cents, and no doubt there are others for the container royalty per assessable ton.

The assessment committee calculated a 1968–1969 shortfall of \$4,991,710 after adjustments for a surplus of GAI and a resulting GAI contribution or payment to pensions and welfare and clinics of \$629,618, without which payment the said shortfall would have been \$5,621,328.

Man-hour collections of assessments at 93.1 cents based on an estimated 33.1 million man-hours in the Port of New York per year were estimated by the assessment committee at \$30,816,100 for each of the two contract years of 1969–1970 and 1970–1971.

Liabilities were estimated by the assessment committee for 1969–1970 as a total of \$59,200,000 and for 1970–1971 as a total of \$66,300,000. (Pensions of \$0.70 and \$0.75 per hour, times 40 million hours; welfare and clinics of \$.415 and \$.495 per hour, times the 40 million hours, and estimates of GAI and NYSA support as shown in exhibit 10.) These total liabilities figures for 1969–1970 and 1970–1971, of course, include any anticipated "shortfall" for these 2 years since the liabilities are calculated on the 40-million-hours basis.

[2] Paid by the ocean carriers to the Union.

Recapitulating, there were for 1968-1969 shortfall $4,991,710, for 1969-1970 liabilities $59,200,000, for 1970-1971 liabilities $66,300,000, or a total of $130,491,710 for the 2 years' assessments. Subtracting the man-hour assessments for the 2 years totalling $61,632,200, results in a "net assessment" of $68,859,510 of additional costs to be levied on the per ton basis. Dividing this "net assessment" by a tonnage for the 2 years of 56,071,517 tons, for all cargoes but "excepted cargo, gives the estimated assessment per ton of $1.23.

The assessment committee had made a study estimating 27,480,000 so-called assessable tons for 1960-1970 and 28,591,517 assessable tons by 1970-1971. These assessable tons are referred to by some persons as stevedore tons. Actually they are tons of 2,240 pounds or of 40 cubic feet, whichever is the greater. From exhibit 10, it is not clear that any allowance, or that a proper allowance was made for assessments to be collected on "excepted cargoes." Making such an allowance would reduce the "net assessment" of $68,859,510 of costs above for the 2 years to be levied on the per-ton basis. Likewise, it appears that the assessment committee failed to make proper allowances for automobiles moved on ships carrying automobiles and other vehicles exclusively.

Not all parties agree with these figures above and the estimated $1.23 per ton assessment no doubt is overstated. There are disputes as to the proper shortfall figures and as to the proper tonnages to be used. There is a dispute as to the figures or estimates of tonnage used for all cargoes but "excepted cargoes." Here again, experience will develop the actual figures, and the board of directors of NYSA must adjust the $1.23 per ton assessment upwards or downwards under the terms of Agreement No. T-2390. If too little tonnage factor assessments are collected, or if too much tonnage factor assessments are collected, additional assessments, or refunds of over-assessments, respectively, will be made by NYSA.

In any event, the validity, reasonableness, and lawfulness of Agreement No. T-2390 does not depend upon the figure of $1.23 used by the assessment committee, nor upon the exact dollars and cents amount of this per ton assessment factor. Whether the agreement results in an assessment of $1.23, or $1.13, or some other tonnage factor does not affect the general theory behind Agreement No. T-2390 that assessments should be made in the present circumstances at the Port of New York on a reasonable combination basis of man-hours and of tonnage.

If anything is wrong with the $1.23 figure, the record as a whole shows that this figure will be lower. Therefore, while the man-hour part of Agreement No. T-2390 is a constant 93.1 cents, the tonnage portion of the formula to the extent that it is lower than $1.23 per ton will benefit the ocean carriers with high productivity ratios, that is, the container and the ro-ro carriers, for example. Of course, a reduction in the tonnage factor below $1.23 per ton will also benefit the breakbulk carriers, but not as much as it will benefit the operators with higher productivities.

There is a long history of the evolvement of the combination man-hour/tonnage formula of Agreement No. T–2390, for assessing the fringe benefit costs herein. The underlying principle is to assess these costs in a manner approximating the benefits to be received by the various modes of operation of the ocean carriers. The T–2390 man-hours/tonnage assessment is to be uniformly applied to all operators, but those in the "excepted cargoes" category, which continue on the historical man-hours basis.

Historically, a man-hours assessment was used in the industry. This was generally equitable and fair to the industry as a whole when all ocean carriers operated in relatively the same conventional manner, that is, when all cargoes generally were breakbulk. With the advent of containerization, inequities resulted, and the man-hours assessment fell more heavily on the breakbulk segment of the industry than on the containership segment.

In theory, there may come a time when the industry may be virtually entirely containerized, as it may be soon in the North Atlantic trade, in which event an assessment based only on tonnage (as in Agreement No. T–2364) would be completely fair and equitable to all ocean carriers. This would be so, inasmuch as the tonnage assessments surely would be related to benefits received. Furthermore, since income and revenues of the carriers are based on tonnages carried, as a carrier increased its tonnages and received increased benefits from longshore labor efficiency and knowhow, the carrier would have increased revenues to pay for these fringe benefits of pensions, welfare and clinics, and guaranteed annual income.

In the present situation at the Port of New York, it is estimated that in the contract year 1969–1970, the breakbulk and unitized carriers together will handle about 15.4 million tons of cargo compared with 12.1 million tons of cargo handled together by container and ro-ro carriers. By 1972–1973, it is projected that the container/ro-ro segment will handle 16.5 million tons compared with 14.5 million tons by the breakbulk/unitized segment of the industry. For 1970–1971, it is estimated that breakbulk operators would carry 11,624,439 assessable tons, unitized operators 3,427,078 tons, containerized operators 12,880,000 tons, and ro-ro operators 660,000 tons.

Contributions in 1970–1971 to fringe benefits on the old man-hours assessment basis would be, as estimated on page 23 of exhibit 4b, as follows:

	Breakbulk	Unitized	Container	Ro-Ro
Pension @75 cents	$16,766,017	$3,427,116	$3,803,148	$165,000
Welfare and clinics @49.5 cents	11,065,571	2,261,897	2,510,078	108,990
GAI @22 cents	4,918,031	1,005,287	1,115,590	48,400

There is a probability that GAI should be refigured at 55.5 cents, but this is unnecessary here, for the principle to be illustrated.

The above table shows the great imbalance of payments for fringe benefits if they are based on the man-hours basis alone. The containerized operators would be carrying more tons than the breakbulk operators, but the breakbulk operators would be contributing very much more of the moneys for the pension, welfare, and clinics and GAI benefits. The imbalance again is related to the varying rates of productivity, that is, tons loaded or unloaded per man-hour. Breakbulk operators would be paying for fringe benefits between four and five times as much as containership operators, but breakbulk operators would be carrying less tonnage than the containership operators.

After the October 1, 1968, meeting of the membership, the board of directors of NYSA appointed a seven-member Assessment Committee which held several meetings and reported back on April 1, 1969, that the Committee had been unable to reach agreement on any principles relating to an assessment formula. A strike had commenced in the Port of New York on December 20, 1968, and it ran for 56 days until a new NYSA–ILA contract was ratified on February 14, 1969, both by the ILA membership, and by a unanimous vote of NYSA. Once the strike was settled and the full costs of the labor agreement were known, NYSA members again turned their attention to the proper allocation and assessment of costs.

At a special membership meeting on April 17, 1969, Capt. G. H. Evans, a vice president of States Marine Lines, Mr. M. R. McEvoy, then the president and now the chairman of Sea-Land, and Mr. C. P. Lambos, an attorney of the firm of Lorenz, Finn & Giardino, were appointed as a three-man committee to develop a method of assessing the various fringe benefit costs of the NYSA–ILA labor agreement. Mr. Lambos had long experience and had practically devoted his entire career to the study and handling of NYSA labor problems. The other two gentlemen represented respectively the breakbulk and containerization industry viewpoints.

This assessment committee of three men was authorized to have the widest latitude in studying all facts necessary, including the right to retain economists, actuaries, accountants, and other experts. It was given access to all facilities and staff of NYSA, and was directed to give all interested parties an opportunity to be heard. The committee held its first meeting on April 1, 1969, and worked diligently thereafter. The committee found it necessary to develop an "industry viewpoint" as distinguished from the parochial viewpoint of any single member of the committee, or of any segment of the industry.

Two points were clear to the committee. One, the container operator took the position that the assessment of costs should not place a penalty on one who had committed itself to a substantial capital investment; and, two, the breakbulk operator felt that it should not be burdened as a result of contract costs caused by containerization. The committee also felt that each operator must pay its own direct labor costs, that is, pay its own wages. The committee had more difficulty with other costs, but it aligned vacation and holidays as an integral cost of employing labor, that is, as direct labor costs.

The assessment committee decided that there should be a second grouping of so-called "industry costs," consisting of other benefits which not only contain future and present costs, but also costs generated by past obligations. This second, or industry, category included pensions, welfare and clinics, GAI, and NYSA support.

A major part of pensions to be paid in the next 40 years by the industry consisted of past service liability, not only of present members of the work force, but also of those already on pension. As to welfare, the cost of death benefits, hospitalization, surgical and medical expenses, continue to be about the same regardless of man-hours worked, and are the same for a worker whether he works an average of 2 thousand hours or 700 hours a year. The industry agreed in 1964 to support four medical centers or clinics. Concerning GAI, it is difficult to find a rationale which would justify charging an employer who has maintained job opportunities (man-hours of labor) more than is charged to one who has decreased job opportunities. When containership services replace breakbulk services in a trade, job opportunities are decreased about 80 percent.

In other industries where an employer decreases the number of men as a result of automation, such individual employer usually and normally has been required to pay the costs of dislocation. The entire cost of automation has been borne by such an employer himself, and not by other employers in the same industry who have not gone into innovation. Conversely in the NYSA industry, displacement of jobs is taken care of by GAI, by pensions, including early retirement provisions, and by continued welfare and clinics benefits to those for whom no work may be available. As shown above, what has happened is that the major share of such GAI, welfare and clinics, and pension benefits have been paid, not by the innovator (containerships and ro-ro operators), but by the one who has not changed his operation (the breakbulk operator).

The assessment committee concluded that the fringe benefits of pensions, welfare and clinics, and GAI had to be treated separately, and not in the same manner as direct labor costs. Also, the committee was well aware of the unanimous resolution of the membership of NYSA, that the past system of allocating these benefits solely on a man-hour basis had to be discontinued.

The assessment committee made reports in June 1969, and in September 1969, and as a result a temporary assessment formula was adopted on September 29, 1969, and was filed the next day with the Commission as Agreement No. T–2336. In its September 15, 1969, report, the assessment committee recommended that the Committee be discontinued, and that a new committee be formed to take its place. This committee was not allowed to be disbanded, and it came up finally with a unanimous recommendation on February 6, 1970, for resolution of the assessment problem, on a combination man-hours/tonnage basis, which was substantially the same basis is in Agreement No. T–2390, except for certain changes as to expected cargoes and automobiles resulting from the membership meeting on February 26, 1970.

Containerization has not always been a major consideration in NYSA–ILA labor negotiations, but it played the major role in the 1968 negotiations, and caused sharply increased costs in virtually all categories of the labor contract. Whereas, the 1964 contract resulted in a so-called package increase of $0.80 per hour, the October 1, 1968, to September 30, 1971, contract resulted in a package increase of $1.60 per hour, which does not include shortfall and GAI. Including those additional two items would make the package total about $2.20 per hour. GAI was increased from 1,600 hours in the old contract to 2,080 hours in the new contract.

The $1.60 package includes an increase of $0.98 per hour in basic wages on general cargo, from $3.62 in September 1968, to $4.60 in September 1971; an increase of $0.28 per hour in pension, from $0.47 in 1968, to $0.75 in 1971, and an increase of $0.16 per hour in vacation and holidays, from $0.559 in 1968, to $0.719 in 1971.

In more concrete terms, the maximum vacation was increased from 4 weeks under the old contract to 6 weeks under the new contract, and holidays were increased from 12 under the old contract to 13 days a year under the new contract. Welfare and clinics' increased costs were largely due to inflation. Four medical clinics are maintained in various areas of the Port of New York. It appeared to NYSA that one of these clinics was not necessary because of declining man-hours, but it must be supported by continued clinic payments. Concessions from the Union to limit clinic facilities could not be obtained because of containerization. Pension benefits' increases included the change from $175 to $300 a month for regular pensioners who were at least 62 years old, with 25 years of service. The new contract provided an early retirement, at $250 per month at age 55 or over, with 20 years of service.

The opening demands of the ILA at the 1968 negotiations included straight time pay of $6 per hour, and overtime and holiday pay of $12 per hour; a 6-hour workday; a 2-year term for the contract, cradle to grave complete welfare coverage, pension of $400 per month after 20 years of service regardless of age, with additional $10 per month for every year over 20, 50-percent widows' pension, full funding of pensions within 10 years, GAI changed to GWW (guaranteed weekly wage or pay of 40 hours every week, even if work was 80 hours in another week), 16 holidays, 6-weeks vacation, all containers and containerized cargoes to be stripped and loaded by ILA, a $4 a ton royalty fund "on all bulk cargo," and signing of the agreement by all ports the same day—"one port down—all ports down."

Ten cents of the $1.60 package was given in addition to a $1.50 offer by the Labor Policy Committee of NYSA, at the behest of the International President of the Union as the price for his support of the package. The other $1.50 was given by NYSA to break an impasse in the negotiations in the last week of the Taft-Hartley injunction in an attempt to avoid the strike which resulted later.

The NYSA industry did obtain certain benefits in the 1968–71 contract, including the open register of longshoremen, the filing of employer lists of permanent employees, the free use of employers on a prior day order basis of their list men for work anywhere in their zone, prior day ordering system (8 a.m. start), port-wide mobility of longshoremen, acceptance of the principle that GAI recipients must work and be available for work and debiting of up to 4 days' pay for each day an employee fails to accept work, elimination of travel time for all new men entering the industry, industry-wide discipline and discharge, new grievance procedures, and a 3-year contract.

Lack of manpower had been costly to the industry in the 1966–68 period. There were shortages of manpower in Brooklyn, Staten Island, and New Jersey; employers were unable to obtain the number of gangs needed to work ships, many gangs could not be worked as gangs because they reported with a short complement, and other gangs had to be broken up to obtain fill-ins for absentees. On the terminals, truck lines had been paralyzed by shortages of checkers, cargo had remained on piers too many days, terminal labor had not been available in needed numbers, and some fill-ins ordered at the hiring centers at 8 a.m. reported hours later if they were available at all.

The costs to the industry of the above lack of manpower has not been computed, yet it was undoubtedly many million dollars a year, both in the cost of moving a ton of cargo, and in the loss of ships' time in turnarounds at port. Under the new 1968–71 contract, the concessions made by ILA to NYSA should benefit all operators, both breakbulk and containerized. All operators should pay for these benefits.

Lack of control over the work force under the old contract had a substantial effect on productivity. Under the 1968–71 contract. procedures on industry discipline and GAI penalties, together with the open register, if properly implemented, should promote a good measure of employer control over the work force.

No one can exactly measure or calculate in dollars and cents the benefits to the NYSA industry of the new labor contract, but the industry did obtain substantal benefits, and these benefits cannot be charged or credited solely to any particular segment of the industry because the entire industry will benefit from the new contract.

Basic wages under the new NYSA–ILA contract increased from $3.62 to $4.60 per hour, an average of 9.02 percent in each of the 3 years. The entire contract package increase of $1.60, exclusive of GAI increases, averaged an increase of 10.6 percent a year. Adjustments in other industries ranged from 6 to 10 percent, putting the ILA at the top of the scale. A national average for the 3 years for certain industries was 6.6 percent a year.

Under most American-flag deep-sea labor contracts early retirement is available at any age after 20 years of service. Although this was sought by the ILA, early retirement was granted at age 55 or over with 20 years of service. This limited early retirement brings certain benefits to the NYSA industry, especially in areas of the Port of New York which had lost work opportunities. Every early retiree eliminates an eligible from continued GAI protection. It is cheaper to pay $3,000 a year early retirement than $8,320 per year (wage of $4 times 2,080 hours) under the GAI. "Twenty years and out" had become a rallying cry on the waterfront. Undoubtedly the fear of containerization played a major role in the Union's initial demand for an early retirement age, and the NYSA industry might well have avoided such a benefit in the absence of the containerization issue.

The normal pension was increased from $175 to $300 per month. Under the old contract, widows were entitled to 50 percent of the pensioner's benefits. The new contract froze widows to 50 percent or $100 per month whichever is lesser. This limited the increase to past and present widows to $12.50 per month. The higher pension benefits in the new contract were caused in part by the containerization issue.

GAI was increased in the new contract from 1,600 to 2,080 hours. The GAI program was instituted originally as payment for the reduction in the size of the gang and utilization of manpower and equipment provisions in the 1964 labor agreement. The increase in hours to 2,080 was in consideration of the long term (3-year) contract, open register, flexibility, GAI safeguards such as heavy debiting for failure to work, and control of the work force. Containerization, as the major fear of the employees, played a major role in the increase in GAI benefits.

An analysis of the recipients of GAI benefits for the period January 1, 1968, to September 30, 1968 (under the old contract), shows that 657 longshoremen received GAI payments totalling $1,211,810.15. Of this number, 343 men received $914,900.21. Not all of this cost was because of containerization. For example, 70 workers who received $227,994.20 had worked at an Army base in the Port of New York, and from this base, the military had transferred the work out of the port area.

Once the $1.60 package increase was offered to the Union, the NYSA employers were willing to let the ILA freely assign the money to the various benefits. The cost of $0.14 per hour assigned to the additional fifth and sixth weeks of vacation was a substantial benefit, but from the employers' viewpoint it was better spent for vacations than for wages. If spent for wages, it would have had an immediate effect on overtime, upon taxes, and on social coverages such as unemployment insurance, workmen's compensation and social security. The two additional weeks of vacation also create 80 additional hours now deductible from the improved GAI benefits. Six weeks of vacation totalling 240 hours and 13 days of holidays totalling 104 hours, both subtracted from 2,080 hours GAI, leave 1,736 hours without regard to other deductions, which employees must work or be offered work, in which case these employees will not be entitled to GAI benefits. With respect to the sixth week of vacation, containerization contributed to this cost because it was the overriding issue in the entire negotiations for the 1968–71 contract.

Besides all the above benefits to the ILA, there is the so-called Container Royalty Fund, which was begun in 1961. This fund provides employee benefits supplementary to the contract benefits. The rates of royalty contributions continued the same after October 1, 1968, as before that date.

In summation, the containerization issue was the most critical single issue in the negotiations for the 1968–71 ILA contract. The ILA used containerization as the basic reason for its demands for increased pension and GAI benefits. Containerization caused an increase in the benefits, for early retirement, for the normal pension of $300, for the increase in GAI to 2,080 hours, and a portion of the shortfall of work in the Port of New York under 40 million hours a year. Containerization should be credited for its container royalty payments which are used to make supplementary benefits to employees.

The following table shows for the contract year 1969–1970 the per ton costs on the January 1970 interim assessment basis of $2.73 per man-hour (for pension 70 cents, welfare and clinics 41.5 cents, GAI 55.5 cents, NYSA Support 4 cents, shortfall 32.1 cents, and vacations and holidays 69.9 cents), plus wages of $4.25 per hour, using the productivity factors of 0.52, 2.54, and 3.0, respectively, for breakbulk, container and ro-ro ships. These costs are compared with the per ton costs under the combined man-hour/tonnage formula of No. T–2390.

	Per ton [1]		
	Breakbulk [1]	Container	Ro-Ro
I. Costs per ton interim man-hour basis of $2.73:			
Wages $4.25 per hour	$8.17	$1.67	$1.42
Vacation and holiday, $0.699 per hour	1.34	0.28	0.23
Pension, welfare and clinics, GAI, NYSA support, shortfall $2.031 per hour	3.91	0.80	0.68
Container royalty		[2] 0.28	[2] 0.28
Total cost per ton	13 42	3.03	2.61
II. Costs per ton under T–2390:			
Wages	8.17	1.67	1.42
Vacation and holidays	1.34	0 28	0 23
Pensions, welfare and clinics, GAI, NYSA support, shortfall 93.1 cents per man-hour and $1.23 per ton	[3] 3.02	[3] 1 60	[3] 1.54
Container royalty		[2] .28	[2] .28
Total cost per ton	12.53	3.83	3.47

[1] Rate per hour divided by productivity factors to arrive at cost per ton.
[2] The figure of 28 cents is an estimate submitted by NYSA and involves converting long tons into assessable tons (sometimes called revenue or stevedore tons with the conversion factor varying as to various carriers)
[3] Productivity factors divided by 93.1 cents per man hour, to arrive at costs per ton for this man-hour factor, plus $1.23 per ton for tonnage factor.

Under No. T–2390, the costs for loading or discharging cargo, including wages, vacations, holidays, and fringe benefits would be

\$12.53 per ton of breakbulk cargo compared with \$3.83 per ton for containership cargo and \$3.47 per ton of ro-ro cargo. Obviously the differences under the breakbulk cost of \$8.70 a ton for containership cargo, and \$9.06 a ton for ro-ro cargo should be substantial motivation for innovation.

For the purposes of this record, the above table, which was based on exhibit 32 of record, is one of the most significant tabulations of record. Here is the effect of the change from the January 1970 interim man-hours basis to the Agreement No. T–2390 basis. Breakbulk carriers obtain relief to the extent that their costs are reduced from \$13.42 a ton to \$12.53 a ton, whereas containership carriers' costs are increased from \$3.03 a ton to \$3.83 a ton, and ro-ro carriers' costs are increased from \$2.61 a ton to \$3.47 a ton. These seem to be eminently fair and equitable results, from a dollar and cents cost per ton viewpoint.

Of course, using percentages rather than dollars and cents comparisons, the containerships and ro-ro carriers are subjected seemingly to more substantial increases, and, of course, if the increases are compared on a man-hours basis (ignoring productivity factors), even further increases and even further higher percentages can be shown for the containership and ro-ro carriers. However, all parties admit that the assessment issue and problem in this proceeding boils down to "a dollars and cents issue." This means dollars and cents costs per ton, and not dollar and cents per man-hour.

This is consistent with the fact that if the carriers were to have to increase their freight rates, because of these assessments here in issue, their freight rates would be related to the tons of cargo handled and the costs per ton of handling such cargoes, and contrary-wise, the carriers' freight rates are not directly related to costs per man-hour of longshore labor.

Where both breakbulk operators and containership operators compete in the same trade, they certainly must be aware that they compete ratewise in costs per ton to the shipper and not in per man-hour costs of longshore labor to the carrier. It follows, that the fairest way of assessing industry fringe benefit costs is on all the members of the industry on the same per ton basis, at least for some portion of the fringe benefits.

On the basis of the facts and discussion up to this point in this report, it clearly is evident that the provisions of Agreement No. T–2390 are just and reasonable and otherwise lawful under the Shipping Act from the standpoint of cargoes and carriers in general which operate in and out of the Port of New York. However, there remains the question of what exceptions or changes if any, there should be added to the present exceptions to the general application of Agreement No. T-2390.

There remain to be considered the special pleas of the Puerto Rican trade, the banana and automobile interests, the pleas of Seatrain and U.S. Lines, the situation faced by TTT, the provisions in the agreement regarding the Tonnage Review Committee, and other matters, including the treatment of the Hawaiian and Alaskan trades.

There is no trade now, and there has not been for at least the last 20 years any trade between the Port of New York and Alaska. There is therefore no purpose for an assessment on nonexistent cargo. But, to encourage such cargo to move, if and when some trade between the Port of New York and Alaska may develop, it seems advisable to place such cargo at least for a while in the "excepted cargoes" category under Agreement No. T-2390.

The trade between New York and Hawaii is not extensive at present. Westbound to Hawaii only U.S. Lines offers a common carrier service. It is a weekly service. It is estimated that 75,000 payable or revenue tons moved westbound from New York in 1969 in U.S. Lines' service. Another 25,000 tons moved from other Atlantic Coast ports, making about 2,000 tons per sailing. The Hawaiian service of U.S. Lines is operated in conjunction with its Far East service, with about 10 to 15 percent of the aggregate gross round trip revenues being Hawaiian revenue, including Hawaiian cargoes from all Atlantic ports.

U.S. Lines' service from New York to Hawaii is a conventional service but with a number of containers carried on breakbulk ships. Under these circumstances for the westbound trade to Hawaii, there is some doubt whether placing this portion of the trade in the "excepted cargoes" category would decrease the costs of the carrier, because the evidence tends to show that breakbulk carriers would pay more assessments if placed in the excepted cargoes status than they would pay under Agreement No. T-2390 under the combined man-hours/tonnage basis. Here again, the individual productivity of a particular ship determines the result. U.S. Lines believes that there is substantial merit in the suggestion that Hawaii be placed in excepted cargo status.

Eastbound, from Hawaii to the Port of New York, there is no common carrier service. Some tonnages have moved eastbound on full shipload charters, consisting mainly of canned pineapple cargoes. States Marine Lines discontinued its common carrier service eastbound from Hawaii to New York in 1967, because of the competition of containerships operating between Hawaii and the west coast of the continental United States.

The trade between Hawaii and the Port of New York is susceptible to competition which includes transcontinental overland movement between Oakland, Calif., for example, and the Port of New York. Seatrain already publishes freight rates from Hawaii to interior points in the United States, and in the reverse direction. Such rates presently extend only as far east as Chicago, but Seatrain when it works out the details will be publishing Hawaiian rates to and from almost any and all points in the continental United States. Such service would be via Seatrain Lines across the Pacific Ocean, and via land carriers across the continental United States. Under the circumstances shown, it would appear that there is substantial justification for considering the trade (via the all-water route) between New York and Hawaii to consist of marginal cargoes highly subject to diversion to other routes, and therefore that these cargoes in this trade should be placed in the "excepted cargoes" status under Agreement No. T-2390. It is so concluded that this excepted status is proper for cargoes in this Hawaiian trade.

There are some similarities between the Hawaiian and Puerto Rican trades, and some differences. Both Hawaii and Puerto Rico depend upon ocean transportation. Any increases in transportation costs affect the growth of their economies. Both trades must be served by American-flag vessels and Americans crews.

There is one big difference between the Hawaiian and Puerto Rican trades. Trade between New York and Hawaii had decreased in recent years because of the competition with containerships operating between Hawaii and the west coast ports of the continental United States. States Marine Lines was forced out of the Hawaiian New York eastbound trade in 1967. Previously the Matson-Isthmian joint service in the trade was dissolved and Isthmian Lines withdrew from the service. On the other hand, there has been a tremendous and steady increase in the trade between the Port of New York and the Commonwealth of Puerto Rico.

In the fiscal year 1957–1958, this Puerto Rican trade amounted to 455,000 short tons. The cargoes in this trade increased every year, and in fiscal 1968–1969 amounted to 1,841,000 short tons, or over four times as much as in the first of these 12 fiscal years. The steady growth every year since fiscal 1957–1958 in the New York-Puerto Rican trade shows that it is not likely to dry up, or wither away, because of any reasonable increase in assessments. Therefore, there appears to be no substantial reason to blanket this entire Puerto Rican trade under the "excepted cargo" status.

There is little likelihood that this cargo as a whole will be diverted to other modes of carriage, as in the case of domestic intercoastal or intercoastal cargoes which are subject to rail and motor truck competition. Of course, we do not ignore the fact that the Puerto Rican economy is generally at a level below the rest of the United States, and that Puerto Rico has been struggling for some years to develop its own industry.

It has been estimated, that the difference in charges to this New York-Puerto Rican trade, under Agreement No. T–2390 (using the 93.1 cents factor for fringe benefits, plus 69.9 cents per hour for vacations and holidays, or $1.63 total, times an estimate of man-hours of 1,003,700 for the 1969–1970 contract year, plus the disputed tonnage factor of $1.23 per ton times 2,630,000 assessable tons), versus the charges at the rate for excepted cargo ($2.41 per man-hour times man-hours of 1,003,700), shows about $2,452,014 in additional costs, to this trade for the year.

Naturally, all interests in this Puerto Rican trade would like to avoid these additional costs, and also quite naturally there are other trades and interests at the Port of New York which do not want to bear any share of such costs as might be caused by giving Puerto Rican cargoes "excepted" status. Since the estimated assessable tons in this Puerto Rican trade for the 1968–1969 fiscal year amounted to 2,630,000, and using that tonnage for the 1969–1970 contract year, the above estimated differences in charges between No. T–2390 and the "excepted" rate of $2.41 per man-hour, would amount to about 93 cents an assessable ton.

It was estimated by an economic consultant that the difference in costs of T–2390 and excepted cargo status for the Puerto Rican trade could result in increased freight rates in this Puerto Rican trade of about 4 percent. Whether or not freight rates are increased in this Puerto Rican trade may depend upon what Sea-Land does, since it handles most of the cargoes and, of course, any alleged unreasonable increase would be subject to protest and possible investigation by this Commission.

Of particular interest in this Puerto Rican trade, is the Commonwealth's so-called "Fomento" program of industrial promotion. Principal products of Fomento plants in Puerto Rico are apparel, and fabricated metal and electrical products. These items, when transported to the Port of New York, then sell in highly competitive markets, vulnerable both to import as well as to domestic competition. Two thirds of the Fomento exports from Puerto Rico were food products, tobacco products, textiles and apparel, shoes, leather products, and miscellaneous small products.

Over 100,000 persons are employed in the Fomento industries. Employment is heaviest in the apparel (37,000), leather products (9,000), textile products (8,000), and metal products and electrical goods industries (9,000). The Fomento plants are an export-oriented sector of the Puerto Rican economy, and this is an impelling part of the whole economy of Puerto Rico. About one-fifth of Puerto Rico's apparel shipments to the United States, two-fifths of its shoe and leather products shipments, and nearly half of its electrical products shipments enter through the Port of New York.

From the facts and circumstances of record it appears that there is some considerable justification for putting a portion of the New York-Puerto Rican cargoes in the "excepted cargo" status. It is concluded that the northbound cargo moving from Puerto Rico to the Port of New York is entitled to the "excepted cargo" status.

There is no precise breakdown of record between cargo moving from the Port of New York southbound to Puerto Rico, and cargo moving from Puerto Rico northbound to the Port of New York. Presumably, however, the northbound cargo is less than half of the total. Excepting cargoes northbound from Puerto Rico will place a substantial added burden on nonexcepted cargoes in other trades under Agreement No. T–2390, but at the same time, it will relieve the Puerto Rican carriers of part of the substantial increases in assessments faced by them.

Seatrain estimated increased costs per year of from $750,000 to $1 million in the Puerto Rican trade, and TTT estimated increased costs of $603,500. TTT's witness sincerely believed that this cost would result in a loss to TTT of over $100,000 in 1970, but for competitive reasons TTT was unwilling to give sufficient details of its corporate expenses at the hearing to all parties so that this projected loss could be verified. In any event, the exception for Puerto Rican-New York northbound cargo found reasonable herein does not rely on the financial situation of these two carriers.

Besides the man-hours/tonnage combined assessment formula, Agreement No. T–2390, also provides for the Board of Directors of NYSA to select a qualified neutral group, to be known as the "Tonnage Review Committee." Further, No. T–2390 provides that "any member" of NYSA can request modification of the tonnage definition in the agreement with respect to "any specific cargo," and this Tonnage Review Committee can order an appropriate modification of the tonnage definition for the specific cargo, provided that this Committee shall consider, among other factors:

(*a*) Protection of the continued movement in the Port of New York of marginal commodities such as homogenous cargo.

(*b*) The need to maintain equitable and nondiscriminatory rules of tonnage definitions with respect to all cargo.

(*c*) Effect of modification on the purposes of the tonnage formula and its continued ability to meet obligations under the ILA contract.

(*d*) The contribution rate of such commodity may not be reduced to a point below that which would be paid if the assessment were on an hourly basis.

The limitation in Agreement No. T–2390 of who may request a modification of the tonnage definition to "any member," in the view of witnesses and counsel for NYSA, should have been expanded to include also any person or interest substantially affected by the assessment formula and tonnage definitions in Agreement No. T–2390, including persons, such as United Fruit, Wallenius, and Wobtrans. Accordingly, our approval of Agreement No. T–2390, shall be conditioned on the modification of that agreement to expand the definition of who may request modification of the tonnage definitions to include persons substantially affected thereby.

During the course of the hearing in this proceeding the Tonnage Review Committee of NYSA was constituted and began to function. How it functioned and how it was constituted appear properly to be matters under the general supervision and control of NYSA, but with the clear and firm understanding that anything accomplished by this committee has no more standing under the Shipping Act, than an act of NYSA. In other words, the door was left open at the hearing in this proceeding for the parties to come voluntarily together in reaching any stipulation of facts or in reaching any agreement or any modification of any agreement, and for the parties then to submit such stipulation of fact or agreement between themselves as a matter to be considered by the Commission. Barring any stipulation of fact or agreement of the parties as a result of actions or deliberation of the Tonnage Review Committee (and there have been no such stipulations or agreements as to automobiles, bananas, or any other cargo), any action of the Tonnage Review Committee is not a part of the record herein, and cannot be considered in the disposition of this proceeding.

When the NYSA Assessment Committee was considering the assessment problem, in general it gave very little detailed consideration to the problem of assessments on automobiles. Understandably, it had plenty to do otherwise and was facing almost an insurmountable task.

It was felt that problems, such as the assessments on automobiles, could be considered on an individual basis, such as the basis provided later in Agreement No. T–2390 by the means of the "Tonnage Review Committee." At least one assessment committee member expressed the view that perhaps automobiles should be assessed on a weight (tonnage) basis, but as provided in Agreement No. T–2390 by the NYSA membership, "Tons of unboxed automobiles, trucks and buses shall be calculated at 20 percent of the cubic measurement of the vehicles."

Since any ruling giving special treatment to automobiles under Agreement No. T–2390 necessarily would apply to all automobiles, trucks, and buses, whether importes or exports, and whether in the European, Puerto Rican, or any other trades, such ruling must also consider not only the effect on vehicles handled by Wallenius and Wobtrans, but also the effect on the vehicles handled by TTT, Sea-Land and others. Imports of automobiles into the United States far exceed exports from the nation, and imported foreign vehicles on the whole are smaller and lighter than exported American cars, trucks, and buses.

For automobiles, special treatment under Agreement T–2390 is sought by both Wallenius and by Wobtrans. In 1968, as shown by Departement of Commerce figures, 193,511 vehicles came into the United States through the Port of New York. These vehicles apparently consisted mainly of automobiles, with very few trucks and buses. Adding exports to these imports would make a total in 1968 of about 250,000 (Bureau of Census figures) vehicles imported and exported via the Port of New York. The total for 1969 would be larger than for 1968. The number of imported automobiles registered in the United States in 1968 was 985,767, according to Automotive News. In other words, it is estimated that of the total registered imports of autos into the United States, 20 percent or less came in via the Port of New York. Of the total cars delivered to the Port of New York in 1968, there were 88,837 Volkswagens.

Wobtrans transports autos to the United States in so-called lift-on/lift-off type ships mainly (90 percent), and in so-called roll-on/roll-off (ro-ro) type ships to a lesser extent (less than 10 percent). Wobtrans' carryings consist principally of the small Volkswagen autos. Wobtrans' stevedore at the Port of New York, Pittston Stevedoring Co., is a member of NYSA, and the cost to Wobtrans of discharging its vehicles at the Port of New York includes NYSA assessments.

An average vehicle imported by Wobtrans weighs 0.87 long tons, or 1,949 pounds, and measures 8.7 tons, or 348 cubic feet, a ratio of measurement to weight of 10 to 1. On the average, to discharge a

Wobtrans vehicle from a conventional lift-on/lift-off vessel requires 0.973 man-hours, and from a ro-ro vessel, 0.486 man-hours. About 1.0277 Wobtrans' vehicles are unloaded per man-hour of longshore labor from a lift-on/lift-off ship, and about 2.0576 vehicles per man-hour from a ro-ro ship.

The cars imported via the Port of New York on Wallenius' ships are handled in both lift-on/lift-off, and in ro-ro ships. All cars exported from the Port of New York on Wallenius' ships are handled on roll-on/roll-off vessels. In 1966, Wallenius imported 38,553 automobiles through the Port of New York, using 46,718 man-hours of longshore labor, or at an overall productivity rate of .825 cars per man-hour. This overall rate improved by 1969, possibly because of efficiencies or because of the greater use of ro-ro ships. In 1969, Wallenius imported 67,886 automobiles through the Port of New York using 60,643 man-hours of longshore labor, or at a productivity on the average of about 1.12 cars per man-hour. Presently, the average discharging rate on a lift-on/lift-off vessel of Wallenius is 20 to 30 autos per gang hour with gangs of 25 men, or an average of about one car per one man-hour. On ro-ro ships of Wallenius on import cars, the discharging rate averages between 50 to 65 cars per hour with gangs of 30 to 35 men. Using figures of 57.5 cars and 32.5 men, results in a rate of discharge of about 1.77 cars per hour as a rough estimate on ro-ro ships of Wallenius, but this may be a low estimate, particularly when the Wobtrans' rate of discharge of 2.0576 vehicles per man-hour is considered.

From the above figures it is concluded that Wallenius was importing into the Port of New York more cars on its lift-on/lift-off vessels than on its roll-on/roll-off vessels, but where it had fewer cars to handle as in the case of its exports, it preferred to use and did use exclusively its ro-ro vessels. Exports from the Port of New York on Wallenius vessels in 1969 totalled 12,634 cars.

Those cars exported by Wallenius were, of course, heavier American cars. A Lincoln weighs 5,000 pounds and measures 611 cubic feet, an Impala 3,700 pounds and 560 cubic feet, and a Maverick 2,392 pounds and 401 cubic feet. The imports were lighter foreign cars, including Volvos, Opels, and others. Wallenius' imported cars averaged in 1969 in measurement 360.09 cubic feet or 9 measurement tons, and in weight 1.008 long tons, or about 2,258 pounds per car.

Many vehicles, including many automobiles move out of the Port of New York to Puerto Rico, including both many new and used cars. A considerable number are carried in this New York-Puerto Rican trade by Sea-Land in its specialized lift-on/lift-off ship, the *Detroit*.

TTT carries many automobiles to Puerto Rico in its speedy ro-ro ship, the *Ponce de Leon.* Substantially all of the autos in this trade are carried southbound, with only a few northbound.

TTT's *Ponce de Leon* has five garage-like decks, which enable it to accommodate about 240 trailers used as containers for containerized cargoes. This ro-ro ship averages about 375 to 400 automobiles on each southbound weekly voyage, on a fully loaded voyage of its ship. As many as 450 to 500 automobiles might be carried depending upon the mix of the cargo as between automobiles and trailers. There are heavy and slack seasons for the movements of automobiles to Puerto Rico, but when fewer new cars are moved, generally used cars fill the void.

TTT points out that autos to many Puerto Ricans, especially where bus transportation is poor or nonexistent, are properly classed as necessities, along with basic food imports to Puerto Rico. It is TTT's feeling that practically all of its southbound carryings are essential to the economy of Puerto Rico, whether foods, raw materials for Puerto Rican industries, autos, cranes, bulldozers, industrial steel, etc. On one voyage, TTT carried 48 trailer loads of foodstuffs and 28 trailer loads of steel construction plate.

TTT's commodity carryings for the year 1969 (there were no carryings in January and part of February 1969 because of the longshore strike), included passenger automobiles totaling 12 percent. Commercial vehicles, including trucks, buses, roadbuilding vehicles, etc., amounted to another 11.1 percent of the total carryings. The roadbuilding, etc., portion would not be included under autos, trucks, and buses under Agreement No. T–2390, and making such allowance, would leave a total for TTT of autos, trucks, and buses, of more than 12.6 percent and less than 23.7 percent, a substantial percent of TTT's carryings to be affected by any ruling providing special treatment for autos, trucks, and buses. It should also be borne in mind in considering overall assessments on TTT in this proceeding, that it has been concluded already, that the northbound Puerto Rico to New York trade should be placed in the "excepted cargo" status.

Productivity for TTT, based on 26,117 vehicles (of all kinds, that is, all self-propelled vehicles included buses, trucks, automobiles, cranes, agricultural equipment, and anything other than a trailer) divided into 35,640 man-hours, amounted to a rate of $0.73 vehicles per man-hour. Of course, excluding the cranes, etc., would produce a higher productivity rate for automobiles.

As Captain Evans testified, there are two requisites in loading a ship, one relating to weight and loadline regulations, and the other relating to space and the cubic measurement of the cargo. Thus a ship may be full to cubic capacity or full to weight capacity. Freight rates accordingly are based on measurement and on weight as may be appropriate in any instance. Likewise, stevedore costs apparently are related to measurement, weight, and other factors affecting productivity. All these factors also are to be considered in determining the reasonableness of any assessment formula.

Productivity factors depend upon the the type of tons or type of units related to man-hours of labor. One and a fraction vehicles of Wobtrans are unloaded per man-hour from lift-on/lift-off vessels, and two and a fraction Wobtrans' vehicles are unloaded per man-hour from ro-ro vessels. Converting from units of autos, to units of tons, and using measurement tons with 8.7 measurement tons for a Volkswagen, we find that 8.94 cubic tons of Volkswagens are unloaded per man-hour from a lift-on/lift-off vessel, and that 17.9 cubic tons of Volkswagens are unloaded per man-hour from a ro-ro vessel. As seen, expressed in cubic tons, the productivity rate on these automobiles is very high, and naturally any shift from a man-hours basis to a tonnage basis, even to a part-tonnage basis, will increase the assessment on automobiles substantially. It likewise follows that maybe automobiles were under-assessed in past years to the extent that their high productivity rates and the man-hours formula produced low assessments per automobile.

There is some indication of record of a possibility of diversion of autmobiles away from the Port of New York to other ports, if some relief from the assessment rule in Agreement No. T–2390 is not provided. However, this evidence is not persuasive, and the record as a whole is clear that automobiles are not the marginal type of cargo which cannot stand the burden of some reasonable increase in assessments for the fringe benefits herein. Wallenius already has passed on, on will have passed on, its increased assesments under No. T–2390 in the form of a surcharge on its rates, which surcharge is now effective, or will be effective shortly. The question which remains is whether the burden to be placed on automobiles is fair in relation to the benefits to be received.

In the whole tonnage Agreement No. T–2364, which never became effective, the high measurement tonnage productivity rate for automobiles was recognized, insofar as that agreement provided:

> Tons of *unboxed automobiles* shall be calculated at 25 percent of the cubic measurement of the vehicles. (Emphasis added.)

This 25 percent basis for automobiles also was under consideration by the NYSA membership when it adopted Agreement No. T–2390 with the 20 percent of cubic measurement basis for tons of *unboxed automobiles, trucks, and buses*. The change from 25 to 20 percent apparently was made partly in an attempt to mollify the automobile interests in this proceeding, and partly in view of the fact that on another coast, the West Coast of the United States, there had been a compromise settlement of a dispute, using 20 percent of cubic measurement for automobiles in connection with the so-called "Mechanization and Modernization Fund" (the Mech Fund) of the Pacific Maritime Association (PMA).

Wobtrans contends that the treatment of the automobiles in Agreement No. T–2390 cannot be justified by reference to the terms of settlement which finally ended eight years of controversy regarding PMA's Mech Fund. In the case on the West Coast, PMA was establishing an entirely new charge to fund the Mech Fund, whereas at the Port of New York, only a new formula is at issue. Wobtrans argues that in the PMA settlement, the formula therein assessed bulk cargo at one-seventh of the general cargo rate, cargo in containers at seven-tenths of the general cargo rate, and automobiles and trucks exclusive of trailers at one-fifth of the general cargo rate, and therefore that this PMA basis of settlement cannot be compared with the NYSA formula of a wholly different schedule of charges, such as the excepted cargo status for bulk cargo which excludes shortfall. The Commission approved the PMA compromise formula on the understanding that no party therein voiced any objection to the method of assessments. Wobtrans insists that the terms of the PMA settlement constitute no precedent whatever in the present controversy.

Let us now consider the actual costs in dollar and cents per automobile under Agreement T–2390. Using, for convenience, the productivity figure of 1.0 (instead of 1.0277) vehicles per man-hour for a lift-on/lift-off vessel, and 2.0 (instead of 2.0576) vehicles per man-hour for a ro-ro vessel, under Agreement T–2390, fringe benefit costs for one automobile would be 91.3 cents for lift-on/lift-off and 45.65 cents for ro-ro for the man-hour portion of the formula; and for the tonnage portion of the formula, using $1.23 per ton times 20 percent of 8.7 tons, costs would be $2.14 per automobile, or totals of $3.05 for lift-off, and $2.60 for ro-ro per auto.

These automobile costs for fringe benefits under Agreement No. T–2390 are substantial costs, but they appear to be at least reasonably related to the benefits received, although somewhat on the high side. Based on all the facts herein, and using our best judgment of the charges and benefits, which cannot be finely and precisely related, a fairer assessment herein on automobiles would be one based on 18 percent of measurement tons. This would reduce the cost of the tonnage portion of the formula under No. T-2390 by 10 percent, or by 21.4 cents per automobile, and there is testimony of record that in the volume carriage of automobiles, cents per auto are important. The resulting costs would be, as estimated herein, $2.86 per auto for lift-on/lift-off ships and $2.38 per auto for ro-ro ships. It is concluded that Agreement No. T-2390 should be amended in its tonnage definition of tons of automobiles, trucks and buses to specify calculation at 18 percent instead of 20 percent of the cubic measurement of the vehicles.

It is requested that bananas be treated as "excepted cargo" under Agreement No. T-2390, or that they be assessed on long tons of 2,240 pounds under the combined man-hours tonnage formula provided the assessment be no lower than on excepted cargo. Bananas are packaged in boxes at 45 pounds gross a box, with the bananas occupying 60 to 70 percent of the inside cube of the box. Bananas are transported in full shipload lots, in the holds of conventional breakbulk reefer vessels, from which they are discharged by a system of conveyor belts which deliver the boxed bananas either to railcars or to trucks within the terminal. ILA labor is utilized for the entire discharging operation from the ship's hold to the inland conveyance. The method of discharging bananas has not changed appreciably in recent years.

Boxes of bananas discharged by United Fruit at its Weehawken terminal from 1966 through the first quarter of 1969, have been at a fairly steady rate of labor productivity, averaging about 23.9 boxes per man-hour of longshore labor. Using for convenience the rounded figure of 24 boxes, times 45 pounds a box, results in 1,080 pounds per man-hour, or somewhat less than half a long ton per man-hour on the average on a weight ton basis. However, bananas uniformly measure more tons than they weigh.

United Fruit refers to figures of 524,438 long tons for the 2-year period of October 1, 1969, through September 30, 1971, as equivalent to 1,200,846 measurement tons, which is a ratio of about 2.29 measurement tons to one long ton of bananas.

United Fruit also makes an updated projection for these two years of a total of 1,413,764 measurement tons, and 595,000 man-hours per year of longshore labor times 2 years, or a productivity of about 1.19 measurement tons per man-hour. Therefore, on a measurement ton productivity basis, bananas fell fall between the containerized cargo (productivity of 2.54) and the breakbulk cargo (productivity of 0.52).

Bananas must compete in price with other fruits. There is some possibility of the diversion of bananas away from the Port of New

York to other ports. Del Monte Co. recently inaugurated a banana discharge operation in Wilmington, Del., for the sale of bananas in the metropolitan New York, and other areas, because of higher terminal costs at New York and other reasons. Also, bananas have been assessed for some fringe benefits on the west coast on a weight basis.

As seen, bananas are largely comparable to breakbulk cargoes except for a productivity rate of 1.19 or somewhat more than twice that of the average breakbulk productivity rate of 0.52. Bananas are measurement rather than weight cargo.

In all the circumstances herein, it is concluded that a reasonable basis of assessment of bananas would be on the basis of Agreement No. T–2390, but defining a ton of bananas on the basis of 55 percent of a cubic or measurement ton, rather than 100 percent of such a ton. While it is not believed that this basis now found reasonable and lawful herein would reach below the minimum basis for "excepted cargoes," as provided in Agreement No. T–2390, this new tonnage definition for bananas of 55 percent of cubic, is made subject to the limitation that the assessment on this basis be not less than the contribution would be on the man-hours "excepted cargo" basis.

A number of miscellaneous arguments have been advanced in this proceeding. One contention is that Agreement No. T–2390 requires innovators to absorb some of the direct costs of breakbulk operators. This contention is erroneously based on the premise that pension, welfare and clinics, and GAI costs are direct costs of each employer, but the facts are that these are not direct costs, but fringe benefit industry costs.

Another argument is that the Commission lacks jurisdiction because Agreement No. T–2390 is a non-agreement, or because it is an agreement controlling or regulating labor and collective bargaining. Neither contention is correct. Although No. T–2390 was not adopted by the NYSA membership unanimously (it was adopted by a 58 to 3 vote, and extended by a 61–3 vote), it was adopted in accordance with the bylaws of NYSA. The situation here is different from that in *Hong Kong Tonnage Ceiling Agreement*, 10 F.M.C. 134 (1966), as the Commission ruled on March 11, 1970, in this proceeding.

The bylaws of NYSA in the present situation required only a majority vote. The bylaws specifically provide for the adoption of an assessment formula to meet labor contract costs. The bylaws make it clear that a member of NYSA may withdraw from the labor contract within 14 days after ratification of such contract by a written refusal to subscribe to such contract, but once a carrier ratifies the labor contract such carrier is bound to pay the assessment for the labor contract. (Articles I, II, and VI of the bylaws of NYSA—Exhibit 7 of this record.)

In other words, by ratifying the labor contract with ILA, each of the member carriers of NYSA, including TTT, Seatrain, and U.S. Lines, recognized, acknowledged, and in effect agreed to pay its fair share of assessments for fringe benefits under the labor contract, and each knew that the majority will of NYSA would determine the method of assessments, or at least each was charged with such knowledge. The old man-hours basis of assessment was not ever filed for approval nor approved by the Commission, although it had the force of custom and usage. Nevertheless, that man-hours basis was in no wise prescribed by the bylaws of NYSA, or by the labor contract with ILA as the only means of assessment of fringe benefits.

Agreement No. T–2390 does not control or regulate labor and collective bargaining. Rather it is an agreement between NYSA members, in the form of a cooperative working arrangement of a substantial nature, inasmuch as it provides for the assessment of about $60 million or more per year on NYSA members and others. This agreement is clearly subject to section 15 of the act and to the jurisdiction of the Commission under the standards of the *Volkswagenwerk* case, above.

Agreement No. T–2390 is said to be violative of the antitrust laws, but there is no basis for this contention in this proceeding. The agreement is not a price-fixing arrangement, as it merely provides an assessment arrangement to meet the costs of a separate labor contract. If any prices were fixed, they were fixed in the labor contract, and even that is extremely doubtful. Even if No. T–2390 were to be considered one of a nature contemplated by the antitrust laws, nevertheless it would have to be approved under the Shipping Act, because there is such a clear compelling transportation need for this Agreement to avert chaos at the Port of New York.

Another argument is made that there has been no need shown for Agreement No. T–2390, but this is contrary to the facts. The labor contract, a necessity to the ILA and to NYSA, requires that there be sufficient assessments of NYSA members to meet the needs created by the labor contract. Unless Agreement No. T–2390 is approved, or unless a substitute agreement of substantial merit is approved, there is a strong likelihood, that insufficient funds would be raised to meet the obligations of the ILA labor contract, and consequently that labor chaos at the Port of New York would result. This record demonstrates an overwhelming transportation need for Agreement No. T–2390, subject to the modifications herein already discussed.

Some contention is also made that the ILA labor agreement is the only basis upon which labor costs may be assessed in the Port of New York. This is incorrect as the labor agreement does not so provide. The labor agreement states the obligations of the parties, but does not provide how the monies are to be raised by NYSA to meet its obligations.

There is no showing in this record that Agreement No. T–2390, as modified, will be unjustly discriminatory, or unfair as between carriers, shippers, exporters, importers or ports, or that it will operate to the detriment of the commerce of the United States, or will be contrary to the public interest, or that it will be otherwise in violation of the Shipping Act.

There is argument by some carriers herein that Agreement No. T–2390 does not sufficiently recognize their substantial investments in containerships, ro-ro ships, containers and shoreside equipment, but careful consideration of the history and terms of Agreement No. T–2390 leads clearly to the conclusion that this investment factor was weighed carefully. Aside from the inherent justness of Agreement No. T–2390, the investment in containerships and ro-ro ships is in large part returned to the investor in the form of the benefits received from the speedier turnarounds in port of these newer type ships, with the resultant savings in vessel time and expenses.

Some carrier elements in this proceeding insist that the whole tonnage formula of the prior agreement, No. T–2364, which never became effective, should be approved herein. The time probably will come sometime in the future when the whole tonnage formula will not only be reasonable and lawful, but also acceptable to substantially all elements of NYSA. That time, however, is not here now, and to now approve a whole tonnage formula would be almost as disruptive to the NYSA industry as to continue the old man-hour formula, which assuredly has outlived its former usefulness and has outlived whatever lawfulness it had if it had any lawfulness. In all the circumstances herein, there appears to be no other reasonable and lawful alternative but to approve the combined man-hour/tonnage formula of Agreement No. T–2390, and to approve that Agreement subject to certain modifications as found justified herein.

One further point needs clarification. The effective date of our approval of Agreement No. T–2390 is October 1, 1969, or the same date as the beginning of the second year of the three-year ILA labor contract. This does not entail any serious administrative problems for NYSA because records have been kept of man-hours and tons on and since that date, with the exception of one or two carriers. One carrier, Seatrain, has refused to obtain, or to seek to obtain tonnage records from its shippers on the basis of the tonnage definition in Agreement No. T-2390, and thus has not supplied tons on that basis to NYSA. However, it has provided tons as freighted, or as payable, and estimates that these payable tons may be about 10 percent below the assessable tons as defined in Agreement No. T-2390. In any event, any difficulty in supplying assessable tons under the Agreement's definition should not be considered as a factor important enough to result in our disapproval or approval of the agreement. The matter of methods of obtaining assessable tonnage figures, and audits of such figures, etc., should be left to NYSA administrators, and if they cannot resolve the problem, the parties may return to this Commission to resolve any remaining problem of this sort. To go back to the first year of the 3-year labor contract would entail serious administrative problems, and not to make Agreement No. T-2390 effective until some time after October 1, 1969, would be grossly unfair and unjust, to an intolerable degree, to a considerable number of NYSA members.

It should be remembered that we retain continuing jurisdiction over agreements under section 15, whether or not we have previously approved an agreement. This last caveat applies to all phases of the present agreement. As future experience under this agreement may show that it, as modified, is or is not entirely reasonable, the parties will be able to return to us if the situation clearly warrants some adjustment, and obtain appropriate relief. Our judgment now is that Agreement No. T-2390 as modified is lawful and the best agreement that can be approved on this record.

All proposed findings and conclusions have been considered, and to the extent that they are found material and supported by the record have been substantially incorporated herein, and otherwise are denied.

All pending motions and petitions (including petition for declaratory order) hereby are denied, as either lacking in merit, or as being covered by the findings and conclusions herein, or as being unnecessary to the resolution of the issues in this proceeding.

ULTIMATE FINDINGS AND CONCLUSIONS. It is concluded and found that the expenses or charges which are to be paid or borne by ocean carriers, shippers, and other affected persons as a result of the assessments under Agreement No. T-2390 as modified herein cannot be precisely related to the benefits to be received by the same ocean carriers, shippers and persons who pay or bear the said expenses or charges, but there is ample evidence of record to conclude and to find, and it is concluded and found that the said expenses or charges are reasonably and lawfully related to the said benefits. It is concluded and found, that Agreement No. T-2390 of the NYSA subject to the modifications herein below, has not been shown to be, and is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports; that this agreement as modified will not operate to the detriment of the commerce of the United States, or be contrary to the public interest, or otherwise be in violation of the Shipping Act. This agreement is approved, as of October 1, 1969, and our approval is made subject to the conditions that the agreement be modified: (1) To provide that any person substantially affected by the tonnage definition as well as any member shall have the right to request modification of the tonnage definition by the Tonnage Review Committee; (2) to provide that tons of automobiles, trucks, and buses shall be calculated at 18 percent of the cubic measurements of the vehicles as part of the tonnage definition of the agreement; (3) to provide that bananas be calculated at 55 percent of the cubic measurements of the boxes in which the bananas are shipped as part of the tonnage definition of the agreement; (4) to provide that cargo to and from both Alaska and Hawaii be treated under the "excepted cargo" status (with certain man-hour assessments and royalty where applicable) as provided under the excepted cargo provision of the agreement; and (5) to provide that cargoes northbound from Puerto Rico to the Port of New York likewise be treated under the "excepted cargo" status as provided under the excepted cargo provision of the agreement.

CHARLES E. MORGAN,
Presiding Examiner.